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THE PRESENTENCE REPORT: AN EMPIRICAL STUDY OF ITS USE IN THE FEDERAL CRIMINAL PROCESS*

Since its inception more than 30 years ago, the presentence report procedure utilized in the federal criminal process has been the subject of continuing debate. Although originally advanced as an indispensable

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The Honorable Clarence W. Allgood, Judge, Northern District of Alabama; The Honorable Frank M. Johnson, Jr., Chief Judge, Middle District of Alabama; The Honorable Daniel Holcombe Thomas, Chief Judge, Southern District of Alabama; The Honorable Virgil Pittman, Judge, Southern District of Alabama; The Honorable Newell Edenfield, Judge, Northern District of Georgia; The Honorable Albert J. Henderson, Jr., Judge, Northern District of Georgia; The Honorable William A. Boote, Chief Judge, Middle District of Georgia; The Honorable Alexander A. Lawrence, Chief Judge, Southern District of Georgia; The Honorable Algernon L. Butler, Chief Judge, Eastern District of North Carolina; The Honorable Edwin M. Stanley, Chief Judge, Middle District of North Carolina; The Honorable Woodrow Wilson Jones, Chief Judge, Western District of North Carolina, The Honorable J. Robert Martin, Jr., Chief Judge, District of South Carolina.

W. Foster Jordan, Chief Probation Officer, Northern District of Alabama; James Elmo Turner, Chief Probation Officer, Middle District of Alabama; Earl J. Harrison, Chief Probation Officer, Southern District of Alabama; John C. Carbo, Jr., Chief Probation Officer, Northern District of Georgia; Rosser M. Smith, Chief Probation Officer, Middle District of Georgia; John S. Daniel, Jr., Chief Probation Officer,
element in enlightened sentencing, as well as in other alternative dispositions of criminal offenders, these reports, in application, have demonstrated a potential for expanded use within the criminal justice system. A corollary of this development has been the modification of administrative criminal procedures, the most significant of which is the initiation in some jurisdictions of the presentence investigation prior to the determination of guilt, rather than upon conviction or entry of a guilty plea. As would be expected, controversy has arisen over the propriety of commencing the investigation at this time, with both proponents and opponents alike presenting arguments structured in terms of judicial efficiency.

In order to ascertain whether the practice of advance presentence investigation followed by some federal probation offices in fact does contribute to increased judicial efficiency and if so, whether it can be implemented effectively in jurisdictions that delay investigation until after a determination of guilt, empirical research was conducted under the auspices of the Federal Judicial Center.\(^1\) It is the purpose of this Note to present and analyzes the data gathered in the study and thus provide the basis for a more enlightened approach to the resolution of this controversy. The discussion centers upon the mechanics of advance presentence investigation, the reasons for its implementation, the associated legal and pragmatic problems involved, and recommendations for greater court efficiency in its use. In addition, the role of the probation officer is examined, and suggestions are made for an expanded use of his services in the administration of criminal justice.

**Research Design**

While all federal probation offices commence the investigation of juvenile offenders immediately upon arrest or presentment before a magistrate,\(^2\) the presentence investigation procedures followed for adult

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\(^1\) The Federal Judicial Center was established by Congress in 1967 to further the development and implementation of improved judicial administration in the courts of the United States. Act of Dec. 20, 1967, § 101, 81 Stat. 664, 28 U.S.C. § 620 (Supp. IV, 1969). The focus of the Center is the education and training of personnel, research into the operations of the judiciary, and coordination of research and studies conducted by individuals and public and private agencies.

\(^2\) See Appendix.
offenders differ among the districts. In varying degrees, the practice of conducting such investigations prior to a determination of guilt is found in more than one-half of the federal probation offices. This practice is most pronounced in the Southeastern States, where an investigation is commenced even prior to a defendant’s indication that a plea of guilty will be entered; 16 of the 25 districts employing this procedure are located in this region. In addition, southeastern probation offices have been the most vocal advocates for maintaining and expanding this practice. For these reasons, the 12 federal districts in Alabama, Georgia, Kentucky, North Carolina, and South Carolina were selected for extensive field investigation. Not only do they represent jurisdictions in which presentence reports are prepared for a high percentage of all defendants sentenced, but they also comprise a representative cross section of the average time intervals from filing the criminal complaint to final disposition and constitute a sampling of district courts in three federal circuits. Moreover, in order to negate any prejudice inherent in restricting such a study to jurisdictions employing only one practice, the United States District Court for the District of Maryland, which postpones investigation until guilt has been determined, was also included in the field study.


4 This data was originally obtained from the Probation Division of the Administrative Office of the United States Courts, in Washington, D. C., and later confirmed in a questionnaire sent to each probation office. See Appendix.


6 In order to ascertain the exact procedures and advantages of the particular practice in each of these districts, a series of interviews was conducted with the district judges and chief probation officers. In addition, relevant records and statistics were collected to verify and substantiate the arguments advanced in these interviews. This data, information obtained from the Administrative Office of the United States Courts, and responses to the questionnaires completed by each district constitute the factual bases of this Note.

7 In fiscal year 1967, presentence reports were prepared for 88.6% of all defendants sentenced in federal courts (less special offenses), whereas the percentage for these 12 districts was 95.1%. Administrative Office of the United States Courts, Federal Offenders in the United States District Courts 58-59, at table 20 (1967) [hereinafter cited as Federal Offenders].


9 North Carolina and South Carolina (Fourth Circuit); Alabama and Georgia (Fifth Circuit); Kentucky (Sixth Circuit).

10 The Maryland district court also was selected because it permits disclosure of the
was obtained from all other jurisdictions by means of a questionnaire sent to the Chief Probation Officer in each district.\textsuperscript{11}

**THE FEDERAL PROBATION SYSTEM**

**HISTORICAL SETTING**

Although the concept of probation as an alternative procedure for dealing with criminal defendants has roots in early American jurisprudential history,\textsuperscript{12} the legislative and judicial setting within which the present federal probation system functions is of relatively recent origin. An informal "probation" for criminal offenders initially evolved during the early 1900's, as judges created ad hoc sentencing procedures which provided for release into the community.\textsuperscript{13} Many Attorneys General, however, opposed these procedures on the ground that such action was not specified in the federal sentencing statutes.\textsuperscript{14} Moreover, in reviewing a suit instituted by the Department of Justice, the Supreme Court declared that by suspending sentences and ordering probation, federal district judges were refusing to perform their judicial duty and thus unconstitutionally intruding upon legislative and executive prerogatives.\textsuperscript{15}

Nine years later, in 1925, Congress overcame the effect of this regression by enacting a federal probation statute,\textsuperscript{16} which recognized probation as a useful way to deal with criminal cases and provided for the appointment of federal probation officers. Notwithstanding the advent of such legislation, federal judges, when evaluating cases for purposes of disposition, were forced to rely upon the same sources of information utilized before the Act had been implemented.\textsuperscript{17}

\textsuperscript{11} The principal objective of this questionnaire was to update information contained in the Federal Probation Training Center's 1957 study. \textit{See} note 3 \textit{supra}. For a tabulation of data obtained, see \textsc{Appendix}.

\textsuperscript{12} Probation—the supervision and control of criminal violators without incarceration—is believed to have existed at least as early as 1852 and possibly even as early as 1681. The first statute dealing with probation was enacted in Massachusetts in 1878, providing for the appointment of one probation officer to the police force. \textit{See} S. \textsc{Rubin}, \textsc{The Law of Criminal Correction} 176-77 (1963).


\textsuperscript{15} \textit{Ex parte} United States, 242 U.S. 27, 52 (1916).

\textsuperscript{16} \textit{Act of Mar. 4, 1925, ch. 521, 43 Stat. 1259, as amended}, 18 U.S.C. \textsc{§} 3654 (1964). The Act met strong resistance from advocates of prohibition and was passed only after 15 years of effort. \textit{See} Master, \textit{supra} note 14, at 9.

\textsuperscript{17} \textit{See generally} Chandler, \textit{supra} note 13.
by the inadequacies of these sources, various judges seized upon the new reservoir of manpower made available by the appointment of probation officers to aid in the development of relevant personal and background information concerning certain defendants about to be sentenced. This improvised procedure became the forerunner of today's presentence report.\(^{18}\) Since no facility was charged with coordinating activities or disseminating results, the practice remained highly localized and was not developed to its maximum potential.\(^{19}\)

Cognizant of this haphazard approach to presentence investigation and fully aware of the value of such reports to sentencing judges, the Advisory Committee on Criminal Rules, with the subsequent approval of the Supreme Court, included a provision in the Federal Rules of Criminal Procedure requiring a presentence report on every defendant "unless the court otherwise directs." \(^{20}\) Although initially resisting preparation of a report for every defendant sentenced, district judges soon overcame their reservations and recently have utilized these reports: presentence investigations are now commenced for almost 90 percent of all defendants sentenced in the federal district courts.\(^{21}\) Moreover, this increased use of the presentence report has been accompanied by a concomitant evolution in the role of the probation officer. At first charged with the sole duty of supervising probationers,\(^{22}\) the probation officer today also supervises parolees, prepares presentence reports, recommends sentences to be imposed, and aids in the rehabilitation of the criminal defendant.

**PRESENTENCE INVESTIGATION PROCEDURES**

*Initiating the Investigation.* The primary objective of the presentence report is to focus light on the character and personality of the defendant and to discover those factors that underlie commission of the

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\(^{18}\) This informal method of acquiring information and making a report was formalized by the Administrative Office in 1943. See R. Chappell & V. Evjen, The Presentence Investigation Report 4-2 (Administrative Office of the United States Courts Pub. No. 101, 1943).

\(^{19}\) Chandler, *supra* note 13.

\(^{20}\) As indicated in both the wording of the rule and the Advisory Committee's notes, the clear intent of the drafters was that in most cases, an investigation should be conducted. See Fed. R. Crim. P. 32(c)(1). Subsequent case law, however, diluted the thrust of the rule by stating that a judge's imposition of sentence without the aid of a report should be interpreted to mean that the judge directed the probation office to refrain from initiating an investigation. United States v. Karavias, 170 F.2d 968, 971-72 (7th Cir. 1948).

\(^{21}\) Information obtained from the Probation Division of the Administrative Office of the United States Courts, Washington, D. C.

offense and defendant's conduct in general. This information can be acquired only by a comprehensive investigation conducted prior to sentencing. While rule 32(c) was designed to encourage preparation and use of presentence reports, the trial judge is not compelled to order such an investigation; as a result, each report is prepared at his discretion. Since trials are held for a relatively small percentage of defendants who are sentenced, and even if conducted, rarely reveal pertinent facts about a defendant's personality and behavioral problems, the presentence report is the one practical source of information upon which a trial judge can rely in determining an appropriate sentence. Although the use of a report is encouraged, rule 32(c) does not require that a particular procedure be employed in conducting such an investigation. In the federal system, probation officers commence their investigations at varying stages of the prosecution, and the policy regarding initiation of the procedure rests solely in the discretion of each court. Although several factors influence the exercise of this discretion, a majority of probation offices have adopted as standard procedure postponement of the investigation until after either the defendant or his attorney indicates that a plea of guilty will be entered or after defendant has been convicted. Pursuant to this practice, the court-ordered report must be completed within a specified period of time, usually two or three weeks.

In contrast, a minority of district courts have adopted the procedure of commencing presentence investigations prior to the determination of guilt. As a general rule, in these jurisdictions the probation office

23 "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. . . ." Fed. R. Crim. P. 32(c)(1).

24 In fiscal year 1968, 14 percent of all defendants found guilty and sentenced were convicted following trial. Annual Report 261, at table D4.

25 The Probation Division recommends certain information that should be contained in every presentence report: offense; defendant's version of the offense; prior criminal record; family history; mental history; home and neighborhood; education; religion; interests and leisure-time activities; health; employment; military service; financial condition; evaluative summary; and recommended disposition. Division of Probation, Administrative Office of the United States Courts, The Presentence Investigation Report 9 (1965).

26 The practice employed by each district is determined by the needs of the federal judges of that district. Factors that influence the adoption of a particular procedure include whether judges ride circuit, whether a divisional court system is followed, and which practice will yield the most comprehensive, economical and thorough report.

27 Answers to the questionnaire indicate that as a general policy, 75 probation offices (79%) commence the presentence investigation only after defendant indicates that a plea of guilty will be entered or a determination of guilt is made. See Appendix.

28 See id.

29 See id.
becomes involved in a case immediately following the defendant's presentment before a magistrate, at which time the probation office is notified of defendant's appearance. To avoid the problems that would be created by an inadvertent failure to give prompt notification, certain formal and informal procedures are followed. In some jurisdictions a representative of the probation office is present at all initial appearances before the magistrate; in others, the office is officially informed by the arresting officer or agent. A less direct method, used in the districts studied, involves checking inmate rosters, which the marshall delivers biweekly to the probation office, against a list of defendants already undergoing presentence investigations. A further check is also made by comparing a list of defendants for whom the grand jury has issued indictments with a list of those presently the subject of presentence investigations.

Consent. Although the probation office may become actively involved in the criminal process upon defendant's presentment, in practice, a detailed presentence investigation is commenced only if specifically

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30 Although the standard practice is to delay the probation officer's investigation until after the magistrate's hearing, certain exceptions exist. For example, in the Middle District of Alabama, the probation officer begins his investigation even prior to presentment, if notification has been received from a federal investigation officer that a grand jury indictment will be sought against the accused. Interview with Elmo Turner, Chief Probation Officer for the Middle District of Alabama, in Montgomery, Alabama, July 22, 1969. In such cases, an initial investigation is made by reviewing those presentence reports on file at the probation office in order to determine whether a report concerning the accused had been completed on a previous occasion. In addition, a search is made of available public records in order to obtain further information about the potential defendant. This cursory investigation, however, does not involve any interviews, either with the accused or members of the community, until after an indictment has been issued by the grand jury, defendant has appeared before the magistrate, and an authorization for the investigation has been given.

In the Western District of Kentucky, the probation officer interviews the defendant prior to the preliminary hearing in order to obtain biographical information for use by the magistrate. Interview with Frank E. Saunders, Chief Probation Officer for the Western District of Kentucky, in Louisville, Kentucky, July 28, 1969.

A third variation exists in the Eastern District of Kentucky, where investigations are commenced upon receipt of a criminal complaint sheet from the U.S. Attorney. In practice, these complaint sheets are authorized by the U.S. Attorney whenever approval for the prosecution of a case has been granted, based upon investigations made by federal officials. Interview with John Jarvis, Chief Probation Officer for the Eastern District of Kentucky, in Lexington, Kentucky, July 30, 1969.

31 In the Middle District of Alabama, the probation office sends a list of all defendants then in custody to the Chief Judge, indicating for each person whether a presentence report has been prepared and if not, whether one is in the process of being prepared. This enables the judge to ascertain the current status of each defendant in custody. Interview with Elmo Turner, supra note 30.
authorized by defendant. While the acquisition of a written consent is the usual practice in most jurisdictions employing preconviction investigations, a few districts merely require oral approval, which is obtained by the probation officer when he initially interviews the defendant. Those probation offices requiring only oral consent rationalize their practice by stating that such a procedure not only safeguards a defendant’s rights, but also promotes greater efficiency, since defendants are often hesitant to sign any document while in custody.

Most jurisdictions conducting early investigations, however, require written consent, which can be obtained in two ways. According to one practice, the magistrate explains the purpose and procedure of the investigation to the defendant following his initial appearance; the defendant then signs a consent form, which is forwarded to the probation office, if he agrees to the preparation of the presentence report before a finding of guilt. Under the second and more prevalent practice, consent is procured directly by the probation officer, who upon notice from the magistrate that defendant has been presented, personally meets with him. At this meeting, the probation officer explains the consent form, advises defendant of his right to prohibit an investigation until guilt has been established, and points out that if an investigation is permitted, the contents of the subsequent report will not be disclosed to anyone unless defendant pleads guilty or is convicted. The probation officer also emphasizes that the purpose of the investigation and subsequent report is to aid the court in determining a proper sentence in the event such a determination becomes necessary. In the majority of jurisdictions visited, the probation officer does not attempt to obtain consent from a defendant until counsel has been appointed or retained, and both the defendant and his attorney

32 Notwithstanding the absence of a statutory mandate, none of the probation offices that initiates early presence investigations commence to do so unless defendant has given his consent. This procedure, however, does not preclude a public record search in order to discover any relevant information that would be necessary if an investigation is subsequently commenced.


34 Interview with William Seagle, Chief Probation Officer for the Western District of North Carolina, in Asheville, North Carolina, July 8, 1969.

35 Only a few districts employ this procedure: N.D. Ala., M.D. Ala., S.D. Ala., N.D. Fla., M.D. Fla. (T), N.D. Ga., M.D. Ga., E.D. Tenn. See Appendix

36 Since defendant is already before the magistrate, securing his consent at this time saves the probation officer valuable time and contributes to judicial efficiency. There are, however, countervailing arguments. See notes 66-72 infra and accompanying text.

37 See Sims, supra note 5.

38 This procedure serves as an additional guarantee that defendant’s consent will be
are interviewed concerning the consent authorization. If counsel requests the probation officer to refrain from questioning defendant about the alleged offense, this request is honored. Once authorization is given, however, the probation officer is free to commence and conduct a thorough investigation.

Investigation and Report. Assignment of a probation officer to prepare the presentence report varies according to the practice of the respective probation offices. Some districts are divided into branch offices, which are situated at the statutorily-designated locations for holding court; under this arrangement, the assignment of a particular probation officer depends upon the division either in which a defendant's trial is to be held or in which the defendant resides. In those districts not utilizing the branch office practice, all probation officers work out of one central office; however, the district is then divided into geographical areas, usually by counties, with an officer responsible for each area. In such cases, officers are assigned according to the area in which the defendant resides. This latter arrangement represents the majority practice of districts visited.

Upon assignment of a probation officer, an interview is arranged with defendant, which takes place either at the place of confinement or if defendant has been granted pretrial release, at his residence or at the probation office. This interview is designed to obtain information about defendant's background, family history, education, work experience, and prior criminal record, as well as his version of the offense. This data is vital since it furnishes other sources from which further information can be obtained.

After all necessary information has been accumulated and if guilt has been determined, the probation officer submits his report, in which he

given intelligently and knowingly. Interview with Saxton Daniel, Jr., Chief Probation Officer for the Southern District of Georgia, in Savannah, Georgia, July 14, 1969.

39 Those districts visited having at least one branch office were: N.D. Ala., N.D. Ga., M.D. Ga., S.D. Ga., E.D. Ky., W.D. Ky., E.D.N.C., M.D.N.C., W.D.N.C., and D.S.C.

40 When defendant has been released, initial contact is made by the probation officer in order to set a date for an interview. As a general practice, a form letter setting forth the time and location for the interview is sent. If the defendant is unable to comply, he assumes the responsibility of notifying the officer of an alternative time and place. The preferable practice is to have the initial interview at the probation office. There the surroundings are more conducive to the holding of a private interview designed to elicit personal information concerning the defendant. This location avoids any problem of interruption that would be inherent in an interview held at the defendant's home. A follow-up interview, however, should be held at the defendant's residence to insure that a complete picture of the defendant has been obtained. Interview with John Jarvis, supra note 30.
may make a recommendation concerning disposition, to the court.\textsuperscript{41} Depending upon the policy of the court, the recommendation either is couched in general terms, such as probation or confinement, or is stated more specifically in terms of a particular fine or sentence.\textsuperscript{42} Sentencing occurs immediately after the judge has reviewed the presentence report or in some instances, on a specified day at the end of the criminal term.\textsuperscript{43}

Upon completion of the presentence report, the work of the probation officer is completed. If final sentencing involves incarceration, the presentence report is then forwarded to the penal institution for use by prison officials in planning a meaningful program of rehabilitation. If defendant is found not guilty or if for any reason no determination of guilt is made, the presentence report is filed at the probation office for use in the event defendant is again subjected to criminal proceedings.\textsuperscript{44} Although the practices of the various probation offices differ, these reports generally remain on file for a specified number of years, after which they are forwarded to a centralized storage facility for each circuit, where they are retained indefinitely. If final disposition results in probation, the information obtained in preparation of the report will aid the probation officer in his supervisory function.

\textsuperscript{41} Because the probation officer may have completed his report months before defendant is brought to trial, a supplement may have to be made before trial in order to insure that the report is current.

\textsuperscript{42} In the 13 districts surveyed, the following policies were in effect: Recommend generally probation or confinement (N.D. Ala., M.D. Ala., S.D. Ala., S.D. Ga., D. Md., M.D.N.C., W.D.N.C., E.D. Ky.); recommend as to suitability for probation (E.D.N.C.); recommend specifically as to alternative dispositions (N.D. Ga., M.D. Ga., W.D. Ky. (all but Judge Swinford), D.S.C.). See generally Federal Offenders xvii, 54-55.

\textsuperscript{43} A particularly effective sentencing procedure has been developed in the Middle District of Alabama, whereby a conference is held in chambers among the judge, defendant, defendant’s attorney, and the probation officer in order to review the facts of the offense and the presentence report prior to the imposition of sentence. Thus, defendant is made an active participant in the determination of his own sentence. Interview with the Honorable Frank M. Johnson, Jr., Chief Judge for the Middle District of Alabama, in Montgomery, Alabama, July 22, 1969.

\textsuperscript{44} The districts visited indicated little waste due to unused reports and that a high percentage of reports are re-used. In the Eastern District of North Carolina, a study conducted by the Chief Probation Officer revealed that 28\% of reports initially unused are referred to again in the same district. In addition, many are forwarded to other districts where defendants subsequently have been held for prosecution. Interview with Kirkwood Hanrahan, Chief Probation Officer for the Eastern District of North Carolina, in Raleigh, North Carolina, July 2, 1969.
EVALUATION OF EARLY PRESENTENCE INVESTIGATION PRACTICES

ADVANTAGES

Commencement of a presentence investigation prior to a determination of guilt has several significant advantages: it is a more rational procedure for regulating the workload of probation officers located in districts that convene court in more than one division; it provides an early opportunity for establishment of rapport with the defendant and his family; it negates the necessity of multiple appearances by the defendant before final disposition of his case; it allows additional time to do a more thorough and comprehensive report; it serves as an additional "screening" process in the administration of criminal justice; and it is a necessary basis upon which a procedure for "deferred" prosecution can be formulated.

The advantage of conducting an early presentence investigation is most apparent in those districts that hold court in various statutory locations within the districts, such as the Eastern District of Kentucky, where the court may sit in as many as eight different locations within a six-month period.46 In the districts surveyed, one- to three-week spring and fall criminal terms are held in each division, during which the first few days are devoted to arraignments and the remaining time to trials.46 Since the policy in these districts is to dispose of all cases on the criminal docket by the end of each term,47 if the probation officer postpones investigation until defendant either pleads guilty at arraignment or is convicted at trial, only one or two weeks would remain in which to prepare a report.48 Moreover, many of the dis-


47 The necessity for maintaining such divisional arrangements has been debated for years. The validity of such a system is questionable simply from the standpoint of efficiency; however, it is rooted in political considerations and not likely to be altered.

48 The judges in these districts believe it is fiscally impractical for the court to return to each division for the sole purpose of sentencing, since such a trip involves travel and lodging expenses for the judge, his law clerk and secretary, the clerk of the court, a representative from the U.S. Attorney's Office, at least one probation officer, and a necessary contingent from the U.S. Marshall's Office. By both convicting and sentencing in one divisional term, this extra expenditure is avoided.

48 Under the traditional practice of not initiating the presentence investigation until after guilt has been determined, the probation officer would find himself with 40 to 50 cases on the first day of court as the result of guilty pleas at arraignment. Further-
trects utilizing this procedure have assigned their probation personnel to divisional offices in order to provide at least one officer for each division. 49 Conceivably, therefore, under the postconviction investigation system one officer might be required to prepare all presentence reports for a division within a brief two-week period and then find himself with no presentence work until the court returns six months later. By allowing investigations to commence upon presentment before a magistrate, however, the pressure on the probation officer to complete a report within a brief period of time is virtually eliminated, and the officer himself, rather than an inflexible court system, determines and distributes his workload. With as much as six months between presentment and final disposition to complete an investigation, the probation officer is able to conduct a more comprehensive and accurate investigation than is possible under the postconviction procedure. 50 Furthermore, the officer's probation and parole duties are not adversely affected and actually may be coordinated with scheduled presentence investigations to diminish both time demands and travel expenses. 51

more, as trials are conducted and defendants found guilty, the probation officer's workload increases, all of which must be completed within the two- to three-week term. If a probation officer were required to conduct such a large number of presentence investigations during this short period, minimal time would remain for performing supervisory duties. Dictation alone would require as much as 40 hours and when coupled with the actual investigation, would leave little time for other essential duties. If information must be obtained from offices outside the district, additional delay occurs. By initiating an investigation early, however, extrinsic information, military records, and other data can be gathered and verified well before the report is due; also, supplemental interviews can be conducted. If the officer can begin early, he will have the opportunity to re-interview the defendant and verify the accumulated data. One suggested procedure for avoiding the rush caused by delayed investigations is to conduct arraignments three to four weeks in advance of the commencement of a term of court, as is the practice in the Southern District of Georgia. Such a procedure, however, is beneficial only if a sufficient caseload exists in the division. More often the caseload is light, and ancillary considerations of time and travel expense militate against its use. In such instances, it would appear more sensible in terms of judicial efficiency, to hold sentencing day after convictions have been obtained than to conduct an early arraignment procedure.

49 In rural districts encompassing large geographical areas, the probation office is organized in this manner in order to economize on travel time and expense and to effect a closer relationship between the probation officer and the community.

50 Unfortunately, the early preparation of presentence reports also creates problems. For example, in South Carolina, the court does not sit in each division on scheduled dates, but instead relies upon the U.S. Attorney to notify the chief judge when the accumulation in a particular division is sufficient to warrant holding court. The policy in this district is for the probation office to complete its investigation as soon as possible after notice of defendant's presentment and then to keep the report on file until he is brought before the proper divisional court. Conceivably, the report may not be used until months after its completion, making it necessary to prepare a supplemental report to insure desired continuity.

51 The offices that follow the early investigation procedure have the opportunity to
Secondly, by participating in a case before adjudication of guilt, the probation officer's relationship with the accused's family is likely to be more hospitable, since his investigation is not by necessity limited to the alternatives of probation or imprisonment, but can be conducted in the context of the additional possibilities of diverting the case to a more appropriate agency or of deferring prosecution. Furthermore, because the probation officer is often the first person the defendant or his family meets who is nonhostile and sincerely interested in the welfare of all parties, the impression given can be of long-term importance. In fact, the probation officers in most jurisdictions suggest the desirability of obtaining an attorney, and in some districts actually initiate the necessary procedures for obtaining court appointed counsel under the Criminal Justice Act. By establishing and maintaining a close relationship with the defendant and his family throughout the progress of a case, the probation officer can solidify a rapport which later may be instrumental in defendant's rehabilitation.

Another favorable incident of the early preparation of presentence reports is the increased possibility of immediate disposition upon adjudication. With a thorough and thoughtful report available, the judge can intelligently impose sentence while the facts of the case are still fresh in his mind. More importantly, a defendant who eventually is granted probation would not have to remain incarcerated while awaiting completion of a presentence report. In addition, even a defendant who is ultimately imprisoned would benefit from immediate disposition, since he would not be forced to remain in a local jail, where at best conditions are usually poor, but could begin serving his sentence in the more favorable confines of a federal penitentiary.

Early presentence investigation also serves a "screening" function in the criminal process. Since the probation officer is continuously

make advanced plans and thus combine both probation/parole supervision and presentence work on trips to rural areas. Under the more conventional, delayed system, time pressures often necessitate special trips into rural areas merely to complete presentence investigations.

52 In most jurisdictions, particularly those having divisional offices, the probation officer who prepares the presentence report also supervises defendant if he is placed on probation or imprisoned and subsequently paroled.

53 In the Eastern District of North Carolina, the chief judge has designated the probation office as the court's agent for the purpose of obtaining the information necessary to fulfill the conditions prescribed in the Criminal Justice Act of 1964. Interview with Kirkwood Hanrahan, Chief Probation Officer, Eastern District of North Carolina, in Raleigh, North Carolina, July 2, 1969; see 18 U.S.C. 3006A (1964), as amended, (Supp. IV, 1969).

involved in a case from the time of defendant's initial appearance before a magistrate through trial, he is usually the only person familiar with all aspects and attendant circumstances of defendant's case. Thus, with knowledge of the operative facts of the offense, defendant's history and background, and other relevant information, the probation officer often is better equipped to evaluate the merits of the case, the extent of defendant's implication, and the desirability of further prosecution. For example, the presentence investigation might reveal that defendant suffers from a physical or mental disorder, indicating, perhaps, that further prosecution would serve the interests of neither society nor the individual. By pointing out such circumstances to the prosecutor, the case can be directed to more appropriate authorities or dismissed on the merits.

Potentially, the early presentence investigation's greatest contribution to the administration of criminal justice could be its ability to influence disposition of an offender without conviction—"deferred" prosecution. Presently, such disposition has been approved by the Attorney General only for juvenile offenders in the federal system, but the information developed in early presentence reports could form the basis for a federal system of adult, as well as juvenile, "deferred" prosecution. As the cost of maintaining an individual in a federal peni-

55 See note 30 supra and accompanying text.
56 See note 41 supra.
57 In cases involving Selective Service violators, the investigation may reveal that the defendant is either mentally or physically disqualified for military service and that bringing charges against him would be counterproductive. Interview with Kirkwood Hanrahan, Chief Probation Officer, Eastern District of North Carolina, in Raleigh, North Carolina, July 2, 1969; Interview with John Carbo, Jr., Chief Probation Officer, Northern District of Georgia, in Atlanta, Georgia, July 17, 1969. In the Northern and Middle Districts of Georgia, information in the presentence report is used when competency is in issue or a plea of nolo contendere is being considered. Interview with John Carbo, Jr., supra; Interview with Rosser Smith, Chief Probation Officer, Middle District of Georgia, in Macon, Georgia, July 16, 1969.
58 Annual Report 149 n.3. In a pilot project conducted by the Legal Aid Agency of the District of Columbia, a report based on information similar to that obtained in a presentence investigation is developed for use by defense counsel at the various stages of the criminal process. See Dash, Medalie & Rhoden, Demonstrating Rehabilitative Planning as a Defense Strategy, 54 Cornell L. Rev. 408 (1969); Medalie, The Offender Rehabilitation Project: A New Role for Defense Counsel at Pretrial and Sentencing, 56 Geo. L.J. 2 (1967). For a discussion of the Offender Rehabilitation Project, see notes 117-120 infra and accompanying text.
59 Although the Attorney General's directive was intended primarily to provide for "deferred" prosecution of juveniles, some districts indicated such a program is also used for selected adult offenders. Interview with Rosser Smith, Chief Probation Officer, Middle District of Georgia, in Macon, Georgia, July 16, 1969; Interview with John Carbo, Jr., Chief Probation Officer, Northern District of Georgia, in Atlanta, Georgia, July 17, 1969; Interview with Kirkwood Hanrahan, Chief Probation Officer.
tentiary increases and as the relative merits of a system of selective prosecution become more convincing, it should be more apparent that the information developed through early presentence investigation can and should be utilized in order to render more appropriate case dispositions for individual offenders.

DISADVANTAGES

While the practice of commencing presentence investigations prior to a determination of guilt provides definite advantages, particularly for jurisdictions that hold court terms in different locations, such a system also has numerous inherent disadvantages. The most patent deficiency is the misallocation of resources and manpower expended in preparing nonessential reports. In fiscal year 1968, 839 presentence reports were prepared but unused, and although accounting for little more than 3.5 percent of all reports prepared, they represented an investment of more than 11,000 man-hours. Such an expenditure of man-hours, as well as related costs, is a luxury few probation offices can afford, and because presentence reports are prepared for the exclusive use of the court upon a determination of guilt, the time and expense utilized in their preparation essentially is wasted when guilt is not established. In a few instances, the reports may have been used

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Eastern District of North Carolina, in Raleigh, North Carolina, July 2, 1969; Interview with William C. Nau, Chief Probation Officer, District of South Carolina, in Greenville, South Carolina, July 11, 1969. A program of deferred prosecution for adult offenders is currently being studied by the Judicial Conference Committee on the Administration of the Probation System. See Annual Report 69.

60 The annual cost of supervising an individual on probation is $371, whereas the cost of incarceration is $3,206 per year. Annual Report 155. Furthermore, most prosecutors, and particularly those in large, urban areas constantly are faced with congested court dockets, which can be alleviated only through selective prosecution. With the assistance of the probation office and the presentence report, the decision of whom to "select out" of the criminal process can be made in an enlightened manner, benefiting both the defendant and society. Id. Of further benefit to society is that the individual on probation can be a working member of the community. A study conducted in the Northern District of Alabama for the calendar year 1966 revealed that 77% of those on probation were gainfully employed, earning a total income exceeding $1 million. Interview with Foster Jordan, Chief Probation Officer, Northern District of Alabama, in Birmingham, Alabama, July 21, 1969.

61 See Annual Report 150. Information obtained from the Probation Division of the Administrative Office revealed that the average time for preparing a presentence report is fourteen hours. Probation Division statistics indicated that this number of prepared but unused reports decreased in fiscal 1969 to 673. Nevertheless, the number of man-hours expended did not reflect a proportionate reduction, decreasing to only 10,000 man-hours. The Western District of Kentucky estimated that 320 man-hours were lost in investigation, 125 in dictation, and 82 in typing for 25 cases that were dismissed, costing the Government $2,000. Interview with Frank Saunders, Chief Probation Officer for the Western District of Kentucky, in Louisville, Kentucky, July 28, 1969.
for early referral of a case to an alternative agency or for implementing "deferred" prosecution; the fact remains, however, that the great majority of unused presentence reports in no way contributes to the final disposition of a case.

Additional factors also militate against the efficacy of the early presentence procedure. A possible legal objection is that if no consent is obtained and if defendant ultimately is found not guilty, the investigation will have constituted an unnecessary, and perhaps wrongful, intrusion upon his privacy,62 which is not cured by the subsequent

62 According to Justice Brandeis, "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion). While this right to be let alone—the right to privacy—is not expressly stated in the Constitution, certain provisions of the Bill of Rights were designed to protect it. For example, "the principal object of the Fourth Amendment is the protection of privacy." Warden v. Hayden, 387 U.S. 294, 304 (1967). Thus, the right to privacy constitutes the conceptual basis of the fourth amendment, which forbids unreasonable searches and seizures invading "the sanctity of man's home and the privacies of life." Boyd v. United States, 116 U.S. 616, 630 (1886).

Historically, the fourth amendment has only been applied to actual physical invasions of an individual's person, home or effects. See Olmstead v. United States, 277 U.S. 438 (1928). Although this restricted application was exceeded in Katz v. United States, the courts have refused to adopt this extension except in eavesdropping cases. 389 U.S. 347 (1967). While an actual physical invasion does not occur in the preparation of the presentence report, there is an invasion, a search into his background—a combing of his entire life—which arguably violates both the spirit and intent of the amendment.

This intrusion may also be a violation of the first amendment. In NAACP v. Alabama, the Supreme Court held that the freedom of association and the right to privacy in one's associations are protected by the first amendment. 357 U.S. 449 (1958). In gathering data for a presentence report, the probation officer interviews members of the community and opens to public scrutiny the relationship between them and the accused, thereby destroying the privacy of the association.

Former Justice Goldberg considered privacy a natural right retained by the people and protected by the ninth amendment. Griswold v. Connecticut, 381 U.S. 479, 487-89 (1965) (concurring opinion). This natural right concept embodies "[n]ot only the bodies of humans, but their minds, their personalities and their spirits . . . to be free from invasion by the political state and by other individuals." C. ANTEAUX, RIGHTS OF OUR FATHERS 90 (1968). A presentence investigation arguably impinges upon the sanctity of a person's reputation and could violate his personal sense of integrity. Melvin v. Reid, 112 Cal. App. 285, 297 P.91 (1931). Even if a presentence investigation does not violate the right to privacy under a specific amendment, it may be an illegal intrusion into that zone of privacy protected by the penumbra theory. Although conceptually vague, the penumbra theory recognizes that the right to privacy cannot always be protected by a specific amendment; instead the protections of the first, third, fourth, fifth, and ninth amendments are expanded to cover specific factual situations. See Griswold v. Connecticut, 381 U.S. 479 (1965).

Assuming that a presentence investigation does constitute an invasion of privacy, it is important to examine possible harm to the accused and to balance it against legitimate government interests. Although the wrong occurs at the moment of investigation, it
acquittal, since defendant's reputation has been damaged as the result of embarrassing questions posed to employers, friends, and relatives. The risk of social disapprobation associated with having been a criminal defendant should not be increased without rigid precautions. Although the requirement of consent serves as a partial safeguard of defendant's privacy, the issue remains whether such an intrusion is warranted ab initio. If a defendant gives his consent to an early presentence investigation and subsequently is found guilty, the intrusion may be justified ex post facto; thus, it has been held that commencing a presentence investigation prior to a determination of guilt is not reversible error if the report is not submitted to the court and if its contents are not disclosed until after conviction. No court, however, has ruled on whether it would be an infringement upon the defendant's rights if an early investigation were to have been undertaken without

is clear that an accused who is later acquitted could easily suffer lasting damage to his reputation, loss of employment, and social ostracism as a result of a needless investigation. Such an infringement upon the sanctity of a person's private life and reputation is no small matter. The Government has no authority to expose the private affairs of an individual without justification. Cf. Watkins v. United States, 354 U.S. 184 (1957). Although the Government has a legitimate interest in assuring an enlightened and efficient sentencing process, in striking a balance, it appears that absent consent, presentence investigations should be postponed until an adjudication of guilt; mere efficiency is not a compelling enough interest to overcome the possible harm resulting from the invasion of privacy.

63 Fashioning a remedy for an accused whose privacy has been invaded poses certain problems. If the intrusion is discovered subsequent to the defendant's conviction, it could amount to harmless error. While the invasion was unauthorized, if facts elicited from the investigation are not made known to either the judge or the jury prior to a determination of guilt, the conviction would not be tainted. A possible remedy, however, would be a remand for resentencing after a full disclosure of the presentence report to the defendant and an opportunity to make known any mitigating facts. This relief serves a beneficial purpose if the probation officer has not had an opportunity to interview the defendant rather than as a deterrent upon probation officers. If the unauthorized investigation becomes known prior to a determination of guilt, the defendant should seek an injunction to halt further investigation. If the report is prepared without the defendant's consent and guilt is not established, the defendant might also be able to secure its destruction. This relief would be analogous to the destruction of arrest records of nonprosecuted individuals. United States v. McHead, 385 F.2d 734 (5th Cir. 1967). None of these remedies, however, are adequate to redress the loss of privacy occasioned by the probation officer's misconduct. While the above remedies may be available to the wronged defendant, it is worthwhile to note that in all districts visited, no investigation, other than a public record search, would be initiated until defendant had given his approval.

64 "The rule [Fed. R. Crim. P. 32(c) (1)] does not prohibit the presentence investigation or the preparation of a presentence report before a verdict of guilty has been returned. It only provides that the report shall not be submitted to the court, or its contents disclosed to anyone, unless the defendant has pleaded guilty or has been found guilty." Stevens v. United States, 227 F.2d 483, 485 (10th Cir. 1955).
defendant's consent and without a subsequent determination of guilt. Of greater concern is the possibility that coercion may be used to obtain defendant's consent for an early investigation, particularly when consent is acquired orally or secured pro forma in writing by a magistrate. In such instances, defendant may not be fully apprised of his right to refuse consent, and pressures, both intentional and inadvertent, easily can be brought to bear on him to agree to this procedure. The legal difficulties in determining whether an investigation had been knowingly authorized can be avoided partially by utilizing the written consent forms provided by the Federal Probation System. These forms instruct defendant that the purpose of the investigation is to aid the court in sentencing, if and when he pleads or is found guilty, and that the report and any information obtained will not be released to anyone, including the court, until guilt has been established. If defendant can show that his consent resulted from the coercive atmosphere surrounding the magistrate's hearing, an argument can be made that it constituted an invalid waiver. The Supreme Court has ruled that from the time of arrest, defendant is the subject of an accusatorial process, which to many can prove overwhelmingly coercive; it is questionable, therefore, whether in light of the many duties and pressures upon a defendant during this process, the right to refrain from signing a consent form can be fully appreciated. To insure valid consent, it is essential that defendant fully understand the purpose of the investigation. Consent also may be the result of coercion or undue suggestiveness when defendant is informed that if he does not agree to an early investigation, the court possibly may sentence him

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65 Even when consent is not given, most probation officers conduct a public records search; it is unlikely, however, that such an abbreviated investigation would be found objectionable, since the subsequent report usually contains only the FBI record of local convictions and a record of any prior encounters with local authorities, such as the welfare agency or juvenile or family court. See, e.g., Maetz v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956); Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

66 In the case of an oral acquiescence, no record of assent is available should defendant challenge the validity of the investigation as having been conducted against his will. For the probation offices requiring only oral consent, see Appendix.


68 See Federal Probation System, United States District Court, Probation Form 13 (Feb. 1962).

69 Even if it can be shown that defendant's waiver was a product of coercion, the defendant is severely hampered in securing redress for the invasion of his privacy. See note 63 supra.

without the benefit of a presentence report. Since defendant in effect would be penalized for not cooperating, consent thus obtained hardly can be classified as a "voluntary" waiver of the right to refuse authorization. The Supreme Court has held that it is possible for a criminal defendant to waive his rights, but only if done intelligently and knowingly, and although this standard has never been applied specifically to the area of presentence investigations, to do so would seem a logical extension of the Court's general concern for the protection of the rights of criminal defendants. Thus, if a defendant merely signs a consent form without the requisite knowledge and awareness that he is waiving his rights, such consent would be ineffective. To avoid the possibility of an invalid waiver, written consent should be procured by the probation officer and only after consultation with defendant's attorney.

Apart from waste and coercion, additional dysfunctional aspects attend the practice of early presentence investigation. In some instances, use of such early investigations in the name of judicial efficiency is not only questionable, but of dubious constitutional validity. In one district, presentence investigations are begun even before indictment or presentment to the magistrate. Such a practice should be carefully circumscribed, allowing an investigation only of public records. An investigation beyond this limitation does not seem justified and should not be permitted, since it is an intrusion into the privacy of an individual before he has even been subjected to the formal criminal process. Another possible danger results from the close working relationship among the various investigative agencies, upon which the prearraignment procedure to a great extent depends. While such a relationship itself is legitimate, a defendant may be seriously prejudiced during the presentence investigation if incriminating information is elicited

71 Since use of a presentence report is in the court's discretion, it probably is not possible to force the court to await its preparation before sentencing. Cf. Williams v. New York, 337 U.S. 241 (1949). If, however, it can be shown that a judge consistently refuses to await its preparation for individuals who have not yet consented, such an abuse of discretion could be a violation of equal protection as subsumed in the due process clause of the fifth amendment and applicable to the federal government. See Bolling v. Sharpe, 347 U.S. 497 (1954).

72 In a majority of jurisdictions visited, a safeguard to insure that a knowing consent is given is the requirement that defendant's attorney be consulted concerning the consent authorization. See note 34 supra and accompanying text.


75 See note 30 supra.

76 See note 62 supra.
from him and informally communicated to these agencies.\textsuperscript{77} In addition to creating serious fifth amendment problems,\textsuperscript{78} knowledge of such disclosure on the part of future defendants could jeopardize the entire system of early presentence investigations, which is largely dependent upon defendant's confidence in the secrecy of matters he discusses. Finally, as recently indicated by the Supreme Court in \textit{Gregg v. United States},\textsuperscript{79} the early investigation procedure creates the danger of prejudicing the trial judge, if he were to gain access, either intentionally or accidentally, to the presentencing report prior to a determination of guilt.\textsuperscript{80}

**Disclosure to Defendants**

To maximize the potential advantages of the presentence report system, a certain degree of disclosure of the report prior to sentencing is desirable. Although the present rules of criminal procedure do not allow full disclosure before guilt is determined,\textsuperscript{81} disagreement remains concerning when and to whom the report's contents should be revealed.\textsuperscript{82} A draft submitted to the Supreme Court in 1944 by the Advisory Committee on Criminal Rules contained a provision for full disclosure of the report to the parties once guilt is established.\textsuperscript{83} This provision subsequently was stricken by the Supreme Court,\textsuperscript{84} and until recently,  


\textsuperscript{79} 394 U.S. 489, 492 (1969).

\textsuperscript{80} Concurring in \textit{Smith v. United States}, Justices Clark, Harlan, and Stewart found the district attorney's disclosure of defendant's record to the judge prior to a determination of guilt to be "presumptively prejudicial." 360 U.S. 1, 3 (1959).

\textsuperscript{81} "The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty." \textit{Fed. R. Crim. P. 32(c)(1).}


\textsuperscript{84} See generally Orfield, \textit{The Federal Rules of Criminal Procedure}, 21 N.Y.L.Q. REV. 167 (1946). The deleted portion read as follows: "After determination of the question of guilt the report shall be available, upon such conditions as the court may impose, to the attorneys for the parties and to such other persons or agencies having a legitimate interest therein as the court may designate." \textit{Id.} at 196.
the problem remained unresolved, with some courts permitting disclosure of the report and others treating it as confidential and therefore available only to the court. In 1960, the Advisory Committee on Criminal Rules was reinstituted and in a 1962 draft, which was never adopted, prescribed that a summary of the information contained in the presentence report should be made available to defense counsel before sentence is imposed. Two years later, the Committee offered another proposal, providing for mandatory disclosure to defense counsel, upon request, of a partially censored report. A survey designed to gauge the reaction of federal judges to this proposal, however, revealed overwhelming opposition to mandatory disclosure, thus prompting the Judicial Conference Committee on the Administration of the Probation System to unanimously reject it. The present rule, which was approved by the Supreme Court and adopted in 1966, provides for discretionary disclosure to the parties upon a determination of guilt.

OPPONENTS

Numerous reasons for not disclosing the presentence report to defendant or his counsel have been advanced, the following, however,

85 A survey conducted by the Junior Bar Section of the D.C. Bar Association found that 35% of the judges responding disclosed part or all of the presentence report to defense counsel as a matter of practice. Higgins, Confidentiality of Presentence Reports, 28 ALBANY L. REV. 12, 15 (1964). Case law also was in conflict. Compare United States v. Greathouse, 188 F. Supp. 503 (M.D. Ala. 1960) and United States v. Durham, 181 F. Supp. 503 (D.D.C.), cert. denied, 364 U.S. 854 (1960), with Baker v. United States, 388 F.2d 931 (4th Cir. 1968) and Smith v. United States, 223 F.2d 750, 754 (5th Cir. 1955). In a recent state decision, the New Jersey supreme court has gone beyond the discretionary rule and required that the contents of a presentence report be disclosed to the defense. State v. Kunz, 38 U.S.L.W. 2402 (N.J. Sup. Ct., Jan. 27, 1970).


90 "The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government." Fed. R. CRIM. P. 32(c)(2).
emerge as the most persuasive: The probation officer's sources of information would be reluctant to discuss matters openly and fully; resulting challenges to reports would precipitate serious delays in the administration of criminal justice; and rehabilitation of the defendant would be substantially impaired. Although each of these factors constitutes a potential evil, they neither individually nor collectively justify prohibition of disclosure.

The need for confidentiality has long been offered as a rationale for prohibiting disclosure of presentence reports. Much information is obtained solely because the informant believes that it, or at least his identity, will remain confidential, and arguably a breach of this trust would inhibit such sources of information. Fear of retaliation by a vengeful defendant also might discourage cooperation by interviewees. Conversely, however, disclosure helps insure the accuracy of a report that can affect significantly the disposition of defendant's case. In each instance, the inhibitive effect of disclosure must be balanced against the equally important right of defendant to be sentenced only upon consideration of information that is factually true. If certain information is of little value or its credibility and reliability are questionable, perhaps the best solution would be to expunge it from the report. But if such information is significant, reliable, and relevant, and if the informant would be unwilling to disclose it without a guarantee of confidentiality, special restrictions on disclosure can be developed in order to protect the source and at the same time obtain the information for appraisal by the sentencing judge.

Against the background of increased requests for trials resulting in increased court-time utilized to reach conviction, the argument that disclosure only creates more delays would appear compelling. Nevertheless, almost 85 percent of all defendants convicted in the federal system do plead guilty. Moreover, the opportunity for frivolous and time-consuming argument at a presentence hearing rarely would present itself, since much of the information collected is readily verifiable, as an examination of a presentence report's contents would reveal, and

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91 See Hincks, supra note 83.
92 In Maryland, the presentence report consists of two separable parts: one is confidential and shown only to the judge; the other is fully disclosed. See Thomsen, supra note 10.
93 See Federal Offenders xi, 6, at figure B.
95 See note 24 supra.
96 See note 25 supra.
the court would still retain complete authority to control the focus of such a hearing. Cognizant of these factors, defense counsel would hesitate to antagonize the judge with nonmeritorious claims in behalf of his client, particularly if nothing of value could be gained by employing dilatory tactics. Except in cases of meritorious claims, therefore, any delay incurred in presentence hearings would be the result of factors other than disclosure.

Opponents of disclosure also contend that rehabilitation, a purported goal of most modern criminal justice systems, would be unduly hampered if the contents of presentence reports were revealed to defendants. In addition to the psychological harm that might result from disclosing to a defendant certain information of which he was unaware or at least thought no one else was aware, the close rapport necessary for future rehabilitation, which is built upon confidentiality between the probation officer and the offender, could be destroyed. The fear of inflicting mental distress upon a defendant is legitimate, but such apprehension is more germane to the choice of what a presentence report properly should contain than to an argument for nondisclosure. Certain information, however, which if disclosed would not be of benefit to defendant, can and should be withheld in appropriate circumstances. With respect to the close relationship between a probation officer and defendant, a necessary prerequisite for an effective probationary program, there is no evidence to suggest that it would be adversely affected. In fact, rapport probably would depend more upon the probation officer's actual exercise of his advisory power to recommend probation97 than upon the factual contents of a report prepared in the past. Thus, the value of an objective presentence report, uncluttered by irrelevant and possibly inaccurate information, a result assured by disclosure, would appear to outweigh the remote risk of a loss of cooperation.

PROONENTS

Proponents of disclosure generally base their arguments on fairness to the defendant. Because sentencing plays such an important role in the administration of criminal justice,98 it would seem reasonable to allow the defendant to examine the presentence report in order to effectively refute any biased or factually unfounded material. Although

97 The probation officer generally recommends probation more often than it is granted. See Federal Offenders xvii.
98 Since almost 85% of all defendants convicted in the federal system plead guilty, sentencing provides the most significant forum for exposing both the elements of the crime and the character of the defendant.
due process probably does not require disclosure of the presentence report, if the factual basis of the report is incorrect, resentencing may be required by the fifth amendment. Unfortunately, however, if disclosure is not permitted, such inaccuracies are uncovered only if a judge has articulated his reasons for imposing a particular sentence.

In addition to assuring that the presentence report is factually accurate, disclosure helps the defendant better understand the reasons for the court's disposition of his case. Disclosure, therefore, may well be the first step in defendant's rehabilitation. Moreover, the offender realizes that the probation officer is familiar with his background, and such an awareness can serve to facilitate achieving the candid and open relationship necessary in the event of future probation or parole. The defendant also is made to feel that the sentencing decision is not arbitrary, but a reasoned judgment based upon all the facts in the report.

In 80 of the 94 federal probation offices, some form of disclosure is permitted, and of these 80 offices, 25 allow substantial disclosure of the report to at least defendant or his counsel. It would seem reasonable to infer from these statistics that these jurisdictions have been satisfied with this practice and have as yet not encountered the difficulties predicted by the advocates of nondisclosure. Moreover, the trend seems to be in this direction. In 1967, a committee of the American Bar Association recommended mandatory disclosure of all information contained in presentence reports, with a few specified exceptions designed to protect sources of information and to prevent an adverse effect on rehabilitation. This proposed rule would provide

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101 See Appendix.
102 Id.
103 Interview with Gerald L. Rudolph, Probation Officer for the District of Maryland, in Baltimore, Maryland, September 17, 1969; see Thomsen, supra note 10.
104 [T]he sentencing court [must] permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court
defendant with an adequate basis upon which to challenge the
authenticity of a report, but at the same time would guard against the
evils of mandatory disclosure in all cases under all circumstances. It
has been argued that the 1966 revision to rule 32 was intended merely
to provide federal judges with an opportunity to acquaint themselves
with the merits of disclosure. 105 If this was the intention, sufficient
time for such orientation has passed, and it is suggested that the prac-
tice of disclosure as proposed by the American Bar Association is both
warranted and necessary.

**Observations and Conclusions**

**The Early Investigation**

In those districts that hold court in rigid divisional terms, early com-
 mencement of presentence investigations is almost essential if the pro-
bation officer is to both distribute his workload effectively and insure
that a presentence report will be available for all criminal defendants
who potentially may be sentenced during a given division’s term. 106
While the necessity for this procedure in such districts is obvious, the
efficiency of the criminal justice process is affected adversely by con-
comitant waste, the most notable example of which is caused by the
preparation of presentence reports that are never utilized. 107 Such in-
efficiency, however, can be effectively eliminated, without drastically
altering the current procedure, by exercising a higher degree of selec-
tivity in the preparation of these reports. To achieve this goal, greater
harmony should be sought between the offices of the probation officer
and the U.S. Attorney. During the presentence investigation, the pro-
bation officer’s attention should concentrate on the facts of the case and
the degree of defendant’s participation in the offense. Then, if mitigat-
ing facts are discovered that suggest referral to a more appropriate
agency for disposition, they should be made known to the U.S. At-
torney. 108 Unfortunately, close cooperation between the probation of-

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*ABA Project on Minimum Standards for Criminal Justice, Standards Relating to
Sentence Alternatives and Procedures § 4.4(b) (Teitel Draft, 1967).*

105 See Report of Judicial Conference of the United States, Proposed Amendments
to Rules of Criminal Procedure for the United States District Courts (1966),

106 See note 48 supra and accompanying text.

107 See note 61 supra and accompanying text.

108 See note 57 supra and accompanying text. Although such disclosure may in fact
constitute a technical violation of rule 32(c)(i), the clear intent of the rule is to
protect the defendant from disclosure that would prejudice the determination of guilt.
ficer and the prosecuting attorney is not the rule. To illustrate, of the 602 unused presentence reports prepared during fiscal year 1968 in the 13 jurisdictions studied, 416—almost two-thirds—were the result of either dismissals by the U.S. Attorney, or failure to obtain grand jury indictments.\(^{109}\)

With the probation officer’s development of greater expertise in the fields of law and social services, he is becoming better equipped to perceive from information acquired during his investigations whether there is a likelihood that a particular case will be prosecuted. When he obtains information causing him to believe that prosecution in a given case would be fruitless, this information should be made known to the prosecutor; if the case is then referred out of the criminal process or dismissed, the need for further investigation is obviated.\(^{110}\) While not having completed a presentence report, the probation officer will have served an equally important function, achieving the most appropriate and efficient disposition of the case. Furthermore, such a working relationship will not usurp the independence of either office; the probation officer would merely be advising the prosecutor of mitigating facts, much as the prosecutor would inform the probation office when charges have been dismissed. Thus, a decision could be made, usually weeks before trial is scheduled, whether to prosecute, and as a result, the efficiency of the probation office, court, and prosecuting attorney’s office would be improved by the accelerated disposition of cases not appropriate for trial. Such a screening procedure currently is utilized in most of the jurisdictions studied and could be readily implemented in others without radical alteration of existing practices.

Although those probation offices that commence presentence investigations prior to a determination of guilt should be careful to avoid wasted time and effort within their own districts, avoiding such waste to other jurisdictions should be of equal concern. In all 97 federal pro-

See note 80 supra. On the contrary, the type of information that would be disclosed to the U.S. Attorney under the deferred prosecution procedure is information that tends to exculpate rather than implicate the defendant. Considering the past success of this procedure for juvenile and selected adults described earlier, it would appear that the probation officer’s discretion in selecting the disclosed information can be relied upon in the future.

\(^{109}\) Information obtained from the Probation Division of the Administrative Office of the United States Courts. Of the 839 unused presentence reports for all offices during fiscal 1968, disposition was as follows: dismissal, 405; no filing, 211; acquittal, 200; death, 18; miscellaneous, 5. ANNUAL REPORT 151.

\(^{110}\) In the majority of jurisdictions visited, such a practice is being utilized. If a probation officer has reservations concerning a case, he informs the chief probation officer, who then advises the prosecuting attorney of any mitigating factors and requests a review of the case and a decision whether prosecution will be sought.
bation districts, the probation offices collaborate in preparing pre-
sentence reports.111 This interdistrict cooperation usually occurs when
the defendant is to be tried in a district other than where he resides or
has family ties. In such cases, the former district will request the latter
to conduct the presentence investigation; before doing so, however,
it is important that the requesting office carefully examine the case
and be reasonably sure that it will come to trial.

In addition to being selective in conducting presentencing investiga-
tions, each probation office periodically should analyze its practices
and the operation of its court system to determine if there are any
idiosyncratic procedures which create inefficiencies.112 For example, a
survey could be conducted to determine what proportion of defendants
who plead guilty upon arraignment had indicated such an intent be-
fore the court term commenced. If the ratio is high, the number of
reports that are prepared but unused could be reduced considerably
by conducting early presentence investigations only for those defend-
ants who have indicated their intent to plead guilty.113 Since a large
percentage of federal criminal defendants do plead guilty,114 such a
policy would allow adequate time both for the probation office to
prepare a presentence report and in most cases for the court, during
the same division term, to arraign the defendant and administer a sen-
tence based upon the report. For those defendants found not guilty,
time and money will not have been wasted in preparing an unneces-
sary presentence report. In the case of the limited number of defendants
who initially indicate they will not plead guilty, but who subse-
quently change to such a plea at arraignment, the probation officer
should have sufficient time before the end of the term to prepare a
presentence report, since the number of reports required under such
circumstances would be minimal. If, however, guilt is established as the
result of trial and if there is insufficient time to prepare a comprehensive
report before the end of the divisional term, sentencing could be post-
poned until the court reconvenes at another division. Meanwhile, the

111 Division of Probation, Administrative Office of the United States Courts,
112 For example, in the Middle District of North Carolina a presentence report is
not automatically made on all defendants in a conspiracy case, but only on those def-
endants against whom the U.S. Attorney has assured prosecution will be sought. Interview
with O. Leon Garber, Chief Probation Officer for the Middle District of North
113 This is the procedure in the Southern District of Georgia. Interview with J.
Saxton Daniel, Chief Probation Officer, Southern District of Georgia, in Savannah,
Georgia, July 14, 1969.
114 For example, in fiscal 1968, 86% of the total number of criminal defendants
presentence investigation could be conducted, and the court, upon reconvening at such other division, could hold the presentence hearing on a predetermined date and properly dispose of the case. Under such a procedure, which should not involve an unmanageable number of defendants, the only additional expense would be the cost of transporting defendant to the division where court is being held and the expense of his attorney if court-appointed. Furthermore, such expenses would be significantly less than the amount, both in time and money, expended in preparing unused reports. Thus, by conducting early presentence reports only for those persons who express their intent to plead guilty, the only unused reports and consequent waste would result from defendant's indicating an intent to plead guilty, but actually entering a contrary plea and subsequently being acquitted.\textsuperscript{115}

Although early presentence investigations are a distinct advantage in those districts that hold court in divisions, such practice would be equally beneficial to jurisdictions that arrange their calendars in separate terms—albeit sitting in the same geographical location—since the same cyclical caseload confronts the probation officer. When, however, a court neither "rides circuit" nor apportions its cases in terms, there is no compelling overall advantage to conducting early presentence investigations. Given the limited use of the presentence report and the present role of the probation officer, the practice of waiting until guilt is established would appear more appropriate for these jurisdictions.

\textbf{ROLE OF THE PROBATION OFFICER}

Perhaps the most significant observation that can be made about the process of sentencing is that the role of the probation officer and the function of the presentence report are undergoing a process of evolution. Although the probation officer was primarily responsible for supervision of probationers and parolees, he soon acquired the role of advisor to the court at sentencing, a function that has been institutionalized through the requirement of presentence reports.\textsuperscript{116} Recently,

\textsuperscript{115} Another alternative, which is utilized in the Southern District of Georgia, for districts holding court in divisional terms would be to schedule an arraignment day three to four weeks before court convenes. Such a procedure would provide the probation office with both an accurate count of all defendants pleading guilty and an adequate amount of time to prepare presentencing reports. This procedure could be implemented in those districts where the cost of holding arraignments prior to commencement of the term, plus the expense of transporting defendants tried and found guilty to another division for sentencing, would be less than the expense utilized in the preparation of unused reports.

\textsuperscript{116} See S. Rubin, \textit{supra} note 12, at 176-219.
however, the probation officer has acquired the additional role of "rehabilitative" officer for defendants. With the probation officer's increased professionalism and expertise, the emphasis of presentence investigations has shifted from merely collecting factual data to examining defendants' individualized needs and determining how these needs best can be fulfilled. In carrying out this still-developing role, the probation officer is benefited by early presentence procedures, which allow him to recommend removal from the criminal process of those cases that in the interests of society and defendant's rehabilitation should not be prosecuted.

Also designed to screen cases from the criminal process and to facilitate rehabilitation, the Offender Rehabilitation Project conducted by the Legal Aid Agency for the District of Columbia provides defense attorneys with essentially the same information as obtained from a presentence investigation.\textsuperscript{117} With the aid of a professional rehabilitation agency, the Project prepares its own reports on individual defendants for use by defense counsel at all stages of the criminal process, from initial plea-bargaining until ultimate disposition. Thus, defense counsel can use the information provided to advise the court of what he considers a proper disposition of his client's case, without having to rely upon the initiative of the already overburdened probation office. The success of this project is suggested by a recently published evaluation indicating that Project-defendants have received more favorable dispositions and that ultimately, society benefited rather than suffered from such dispositions.\textsuperscript{118}

The success of such a project, however, depends directly upon the coordination of social service resources within the community, and unfortunately, in the 13 districts visited during this study, as well, probably, as in the great majority of jurisdictions, there is no independent organization capable of integrating and coordinating such resources; nor is there likely to be in the near future.\textsuperscript{119} Except in large urban areas, the probation office is the only facility with sufficient experience, expertise, and familiarity with existing social agencies to effectively coordinate and administer a rehabilitative program. By expanding the range of their activities within the criminal justice system, probation offices, utilizing early presentence investigations, can provide such rehabilitative services and thus act as ad hoc offender re-


\textsuperscript{118} Id. at 75.

\textsuperscript{119} Id. at 27.
habilitation projects in those jurisdictions lacking the resources to support an independent program. 120

Preconviction services, such as performed by the Project, are possibly more effectively utilized by defense counsel in an adversary setting. This possibility, however, should not foreclose the manpower potential present in the probation system, which could be maximized by enlightening the courts, prosecuting and defense attorneys, and probation personnel as to the emerging role of the probation officer. Similarly, the value and usefulness of the early presentence procedure must not be limited to the probation office, but instead must be viewed in the entire context of the administration of criminal justice. The presentence investigation can no longer be restricted to the disposition of a case by probation or sentence; it must focus on the needs of the individual defendant. Only then can it provide the criminal justice system with the necessary means to deal with the complex problem of appropriate disposition of criminal offenders. The potential for such a procedure is evident; its implementation remains a task for the future.

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120 One observation made by the Institute was that the D.C. probation office would not be favorably inclined to provide the requisite services for community-oriented planning and rehabilitation. Id. at 319. Although such a response can be understood in the context of the workload and other variables peculiar to the District of Columbia, it would not be expected from those jurisdictions that were the subject of this study. These jurisdictions exhibited an already effective procedure for pre-conviction screening.
APPENDIX

Questionnaires, the results of which are presented in the table next following, were sent to federal probation offices in Puerto Rico and the 76 districts that were not visited during this study. A reply was received from each office. The questionnaire was designed to elicit information concerning the circumstances under which a presentence report is prepared, the point in time during the criminal process at which the investigation is commenced, the time required for completion, the degree, if any, of disclosure to the defendant or his attorney, and, if so made, at what point the information is disclosed. In reply to a specific question, all offices indicated commencement of the presentence investigation for juvenile offenders immediately after notification of arrest or presentment. For adult offenders, however, many districts have adopted more than one procedure. This is evident in the number of districts in which the general practice is to initiate presentence investigations only after conviction or plea of guilty, but in which an investigation will be commenced prior to such time if the defendant indicates that a plea of guilty will be entered. Other districts following the early presentence procedure prepare reports after a determination of guilt if the defendant refuses to consent to an early presentence investigation. The completion time for a presentence report is germane primarily to those districts that have adopted the practice of preparing a presentence report only after a determination of guilt. For those districts that use the early presentence procedure, the completion time depends upon when the court hears the case and sentences the defendant. While between two and three weeks is the average length of time for districts that commence the investigation only after guilt has been established, this period varies according to whether defendant is a resident of the district or is a transient, the length of time required to obtain information from other districts concerning the defendant, and the case load of the probation officer. Disclosure of contents differs appreciably among the districts, as does the point in time at which disclosure is made. Most districts allow defendant and his attorney to examine the criminal record prior to sentencing. Such disclosure, however, takes place at varying times. It may be done at any time after the defendant is found guilty until sentence is imposed. In many cases the only disclosure results from the judge’s questioning of the defendant, which often concerns parts of the defendant’s record that bear heavily on the judge’s determination of a sentence.
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¹For all cases except misdemeanors, violations of immigration laws, wagering tax laws, and certain federal regulatory statutes, including migratory bird laws and motor carrier regulations. Results of the questionnaire also revealed that a presentence report is prepared in all districts for juvenile offenders immediately following arrest or arraignment before a magistrate.

²The numerals are indicative of the following procedures:
1. After arrest, prior to appearance before a magistrate.
2. At time of appearance before a magistrate.
3. After indictment or information.
4. After defendant or his attorney indicates that a plea of guilty will be entered.

³Consent may be either written (W) or oral (O), and given to either the magistrate (M) or the probation officer (P).

⁴Although disclosure policies may vary among individual judges, the following categories summarize the majority practice in each district:

Entire. Complete report made available to defendant or his attorney.
Partial. Entire report, less probation officer's evaluative summary and recommendation, made available to defendant or his attorney.
Limited. Contents disclosed controlled by court. Majority practice usually limits disclosure to statements made by the judge at sentencing, which usually include defendant's prior record and any facts that affect the judge's determination of a sentence.
No disclosure. No part of the report is made available to either the defendant or his attorney.
PROFESSIONAL CORPORATIONS: ANALYSIS UNDER THE TAX REFORM ACT AND SURVEY OF STATE STATUTES

For many years, physicians, attorneys, and other professionals have attempted to obtain the numerous federal income tax and business advantages available to corporations. Although most states now permit professionals to incorporate under their professional corporation statutes, the main obstacle had been the Internal Revenue Service’s opposition to corporate tax treatment of these organizations. Recently, however, the Treasury acquiesced in several court decisions permitting professionals to avail themselves of these benefits. In increasing numbers, therefore, professionals will seek to capitalize upon the advantages of incorporation. Nevertheless, full tax and corporate benefits may be obtained and the numerous disadvantages avoided only by a careful and detailed examination of both the Internal Revenue Code (Code) and applicable state professional corporation statutes.

Under the Tax Reform Act of 1969, the subchapter S election to avoid double taxation of earnings has effectively been eliminated for professional corporations, since the Act precludes full enjoyment of the benefits of corporate pension plans by such electing corporations. Professional corporations, therefore, probably will decide to retain their tax status as ordinary corporations, but in so doing, will encounter other applicable provisions of the Code. For example, in an effort to avoid a double tax on earnings, the accumulated earnings tax, and the personal holding company tax, a professional corporation may decide to distribute earnings in excessive salaries. The rules relating to unreasonable compensation, however, will then apply, and the corporation will have to escape this pitfall. In addition to tax problems, professional corporations must consider restrictions under state statutes. Although these statutes were enacted to facilitate favorable tax treatment, they do impose certain restrictions on a corporation’s activities which must be taken into account. Illustrative are problems relating to who may form a professional corporation, who may be a shareholder, who is permitted to manage the corporation, what activities the corporation may undertake,

1 For a list of state professional corporation and professional association statutes, see Appendix.
and the extent of tort and contractual liability. In order to assist persons in realizing full enjoyment of the professional corporation as a vehicle for doing business, this Note will address itself to these questions.

**Tax History**

Traditionally, state law barred professionals from practicing in the corporate form because of the fear that limited liability would lead to a deterioration in the quality of their services. Professionals, therefore, initially sought tax treatment as unincorporated associations, which circumvented state prohibitions against professional corporations, but allowed corporate tax treatment, since the Code treats "associations" as corporations for tax purposes. Thus, in *United States v. Kintner*, decided by the Ninth Circuit in 1954, a group of Montana physicians successfully defeated the Government's challenge to use of this device for achieving corporate tax status. Although neither the Code nor the Treasury regulations provided a test for determining whether an association qualified for corporate tax treatment, the physicians were able to rely on guidelines set out in *Morrissey v. Commissioner*. In *Morrissey*, the Supreme Court held that in order to be treated as an "association" taxable as a corporation, a business organization must possess five characteristics: (1) Centralization of management; (2) continuity of life; (3) transferability of interest; (4) limited personal liability; and (5) legal title to property in the organization. Since the physicians' association in *Kintner* fulfilled these requirements, it qualified for corporate tax treatment.

Refusing to acquiesce in *Kintner*, the Treasury Department in 1960 issued new regulations opposing the further formation of professional

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6 216 F.2d 418 (9th Cir. 1954).

7 296 U.S. 344 (1935).

8 Id. at 359.

9 216 F.2d at 418. In *Galt v. United States*, which involved similar facts, a group of Texas physicians succeeded in convincing the district court that their association should be taxable as a corporation. 175 F. Supp. 360 (N.D. Tex. 1959). In explaining its reasoning the district court said:

The testimony in this case meets all the requirements of an incorporation under the laws of Texas if the laws of Texas permitted doctors to incorporate, but since the state law does not permit doctors to incorporate, but associate themselves together to do the identical things that they otherwise would do if incorporated they are due the same tax in the same way as though they were incorporated.

*Id. at 362.*
associations. They arbitrariness assigned a meaning to each characteristic, making it virtually impossible for a professional association to qualify under them. Furthermore, the Treasury Department provided examples to reinforce its position that professional associations would not qualify for corporate tax treatment.

The Kintner Regulations promulgated in 1960 applied only to professional associations, however, and several states, in the belief that organizations labeled as professional corporations possibly might qualify under the new regulations, enacted professional corporation statutes. Since these statutes provided characteristics more closely resembling those of true corporations than did the statutory provisions permitting professional associations, the applicability of the Kintner Regulations to the professional corporation caused considerable confusion. Indeed, the Internal Revenue Service declared an amnesty period from 1961 to 1964, during which it agreed not to challenge professional corporations.

Subsequently, in 1965, the Treasury amended its regulations to apply the same corporate resemblance test to professional corporations as was

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10 [Treas. Reg. §§ 301.7701-1 to -2 (1960).]
11 [Treas. Reg. § 301.7701-2 (a) (1960). The regulations enumerated six corporate characteristics that must be satisfied: (i) Associates, (ii) an objective to carry on business and divide the gains therefrom, (iii) continuity of life, (iv) centralization of management, (v) liability for corporate debts limited to corporate property, and (vi) free transferability of interests.]
12 [See Treas. Reg. §§ 301.7701-2(b) to -2(c) (1960). The regulations defined free transferability of interests as the absence of any consent requirement by the remaining shareholders; some statutes, however, require shareholder approval for stock transfers in the professional corporation. The regulations also defined limited liability as the absence of shareholders' personal liability for debts of the corporation; yet, some professional corporation statutes have preserved common law relationships between professionals and their clients. Although the latter state statutory provision has been interpreted by the Government to preclude qualification under the regulations, in O'Neill v. United States it was held that professionals incorporating under this type of statute do have limited liability. 281 F. Supp. 359, 362 (N.D. Ohio 1968), aff'd, 410 F.2d 888 (6th Cir. 1969).]
13 [Treas. Reg. § 301.7701-2(b) (3) (1960).]
15 [See Comment, Professional Associations and Professional Corporations, 16 Sw. L.J. 462 (1962).]
16 [The Commissioner stated that if a professional corporation filed a valid corporate income tax return during this period, he would not attempt to tax the organization as a partnership by invoking the Kintner Regulations. Rev. Proc. 65-27, 1965-2 CUM. BULL. 1017, 1019.]
applied to professional associations. It then commenced a campaign to tax professional corporations as partnerships, but after encountering several defeats in the courts, announced on August 8, 1969, its acquiescence in those decisions according corporate tax status to professional corporations. Despite its acquiescence, the Treasury Department has announced that it will undertake a study of the effects of professional corporations enjoying corporate tax benefits. Furthermore, the Congress has decided to postpone any legislative action relating to professional corporations until completion of the study.

When the Treasury commences its study, it will be searching for tax loopholes and any substantial abuse by professionals who have incorporated. In its study, however, the Treasury should not consider merely the loss of revenue resulting from corporate pension and profit-sharing plans. Against this potential loss of revenue should be balanced the equitable consideration that ordinary corporate employees presently are entitled to generous retirement benefits. For years the discrimination against self-employed individuals has been patent; moreover, the Self-Employed Individuals Tax Retirement Act of 1962 (H.R. 10) has done little to remedy the situation. The issue, therefore, when professionals incorporate under state professional corporation laws is not whether a professional corporation is truly a corporation; rather, it is whether self-employed individuals should be entitled to retirement benefits commensurate with those available to corporate employees.

TAX BENEFITS AND PROBLEMS OF INCORPORATION

With removal of the major deterrent to incorporation by professionals—Internal Revenue Service opposition to incorporation—profes-

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17 The amendment reiterated the importance of Kintner characteristics and provided that these characteristics were controlling for professional corporations, as well as any other professional organizations, regardless of the label applied under state law. Treas. Reg. § 301.7701-2(h) (1965).
18 See, e.g., Kurzner v. United States, 413 F.2d 97 (5th Cir. 1969); O'Neill v. United States, 410 F.2d 888 (6th Cir. 1969); Empey v. Commissioner, 406 F.2d 157 (10th Cir. 1969); Wallace v. United States, 294 F. Supp. 1225 (E.D. Ark. 1968).
21 See Washington Post, Dec. 10, 1969, ¶ A, at 1, col. 4. Before the Treasury Department commenced its study of professional corporations, the Senate Finance Committee added a provision to the Tax Reform Bill of 1969 which would have denied corporate pension plan benefits to all professional corporations. See S. REP. NO. 552, 91st Cong., 1st Sess. 270-72 (1969). This provision, however, was deleted on the Senate floor in order to postpone action against professional corporations until the Treasury Department completed its study.
tionals will have to consider corporate and tax benefits, as well as countervailing disadvantages, in assessing the advisability of incorporation. Furthermore, particular care must be exercised in order to circumvent potential tax pitfalls created by the Tax Reform Act of 1969.\textsuperscript{23} The Act practically negates for professional corporations the usefulness of a subchapter S election by limiting pension plan benefits under such an election to those available to self-employed individuals.\textsuperscript{24} Thus, the most convenient device utilized by professional corporations to minimize corporate tax problems, including double taxation, unreasonable compensation, the accumulated earnings tax, and the personal holding company tax, has been eliminated. Before deciding to incorporate, therefore, professionals must study not only the benefits, but also those possible tax problems.

TAX BENEFITS FROM INCORPORATION

Pension and Profit-Sharing Plans. The primary incentive for organizing a professional corporation is in the benefits derived for corporate employees from pension and profit-sharing plans.\textsuperscript{25} A corporation is allowed to deduct contributions to a qualified profit-sharing plan to the extent of 15 percent of an employee’s annual salary,\textsuperscript{26} and if an integrated profit-sharing and pension plan is used, it may deduct contributions equal to 25 percent of an employee’s compensation.\textsuperscript{27} In this regard, there are no dollar limitations for either type of plan.\textsuperscript{28} Furthermore, the income earned and accumulated by the pension trust created pursuant to such a plan is exempt from taxation.\textsuperscript{29} Only when the proceeds of the plan are made available or are actually distributed to the beneficiaries will they be subject to a tax,\textsuperscript{30} which will be at ordinary


\textsuperscript{24} Id. § 531(a).

\textsuperscript{25} See INT. REV. CODE OF 1954, §§ 401-05. For a dollar computation of such benefits, see 1 P-H Tax Ideas § 11,016, at 11,363-65 (1969).

\textsuperscript{26} INT. REV. CODE OF 1954, § 404(a) (3) (A).

\textsuperscript{27} Id. § 404(a) (7).

\textsuperscript{28} Retirement plan benefits are more restrictive for self-employed professionals under H.R. 10, which limits employer deductions for contributions to the lesser of $2500 or 10% of the employee’s compensation. Id. §§ 404(e) (1), (e) (2); see Ray, A Comparison of Tax Benefits Available Under H.R. 10 with Those Provided by Professional Associations, 26 Ga. B.J. 269 (1964); Snyder & Weckstein, Quasi-Corporations, Quasi-Employees and Quasi-Tax Relief for Professional Persons, 48 Corn. L.Q. 613, 616 (1963); Strong, Retirement Planning Considerations for Professionals, 15 Prac. Law. 43 (1969).

\textsuperscript{29} INT. REV. CODE OF 1954, § 501(a).

\textsuperscript{30} Id. § 402(a) (1). Moreover, since a retired employee is entitled to an additional
income rates. If, however, the employee contributes after-tax dollars to the plan, a proportionate amount of each distribution will be excluded from income.\textsuperscript{31} Moreover, if such proceeds are distributed in a single year because of an employee’s death or because he leaves the corporation, under the Tax Reform Act of 1969 the amount distributed in excess of the combined employee-employer contributions to the plan is taxed at capital gains rates.\textsuperscript{32} Subject to specified limitations, the contributions of the employer are taxable as ordinary income when distributed to the beneficiary.\textsuperscript{33}

Besides the income tax advantages of a qualified retirement plan, a federal estate tax exemption is available for funds that have not been distributed at an employee’s death, are attributable to employer contributions, and are receivable by a beneficiary other than the executor of the employee’s estate.\textsuperscript{34} In addition, the federal gift tax does not become due upon an employee’s exercise or nonexercise of an option to have survivor benefits that are covered by a qualified retirement plan paid to another person.\textsuperscript{35}

Although the codes of ethics of several professions prohibit splitting fees with lay persons,\textsuperscript{36} only two codes have been interpreted to require exclusion of nonprofessional employees in profit-sharing plans.\textsuperscript{37} In these two codes, however, an exception has been made to permit in-

\textsuperscript{31} Int. Rev. Code of 1954, § 402(a)(1).


\textsuperscript{33} Tax Reform Act of 1969, § 515(b), amending Int. Rev. Code of 1954, § 72(n)(1) and adding § 72(n)(4). The tax on the portion of lump-sum distributions taxable as ordinary income is limited to the greater of: (1) seven times the increase in tax resulting from inclusion of 14 2/7% of the ordinary income portion of the lump-sum distribution in the distributee’s gross income; or (2) seven times the increase in tax resulting if taxable income were to equal 14 2/7% of the ordinary income portion of the distribution minus personal exemptions. In computing the tax limitation, both compensation by the distributee from the employer in the year of the distribution and that portion of the lump-sum distribution taxed at capital gain rates are excluded.

\textsuperscript{34} Int. Rev. Code of 1954, §§ 2039(c)(1)–(2).

\textsuperscript{35} Id., §§ 2517(a)(1), (a)(2). Under H.R. 10, the estate and gift tax exemptions for survivor benefits are not available. Id., §§ 2039(c)(1)–(2), 2517(a)(1)–(2).

\textsuperscript{36} See, e.g., ABA Code of Professional Responsibility, Canon 3, EC 3-8; ADA Principles of Ethics § 9; AICPA Comm. on Professional Ethics, Code of Professional Ethics, Opinion 6 (1967); AMA, Opinions and Reports of the Judicial Council § 7, Opinions 12-13 (1969).

\textsuperscript{37} See ABA Code of Professional Responsibility, Canon 3, EC 3-8; AMA, Opinions and Reports of the Judicial Council § 7, Opinion 28 (1969).
clusion of such lay employees in qualified retirement plans. These prohibitions initially had been interpreted to require exclusion of nonprofessional employees from retirement plans, because employers' contributions often were determined on the basis of their annual net income. Thus, since the Internal Revenue Code prohibits discrimination against certain employees in establishing qualified pension and profit-sharing plans, exclusion of a professional corporation's lay employees could have been fatal to qualification under the Code. The codes of ethics of the legal and medical professions, however, have been amended to permit inclusion of nonprofessional employees, even though contributions to the plans are based to some extent upon the net income of the professional corporation.

Miscellaneous Advantages. The professional corporation's employees benefit from a variety of other advantages, which are common to all corporations and have not been modified by the Tax Reform Act of 1969. Corporate employees need not include in their income the cost of premiums paid by their employer to the extent of $50,000 of group term life insurance. Moreover, amounts paid for these premiums are deductible by the corporation as an ordinary and necessary business expense. If a corporation distributes amounts to a beneficiary of an employee by reason of the latter's death, the beneficiary may exclude from income up to $5,000 of the amount received. These death benefit payments also are deductible by the corporation.

If a corporate employee becomes ill or injured, he may enjoy further tax benefits not available to self-employed individuals. Wages or payments in lieu of wages during a period of injury or illness generally may be excluded from income to the extent of $100 a week. In addition,
an employee may exclude from his income contributions by the corporation to accident and health plans, as well as subsequent distributions under the plan that reimburse him for injury or sickness. Similarly, the employer is allowed a deduction for contributions to such a plan. In contrast, self-employed individuals do not qualify for health plan benefits; thus, they are restricted to deductions for 50 percent of medical insurance premiums, not to exceed $150, plus personal medical expenses not covered by insurance in excess of three percent of adjusted gross income.

The corporate tax rates also represent an advantage for professionals in high tax brackets. Corporate earnings are subject to a tax at 22 percent on the first $25,000 of taxable income and 48 percent on any excess. Such rates may provide more after-tax dollars for investment than do the individual rates. Moreover, because of the 85 percent deduction for intercorporate dividends received, the effective tax rate on income from dividends is 3.3 percent on the first $25,000 of net income and 7.2 percent on the excess.

In essence, there are substantial benefits available to employees of professional corporations, which are unavailable to self-employed persons. Nevertheless, professionals must examine the potential disadvantages of incorporation in order to avoid prohibitive taxes on corporate earnings.

POSSIBLE TAX PROBLEMS FROM INCORPORATION

As noted, the Tax Reform Act of 1969 denies pension plan benefits to qualified corporations electing subchapter S. Although other advantages of a subchapter S election still exist, such as elimination of the waiting period is eliminated if the employee is hospitalized at least one day during the seven-day period; in addition, after 30 days the exclusion limit is raised from $75 to $100 per week.

47 Id. §§ 106, 105 (b).
49 Int. Rev. Code of 1954, § 105 (g).
50 Id. §§ 213 (a) (1)-(2).
51 Id. §§ 11 (b) (2), (c) (3), (d). At present, the surcharge must be added to this amount. Id. § 51.
52 Id. § 243 (a) (1).
53 These figures are arrived at by multiplying 15% (the taxable portion of intercorporate dividends) by 22% and 48% respectively. The surcharge then must be added.
54 Tax Reform Act of 1969, § 531 (a), adding Int. Rev. Code of 1954, § 1379. This section provides that commencing in 1971, corporate contributions to pension plans for shareholder-employees owning greater than 5% of the outstanding stock of the corporation must be included in the shareholder-employee's income to the extent that the contribution exceeds the lesser of $2,500 or 10% of the employee's compensation.
double tax,\textsuperscript{55} accumulated earnings tax, and personal holding company tax,\textsuperscript{56} denial of corporate retirement plan benefits negates the usefulness of such an election. Professional corporations, therefore, will want to avoid double taxation of earnings by other means, the most obvious of which are high salaries, minimal dividends, and retention of all other earnings.

\textit{Unreasonable Compensation}. In an effort to prevent double taxation of corporate earnings, as well as to avoid the unreasonable accumulated earnings tax,\textsuperscript{57} professionals should set their salaries at a level sufficiently high to absorb all the corporation's earnings. To qualify for a deduction as a business expense, however, compensation must be both reasonable in amount and paid only for services actually rendered.\textsuperscript{58} Failure to meet either test will result in taxing the payment as a dividend, if it bears a close relationship to holding of stock.\textsuperscript{59}

Although determining the reasonableness of compensation depends upon the particular circumstances of each case, courts consider several factors, including previous dividend payment policy, the qualifications of the particular employee compared to other employees, and the individual employee's overall contribution to the success of the business.\textsuperscript{60} The most important factor, however, and possibly the most advantageous for professional corporations, is the comparison of salary scales utilized by other firms in the profession.\textsuperscript{61} In fact, several commentators have suggested that because high salaries currently are paid to professionals in unincorporated partnerships, this factor will be particularly helpful to professional corporations.\textsuperscript{62}

\begin{footnotes}
\item[55] Double taxation is avoided by taxing the shareholders directly on their shares of the subchapter \textit{S} corporation's income, whether or not distributed. \textit{See} \textit{Int. Rev. Code of} \textit{1954}, § 1373.
\item[57] \textit{Int. Rev. Code of} \textit{1954}, §§ 531-37; \textit{see} notes \textit{72-92 infra} and accompanying text.
\item[58] \textit{Treas. Reg.} § 1.162-7(a) (1958).
\item[59] \textit{Id.} § 1.162-8 (1958).
\item[61] "[\ldots] reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances." \textit{Treas. Reg.} § 1.162-7(b) (3) (1958).
\item[62] "A salary paid by a corporation to a professional employee which is similar to the earnings of a non-incorporated professional under the otherwise same circumstances should be within the definition of reasonable compensation." \textit{Peterson, Weissman &
If high salaries are considered reasonable in amount, professional corporations still must satisfy the second requirement that compensation represent payment for actual services rendered, rather than a distribution of corporate earnings and profits. In *Klamath Medical Serv. Bureau v. Commissioner*, a group of Oregon physicians, who were shareholders of a corporation that provided hospital facilities and medical services, supplied only the medical services; they were salaried, however, on the basis of the entire corporate income, including income generated from the hospital facilities. Thus, the total amount paid to them exceeded their personal billings for medical services. The court held that the compensation received by the physicians was reasonable only up to 100 percent of their billings and disallowed corporate deductions for compensation above that amount, finding such deductions to be a distribution of corporate profits. The court emphasized that the physicians’ employment contract did not obligate the corporation to pay them more than their billings; consequently, the excess payments were not even considered compensation, and their reasonableness was not in issue.

In an area with few rules, therefore, *Klamath* illustrates the outer limits for compensation to professional employees. First, 100 percent of professionals’ fees, to the extent of the net income from fees, is the limit of reasonable compensation. Nevertheless, the amount distributed still must be reasonable under the particular circumstances. Second, if a professional corporation earns income from investments, salaries in excess of net billings will be considered distributions of profits and taxable as dividends, even though the amount distributed would be reasonable as compensation.


63 261 F.2d 842 (9th Cir. 1958), aff’g 29 T.C. 339 (1957).
64 Id. at 846, 848.
65 Any amount over and beyond the 100 per cent base fee could, or could not, be paid to the doctor-members, as the management saw fit. . . . This voluntary payment to the doctors of more than 100 percent of base pay the doctors had agreed to accept as compensation in full for their services, might be an ordinary, but could not be a necessary, expense and hence, not an ordinary and necessary expense.
66 Id. at 848.
67 Id. at 847.
68 *See* note 187 *infra* and accompanying text.
69 In addition, if a professional corporation derives substantial income from services...
As a practical matter, professionals should set their salaries at a pre-arranged percentage of the previous year's billings, paying bonuses throughout the year for any increases in billings.\textsuperscript{69} In addition, the professional corporation should use formal written employment contracts specifying compensation in order to avoid the voluntariness of payments problem noted in \textit{Klamath}.\textsuperscript{70} Even with these precautionary measures, however, a written contract based upon individual billings still will have to be considered in light of the personal holding company tax rules.\textsuperscript{71}

\textit{Unreasonable Accumulation of Earnings.} If a professional corporation cannot distribute all of its earnings and profits as reasonable compensation, it may decide to retain them in order to avoid a double tax. This practice, however, will usually be inhibited by section 531 of the Code, which imposes a penalty tax on the accumulated earnings of a corporation formed for the purpose of avoiding a tax on its shareholders.\textsuperscript{72} In deciding whether such an unlawful purpose exists, primary emphasis is placed upon the reasonable needs of the business.\textsuperscript{73} To assist in making this determination, the regulations offer five guidelines indicating acceptable purposes for reasonably accumulating earnings\textsuperscript{74} which should prove helpful to professional corporations attempting to avoid the penalty tax.

of nonshareholder technicians and assistants, a distribution to professionals equal to total billings will not be reasonable. In such cases, compensation must be limited to the fair value of the professionals' managerial services. See Alexander, \textit{supra} note 62, at 217. See also McClung Hosp., Inc., 19 CCH Tax Ct. Mem. 449, 452 (1960). The Tax Court held that the "100% of billings" test was to be applied to aggregate billings of all shareholder-physicians rather than on an individual basis.

\textsuperscript{69} See Peterson, Weissman & White, \textit{supra} note 62, at 823.

\textsuperscript{70} See note 65 \textit{supra} and accompanying text.

\textsuperscript{71} See notes 93-101 \textit{infra} and accompanying text.

\textsuperscript{72} See INT. REV. CODE OF 1954, § 532(a). The tax is imposed at the rate of 27\%\% on the first $100,000 of accumulated taxable income and 38\%\% on the excess. \textit{Id.} § 531. In computing the tax, however, corporations receive a credit of $100,000 of accumulated earnings before incurring a penalty tax. \textit{Id.} § 535(c). The penalty tax applies to all corporations except foreign personal holding companies, domestic personal holding companies, and tax-exempt corporations. \textit{Id.} § 532. For a discussion of the personal holding company tax, see notes 93-101 \textit{infra} and accompanying text.

\textsuperscript{73} See INT. REV. CODE OF 1954, § 533(a). Section 533 also places the burden of proof on the corporation to demonstrate that it has reasonably accumulated earnings. The burden of proof may be shifted to the Government, however, if the taxpayer files a statement showing the facts upon which he will rely in order to prove that earnings and profits were not unreasonably accumulated. \textit{Id.} §§ 534(a)(2), (c). The statement must conform to certain specifications. \textit{Id.} § 534(c); Treas. Reg. § 1.534-2(d) (1959).

\textsuperscript{74} Treas. Reg. §§ 1.537-2(b)(1)-(5) (1959). It should be noted that these guidelines are suggestive, not exclusive, and not a guarantee that the corporation has reasonably accumulated earnings. See \textit{id.} § 1.537-2(b) (1959).
The first guideline provides that accumulations for the "bona fide expansion of business or replacement of plant" may be considered reasonable.\textsuperscript{75} For example, if a professional medical corporation wishes to invest in new and improved medical equipment, accumulations for such a purpose should qualify as a reasonable business need.\textsuperscript{76} Similarly, accumulations for equipment by other types of professional corporations should qualify. If, however, earnings retained for expansion purposes are not expended within a reasonable period of time, the Internal Revenue Service probably will question the propriety of the accumulation.\textsuperscript{77}

A second legitimate basis for a reasonable accumulation is "[t]o acquire a business enterprise through purchasing stock or assets."\textsuperscript{78} In this area, the interaction between the federal tax laws and the state professional corporation statutes is significant. The regulations provide that for tax purposes the "business" of a corporation is not restricted to that presently being conducted, but includes any line of business the corporation may wish to pursue.\textsuperscript{79} The regulations also state, however, that investments in property or stock unrelated to the corporation's primary business evidences an unreasonable accumulation.\textsuperscript{80} The regulations, therefore, impliedly distinguish between passive investment and active engagement in another unrelated business.\textsuperscript{81} In addition to this distinction, the regulations also provide that when a taxpayer corporation undertakes another business through the purchase of stock, a parent-subsidiary relationship must exist if the subsidiary's business is to qualify as that of the parent.\textsuperscript{82} To meet this test, the taxpayer corporation must

\textsuperscript{75} Id. § 1.537-2(b)(1) (1959).
\textsuperscript{77} B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders 224-25 (2d ed. 1966). The authors point out that the Commissioner will impose the accumulated earnings tax when future expansion plans are uncertain or vague, even though § 537 provides that the "reasonable needs of the business" includes the reasonably anticipated needs of the business." Id. (emphasis added).
\textsuperscript{78} Treas. Reg. § 1.537-2(b)(2) (1959).
\textsuperscript{79} Id. § 1.537-3(a) (1959).
\textsuperscript{80} Although the following purposes are not exclusive, accumulations of earnings and profits to meet any one of such objectives may indicate that the earnings and profits of a corporation are being accumulated beyond the reasonable needs of the business:

- (4) Investments in properties, or securities which are unrelated to the activities of the business of the taxpayer corporation . . . .

Id. § 1.537-2(c) (1959).
\textsuperscript{81} See B. Bittker & J. Eustice, supra note 77, at 228-29.
\textsuperscript{82} Earnings and profits of the first corporation put into the second corporation
own at least 80 percent of the acquired company’s voting stock. Thus, in order for a corporation to reasonably accumulate earnings for use in an unrelated business, it must either actively conduct the new business venture or own at least 80 percent of the voting stock of the corporation actively conducting the new business.

Professional corporation statutes also are pertinent in determining whether a corporation qualifies under these provisions. Such statutes generally prohibit professional corporations from engaging in any business or profession other than that for which they are chartered, but do allow investment in stocks, bonds, and real estate. The dichotomy between active engagement and investment, therefore, is also found in professional corporation laws. There is, however, a critical difference: State professional corporation statutes prohibit active engagement and permit investments, while the income tax regulations require active engagement in an unrelated business in order to qualify as a reasonable business need and treat investments in such businesses as an unreasonable need for accumulating income. Furthermore, neither the state professional corporation statutes, the Code, nor the regulations define the terms “active engagement” and “investment.”

As a practical matter, there may be several approaches whereby a professional corporation can comply with both the income tax regulations and state law. First, the professional corporation can invest in lines of business incident to its main business. Such investments would be permitted under state law and at the same time, would be sufficiently related to the corporation’s main business to qualify as a reasonable business need. The investments, however, would have to be closely related to the rendering of professional services and thus quite limited in scope. For example, a professional medical corporation’s ownership of a pharmacy probably would not be related sufficiently to the practice of medicine, since a medical corporation is a service-oriented business, while a pharmacy is product-oriented and an entirely different profes-

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through the purchase of stock or securities or otherwise, may, if a subsidiary relationship is established, constitute employment of the earnings and profits in its own business.

Treas. Reg. § 1.537-3(b) (1959).

83 Id. § 1.537-3(b) (1959). If a taxpayer corporation owns less than 80% of the stock of a second corporation, the facts of the case will determine whether the taxpayer is actively engaged in the business of the second corporation. Id.

84 See note 183-187 infra and accompanying text.

85 The corporate division provisions of the Code possibly will provide guidance to professionals in defining active conduct of a trade or business, particularly with respect to real estate transactions. Int. Rev. Code of 1954, § 355; see Treas. Reg. §§ 1.355-1(c)-(d), -4(a) (1955).
sion. A second alternative for a professional corporation might be operation of an unrelated business through an 80-percent owned subsidiary. If the professional corporation permits its subsidiary to operate autonomously—without common directors or managers—such an arrangement might satisfy state law as a mere investment in stock while also qualifying under the income tax regulations as active engagement in a trade or business. Although less than satisfactory, these alternatives may provide some solution for professional corporations.

The third guideline to indicate a reasonable purpose for accumulating income is “retirement of bona fide indebtedness created in connection with the trade or business.” 86 This basis for accumulating earnings is not particularly applicable to professional corporations, since it would be quite unusual for such a corporation to issue bonds or other long term debt securities. If a professional corporation borrows heavily in order to provide for office expansion or to purchase equipment, however, retention of earnings for the purpose of retiring the debt should qualify as a reasonable business need.

A fourth basis for reasonable accumulation of earnings is “[t]o provide necessary working capital for the business.” 87 Although the need for working capital varies widely with both the business and the particular company, service-oriented businesses, such as professional corporations, typically will require much less working capital than product-oriented businesses, which must maintain large inventories. Of course, like any corporation, one organized by professionals will have to produce detailed records of cash flows and accounts receivable collection rates in order to justify large scale accumulations for working capital. 88 An additional problem related to retention of earnings for working capital is an accumulation to redeem the corporation’s stock. In an ordinary corporation, accumulation of earnings for a redemption might not be considered a reasonable business need. 89 In contrast, a professional corporation’s redemption of a deceased or disqualified shareholder’s stock could be a legal requirement, 90 and accumulations to provide for such a re-

86 Treas. Reg. § 1.537-2 (b) (3) (1959).
87 Id. § 1.537-2 (b) (4) (1959).
88 For illustrations of methods and tests that may be used to prove working capital needs, see 187 BNA TAX MANAGEMENT PORTFOLIO, ACCUMULATED EARNINGS TAX— WORKING CAPITAL A-13 to -21 (1968).
89 In ordinary corporations, stock redemptions serve several purposes, such as consolidating control of the business, eliminating dissenting minorities, and excluding outsiders from sharing in earnings upon the death of a shareholder. Nevertheless, these purposes may not be considered reasonable needs of the business. See B. BITTKE & J. EUSTICE, supra note 77, at 231.
90 All states statutorily require shareholders of a professional corporation to be
demption should qualify as a reasonable business need. Furthermore, the Tax Reform Act of 1969 has extended the definition of "reasonable needs of the business" to include accumulations in the year of a shareholder's death, or later, to finance a stock redemption qualifying under section 303.91

The final guideline exemplifying what constitutes a reasonable business need is an accumulation "to provide for investments or loans to suppliers or customers if necessary in order to maintain the business of corporation."92 Although this provision will not be particularly applicable to professional corporations, a loan, for example, by a professional medical corporation to a medical supplier might justify a retention of earnings.

Based on these five guidelines for determining reasonable business needs, professional corporations should be able to justify a substantial retention of earnings. If excess earnings begin to accumulate, the funds should be utilized for purposes that promise the greatest rate of return and that are consistent with Treasury regulations and state professional corporation statutes. Even if a professional corporation does exercise care in regard to its accumulated earnings, however, it must still avoid the personal holding company tax.

**Personal Holding Company Tax.** There are two basic rules for determining whether a corporation should be considered a personal holding company and thus be subject to a 70-percent tax on undistributed personal holding company income.93 First, five or fewer shareholders of the corporation must own at some time during the last half of the taxable year more than 50 percent of the corporation's outstanding stock;94 second, 60 percent or more of the corporation's adjusted ordinary gross income for the taxable year must be personal holding company income.95

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91 Tax Reform Act of 1969, § 906, amending Int. Rev. Code of 1954, § 537. The redemption must comply with all the requirements of § 303. Section 303(a) provides that a distribution in redemption of stock in the decedent's gross estate may not exceed the total estate, inheritance, and death taxes imposed, plus funeral and administrative expenses deductible from the decedent's estate. Section 303(b)(1) provides time limits for the distribution, and § 303(b)(2) requires that the value of the stock redeemed must exceed either 35% of the value of the decedent's gross estate or 50% of his taxable estate.


94 Id. § 542(a)(2); see id. § 544; Treas. Reg. §§ 1.544-1 to -7 (1958).

There are several types of personal holding company income, but the most significant in the context of professional corporations is that generated by certain corporate contracts for personal services. If the contract provides that someone other than the corporation has the right to designate who will perform the services, or if the person to perform the services is designated in the contract, amounts received under the contract constitute personal holding company income. In addition, the shareholder to perform the services must own at some time during the taxable year at least 25 percent in value of the outstanding stock of the corporation.

If a professional corporation is found to be a personal holding company, the penalty tax can be avoided in several ways. The corporation may be able to pay out its entire income in salaries, if it can stay within the limits of reasonable compensation. Furthermore, a professional corporation could be sure always to have five or more equal shareholders, or at least not to contract for the services of a 25 percent or greater shareholder. The most practical approach, however, would be for the professional corporation to utilize standard written contracts, reserving in the corporation the right to designate who will perform the services for the client or patient. These possible alternatives should enable professional corporations to avoid the personal holding company tax.

STATE PROFESSIONAL CORPORATION STATUTES

In addition to the tax benefits and potential pitfalls of practicing as a professional corporation, there are a variety of problems raised by pro-

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96 Int. Rev. Code of 1954, § 543(a)(7). Section 543(a) lists the types of personal holding company income as follows: (1) Dividends, interest, royalties, and annuities; (2) rents; (3) mineral, oil and gas royalties; (4) copyright royalties; (5) produced film rents; (6) compensation for use of corporate property by a shareholder; and (7) personal services contracts.


99 See Snyder & Weckstein, supra note 28, at 644; notes 58-71 supra and accompanying text.


101 See United States v. Empey, 406 F.2d 157, 161 (10th Cir. 1969). In Empey, the court listed the items included in one type of contract reserving to the corporation the right to designate which employee will render the services.
fessional corporation statutes. Although these problems are compounded by the paucity of case law, the following survey of the more typical statutory provisions should provide some guidelines upon which to base planning decisions. Initially, however, the ethical considerations associated with professional corporations will be examined, since they could serve as a threshold deterrent to incorporation.

**ETHICAL CONSIDERATIONS**

The medical and legal professions ethically oppose use of the ordinary and traditional business corporation for practicing medicine or law. With the enactment of professional corporation legislation in the 1960's, however, these codes of ethics were amended to allow corporate practice in the modified form of a professional corporation. The American Medical Association's (AMA) opposition had been based upon a fear that the limited liability provided by corporate practice would insulate physicians from personal liability for their torts, thus leading to deterioration in the quality of their services. The new professional corporation statutes, however, impose personal liability for an individual's torts; consequently, the AMA removed its ethical bar to the corporate practice of medicine, provided that in addition to continued tort liability, ownership and management of the professional corporation remain under the direct control of the physician.

The American Bar Association (ABA) similarly believed that limited liability would afford inadequate protection for the public and prohibited attorneys from practicing in the corporate form. Since the

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104 [S]uch practice is detrimental to the best interests of scientific medicine and of the people themselves. When medical service is made impersonal, when the humanities of medicine are removed, when the coldness and automaticity of the machine are substituted for the humane interest inherent in individual service . . . the greatest incentive to scientific improvement will be destroyed and the public will be poorly served.


105 See notes 215-17 infra and accompanying text.

106 AMA, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL § 6, Opinion 14 (1969) (emphasis added). For a discussion of state statutory provisions relating to ownership and management, see notes 141-54 and 170-80 infra and accompanying text.

107 ABA Canons of Professional Ethics, No. 35 (1933); see State ex rel. Green v. Brown, 173 Ohio St. 114, 180 N.E.2d 157 (1962).
new professional corporation statutes avoid this deficiency, attorneys since 1961 have been permitted to incorporate and practice as professional corporations.\textsuperscript{108} The ABA, however, also conditions this approval on exclusion of laymen from ownership and prohibition against lay directors or officers exercising professional judgments.\textsuperscript{109}

The ethical controversy over incorporation by accountants has finally been settled. The governing body of the American Institute of Certified Public Accountants (AICPA) in 1969 approved a proposed amendment to its Code of Ethics to allow incorporation by members;\textsuperscript{110} in 1970 the membership approved this proposed rule.\textsuperscript{111}

Although codes of ethics allow incorporation by professionals, still the codes have no binding force under state law. Under the prior AICPA ethical code, members were prohibited from engaging in the corporate practice of accounting;\textsuperscript{112} most state statutes, however, expressly permit accountants to incorporate.\textsuperscript{113} Thus, although the AICPA could expel a member who violated its prohibition against practicing in the corporate form,\textsuperscript{114} a member still could do so under state law. This anomaly was illustrated in State Bd. of Accountancy v. Eber,\textsuperscript{115} in which the state licensing board revoked the license of a recalcitrant member. The court ruled that a state board of public accounting cannot prevent a person from practicing as a corporation simply because it violates the professional code of ethics, when a state statute specifically permits this practice.\textsuperscript{116}

**PERSONS WHO MAY INCORPORATE**

Under all professional corporation statutes, an individual must render a professional service to the public in order for his organization to qualify

\textsuperscript{108}See ABA Code of Professional Responsibility, D.R. 5-107(c).

\textsuperscript{109}Id. For a discussion of the statutory provisions relating to ownership and management, see notes 144-54, 170-80 infra and accompanying text.

\textsuperscript{110}This proposed rule, which would replace rule 4.06, provides that "a member or associate may offer services of a type performed by public accountants only in the form of either a proprietorship, or a partnership, or a professional corporation or association whose characteristics conform to resolution of Council." See News Reports, J. Accountancy, June 1969, at 9.

\textsuperscript{111}AICPA Code of Professional Ethics art. 4, § 4.06.

\textsuperscript{112}AICPA Code of Professional Ethics art. 4, § 4.06 (1967).

\textsuperscript{113}See notes 118-19 infra and accompanying text.

\textsuperscript{114}See generally AICPA Code of Professional Ethics art. 6, § 3(b).

\textsuperscript{115}149 So. 2d 81 (Fla. Dist. Ct. App. 1963).

\textsuperscript{116}In commenting on the ethical nature of the controversy, the court stated "that the legally personal obligation of the accountant to his client is in no way adversely affected when an accountant takes advantage of the provisions of the Professional Service Corporation Act." Id. at 83.
as a professional corporation.\textsuperscript{117} Most state statutes require only a license or other legal authorization in order to render a professional service;\textsuperscript{118} thus, all licensed professionals would qualify under these statutes to form a professional corporation. Such statutes will be categorized as the all-inclusive type. Other states specifically designate those professionals who may organize professional corporations;\textsuperscript{119} these statutes will be referred to as the restrictive type.

In several states that have enacted restrictive statutes, professional status has been conferred upon some vocations not commonly considered "professions" and not usually requiring a license to practice.\textsuperscript{120} In contrast, several states with restrictive statutes exclude certain groups traditionally considered professionals and generally required to be licensed to practice.\textsuperscript{121} This discrimination does not appear to be based upon sound reasoning, and although the state legislatures simply may have been guilty of oversight in formulating their professional corporation laws, the result is that each time it becomes desirable to include another profession within a restrictive statute’s coverage, it must be amended. For example, computer specialists increasingly are being considered professionals, and if in the future they are subjected to a licensing requirement, they automatically would become entitled to form professional corporations in states with all-inclusive statutes. In a state with a restrictive statute, however, absent a statutory amendment they would not be permitted to incorporate.

\textsuperscript{117} See, e.g., \textsc{Fla. Stat. Ann.} § 621.03(2) (Supp. 1969): “The term professional corporation means a corporation which is organized . . . for the sole and specific purpose of rendering professional services . . . .” All states with professional corporation statutes have provisions which follow this general pattern.

\textsuperscript{118} Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, Wisconsin. See, e.g., \textsc{Md. Ann. Code} art. 23, § 433 (Supp. 1969): “An individual . . . duly licensed . . . to render the same professional services within this state may organize or become a shareholder . . . of a professional corporation . . . .”

\textsuperscript{119} Connecticut, Hawaii, Kansas, Massachusetts, Missouri, Montana, New Hampshire, North Carolina, Ohio, Oklahoma, Rhode Island, Utah, Virginia. Professions common to all restrictive statutes include: accountants, architects, engineers, attorneys, dentists, doctors, veterinarians, chiroprists, podiatrists, chiropractors, optometrists, and osteopaths. Five states have laws directed at specific professions to the exclusion of all other professions: Colorado, Louisiana, Minnesota, South Dakota, West Virginia.

\textsuperscript{120} California, Massachusetts, and Montana (physical therapists); California and North Carolina (psychologists); Connecticut and Utah (naturopaths).

\textsuperscript{121} All restrictive statutes except Montana deny professional status to nurses; all but Montana, Ohio, and Utah deny professional status to pharmacists. Nevertheless, pharmacists and registered nurses require a license to practice.
The all-inclusive statutes, therefore, seem to adopt the more rational and practical approach to determine who may incorporate. Such statutes do not encounter definitional problems with marginal professions, such as nurses, pharmacists, physical therapists, and psychologists, because the controlling factor is a licensing requirement. Furthermore, by imposing a consistent standard for incorporation and avoiding discrimination against particular professions, the statutes are more equitable in their application. Finally, these statutes are able to reach new professions as they arise, thus providing needed flexibility without affecting the state's control over professional status, which still can be exercised by means of the licensing requirement.

A variation of the all-inclusive statute, which is found in 15 states, provides examples of professions intended to be within the statute's coverage.\textsuperscript{122} Although such a statute is preferable to the restrictive type, uncertainty still may arise when a profession is omitted from the list of examples.\textsuperscript{123} Thus, in Michigan where the professional corporation statute initially did not list public accountants by way of example, the legislature amended the statute to include them, thereby avoiding possible problems of interpretation even though a license already was required.\textsuperscript{124}

\textbf{STATUS OF ASSISTANTS}

In addition to designating those individuals who may render the professional services of the corporation, all but 10 professional corporation statutes designate who may be employed by the corporation in a nonprofessional capacity.\textsuperscript{125} In 30 states, nonprofessional employees may include clerks, secretaries, bookkeepers, technicians, and anyone else who


By way of example and without limiting the generality thereof, the personal services which come within the provisions of this act are the personal services rendered by certified public accountants, chiropractors, dentists, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, architects, veterinarians, attorneys at law, and life insurance agents.


\textsuperscript{125} All states have a provision for nonprofessionals except Alaska, Arkansas, Colorado, Illinois, Indiana, Kansas, Louisiana, South Dakota, Tennessee, and Utah.
is not normally considered a professional by the general public.\textsuperscript{126} Ten other states, however, limit employment of nonprofessionals to persons who are under the direct supervision and control of a professional in the corporation.\textsuperscript{127} Thus, by emphasizing the supervisory nature of the professional’s relationship to the nonprofessional, this type of statute avoids those problems of interpretation that could arise when an employee is a professional but does not render the services of the corporation.\textsuperscript{128} For example, is is arguable that a nurse, who normally must obtain a license to practice, would be excluded from employment by a medical corporation in the 17 states that only permit assistants who normally are not considered professionals by the general public, whereas in the 10 states with “direct supervision and control” provisions, a nurse doubtless would be allowed to work for such a corporation. Any reasonable interpretation of the former type of statute, however, should allow nurses to work for medical corporations, since they presently are permitted to work in doctors’ offices.

In the 10 states that do not attempt to delineate permissible nonprofessional employees,\textsuperscript{129} there would appear to be no restriction upon who can be employed as a nonprofessional assistant, since professional partnerships are permitted to employ nonprofessionals. Indeed, this view has been adopted by seven states, which specifically stipulate that a professional corporation may employ anyone, as long as nonlicensed employees do not render professional services to the public.\textsuperscript{130}

\textsuperscript{126} Alabama, Arizona, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Vermont, Washington, and Wisconsin. One typical statute states that “[t]his provision shall not be interpreted to include in the term ‘employee,’ . . . clerks, secretaries, bookkeepers, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license . . . is required.” KY. REV. STAT. ANN. § 274.045 (1969).

\textsuperscript{127} Alabama, Arizona, Delaware, Georgia, New Hampshire, New Jersey, Ohio, Oregon, South Carolina, and Wisconsin.

\textsuperscript{128} But see Harvard Student Legislative Research Bureau, supra note 123, at 416-17 (recommends definition of assistant as one not normally considered a professional by the public).

\textsuperscript{129} See note 125 supra.

\textsuperscript{130} California, Minnesota, North Carolina, Pennsylvania, Rhode Island, Virginia, and West Virginia. One statute provides that “[n]othing contained herein shall be interpreted to prohibit any such corporation from employing unlicensed persons to perform functions not constituting such professional services.” R.I. GEN. LAWS ANN. § 7-5.1-6 (Supp. 1968).
MINIMUM NUMBER OF PROFESSIONALS

The minimum number of professionals statutorily required to form a professional corporation ranges from only one to as many as three, with three states failing to specify a minimum requirement. The one-man professional corporation is permitted by a majority of state statutes, however, it may not qualify as a corporation for tax purposes. In its recent acquiescence the Government reserved the right to tax a professional corporation as a partnership in any situation reflecting "special circumstances" not present in the O'Neil and Kurzner cases. Since neither case involved a one-man professional corporation, the Internal Revenue Service has not committed itself to bestow favorable tax treatment upon this type of professional corporation. Because the only apparent benefit to be derived from such incorporation would be deferred compensation plans, section 269, which disallows any corporate deductions when a person's principal purpose for incorporating is to avoid federal income tax, should apply. Nevertheless, one commentator believes that the "principal purpose" test of section 269 can be overcome by such business advantages for one-man corporations as limited contract liability and transferability of interest.

Those professional corporation statutes requiring a minimum of two professionals to incorporate should enable the restrictions of section 269 to be avoided. The advantages of such a corporation extend beyond tax benefits to include centralization of management, continuity of life, transferability of interest, and limited contract liability. In addition,

131 Thirty-two states require only one: Alaska, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Washington, West Virginia, and Wisconsin. Eight states require two or more: Alabama, Arizona, Arkansas, Georgia, Illinois, Mississippi, Tennessee, and Vermont. Four states require at least three: Kansas, South Dakota, Utah, and Virginia.

132 See note 131 supra and accompanying text.


134 INT. REV. CODE OF 1954, §§ 401-05.

135 Id. § 269. For a discussion of the use of § 269 against professional corporations, see O'Neil, Professional Service Corporations: Coping with Operational Problems, 31 J. TAXATION 94, 97 (1969); Rework Bull., 7 CCH 1969 STAND. FED. TAX REP. ¶ 8160, at 74,873.

136 Address by Marshall Wolper, Maryland Association of Certified Public Accountants Monthly Meeting, Sept. 24, 1969. Mr. Wolper, C.L.U., has been involved in the organization of over 200 professional corporations.

137 See note 131 supra and accompanying text.
since Kurzner, in which the IRS acquiesced, involved a two-man professional corporation, the Service's reservation to tax as a partnership any corporation reflecting "special circumstances" should not be invoked in such situations.

Because the Kintner Regulations use the term "associates" to describe one requirement of a corporation, several state statutes require a minimum of three professionals to form and operate a corporation, thereby overcoming any doubt as to the minimum number of professionals allowed to incorporate. The requirement of three professionals, however, would seem unnecessary; since two professionals were sufficient in Kurzner, such a statutory minimum should be sufficient to qualify for corporate tax treatment. Aside from the possible tax consequences, because some states allow one individual to form an ordinary business corporation, the state professional corporation law should not prohibit one-man professional corporations in such an unreasonable and discriminating manner.

SHAREHOLDER QUALIFICATIONS

Professional corporation statutes in all but three states require only that shareholders be licensed to render the service offered to the public by the corporations, without further requiring that they be employed by the corporation. Although the basic structure of a professional corporation generally will consist of shareholder-employees, in these states there may be shareholders who do not participate in the rendering

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139 413 F.2d at 97.
140 Although § 269 has never been used by the Internal Revenue Service to attack twoman professional corporations, certain writers have expressed a fear that in the future it may be used in this manner. See Rev. Rul. Bull., 7 CCH STAND. FED. TAX REP. ¶ 8160, at 74,873. If professionals do incorporate, they must be careful to operate as a corporation and maintain all corporate formalities, such as billing and letterheads. The corporate form has been disallowed for failure to operate accordingly. See Roubik v. Commissioner, 7 CCH 1970 STAND. FED. TAX REP. ¶ 7257, at 72,059 (T.C., Feb. 4, 1970).
141 Treas. Reg. § 301.7701-2 (a) (1960); see text accompanying note 11 supra.
142 See note 131 supra.
143 See Harvard Student Legislative Research Bureau, supra note 123, at 407-09 The Bureau believes that the statutory minimum capitalization requirement will adequately protect the creditors of a one-man professional corporation.
144 Colorado, Nevada, and Rhode Island.
145 See, e.g., Ky. REV. STAT. ANN. § 274.035 (1969): "No person may be a . . . shareholder of a professional service corporation unless he is and remains duly licensed . . . to render the professional services for which the corporation was organized."
146 Maryland specifically provides that an employment relationship is unnecessary to qualify as a shareholder of a professional corporation. See Md. ANN. CODE art. 23, § 434 (Supp. 1969). The majority of states, however, make no mention of employment, and it may be inferred that there is no condition of employment to be a shareholder.
of services. The main advantage of not imposing an employment requirement is the case with which an interest in the corporation may be transferred. Nevertheless, as a practical matter minority shareholders not employed by the corporation will have an investment of questionable value, since dividends rarely will be declared.\footnote{147}

In three states, a shareholder must be both a licensed professional and actively engaged as an employee of the corporation.\footnote{148} This requirement imposes restrictions upon the alienability of shares,\footnote{149} but in light of the Government's acquiescence in \textit{Kurzner},\footnote{150} such a restriction does not prevent a professional corporation from qualifying for corporate tax treatment.\footnote{151} Although retired shareholders of a professional corporation will not be able to retain a financial interest in the firm, a practice common in professional partnerships, they can minimize this disadvantage by the use of corporate pension plans.\footnote{152} In addition, the "active engagement" requirement could create interpretation problems because of its vagueness; in fact, in an attempt at clarification, one state statute provides a list of situations satisfying the requirement.\footnote{153} Even

\footnote{147}Typically, professionals will pay themselves salaries commensurate with the bulk of corporate earnings; corporate profits thus will be distributed as a deductible item. \textit{See} Int. Rev. Code of 1954, § 162(a)(1).

\footnote{148}Colorado, Nevada, and Rhode Island. A typical statute provides that "[a]ny corporation ... may engage in rendering professional services ... provided that every ... shareholder ... is actively employed by the corporation in such practice." R.I. Gen. Laws Ann. § 7-5.1-3 (Supp. 1968). The Nevada statute also can be interpreted as requiring only active engagement in the profession, not necessarily as an employee of the professional corporation. As a practical matter, however, no professional corporation would permit an active competitor to be a shareholder; thus, the shareholder would probably be required to be employed by the professional corporation to satisfy the active engagement requirement. Rev. Rev. Stat. § 89.070 (1968).

\footnote{149}See text accompanying note 235 infra.

\footnote{150}See notes 18-19 supra and accompanying text.


\footnote{152}See notes 25-41 supra and accompanying text. By virtue of such a pension plan, the professional corporation can deduct contributions to the plan as an ordinary business expense. Int. Rev. Code of 1954, § 404(a). The retired professional would not be taxed on the proceeds from the pension plan until he or his beneficiaries received the payments. \textit{Id.} § 402(a).

\footnote{153}Colorado Medical Corporation Act § 2 (CCH 1969 Stand. Fed. Tax Rep. § 6802 (effective July 1, 1969)), \textit{to be codified as} Colo. Rev. Stat. § 91-1-37, lists such situations as illnesses, accidents, and vacations as events not precluding a shareholder from being actively engaged. Furthermore, the statute provides that service in the armed forces and leaves of absence of up to one year are permissible.
this statute, however, does not cover those situations beyond the scope of statutory draftsmanship.\textsuperscript{154}

Although all but three states have avoided the active engagement provision, it seems to be a desirable shareholder requirement. The stringent demands of professional practice require intimate knowledge of the corporation’s operations in order to vote intelligently as a shareholder. Nonemployed shareholders probably would not have this knowledge and therefore would be handicapped in exercising their judgment as voting shareholders.

In the majority of states there are three exceptions to the general rule that a shareholder must be a licensed professional. The first exception applies if a nonprofessional judgment creditor attaches the stock of a shareholder. In a recent Florida case,\textsuperscript{155} the court held that the state statute restricting alienation of shares only to licensed professionals did not prohibit the levy and sale of such stock.\textsuperscript{156} A judgment creditor, of course, would be required to sell his stock, since he is prohibited as a nonprofessional from being a shareholder. The other two exceptions arise when a professional has died and his nonprofessional executor or administrator and successors in interest hold stock in the corporation or when a professional shareholder is disqualified from practice because either his license is revoked or he is elected to public office.\textsuperscript{157} In these situations, the major issues are the length of time the nonprofessional or disqualified practitioners may hold the stock and their rights during this period.

Most state statutes do not prescribe the maximum length of time a nonprofessional or disqualified shareholder may hold the stock,\textsuperscript{158} and such statutes should be amended in order to eliminate doubt as to the holding period.\textsuperscript{159} Other states, however, permit a disqualified share-

\textsuperscript{154} An example would be a semiretired shareholder who maintains a skeleton office in the professional corporation and performs light client-firm liaison duties.

\textsuperscript{155} Street v. Sugerman, 202 So. 2d 749 (Fla. 1967).

\textsuperscript{156} The court stated that “[t]he fact that the corporation may not voluntarily ‘issue’ or the shareholders may not ‘sell or transfer’ their stock voluntarily to a non-professional is not reason to prevent an execution and sale, by law for a judgment creditor.” Id. at 750, quoting Street v. Sugerman, 198 So. 2d 57, 59 (Fla. Dist. Ct. App. 1967).

\textsuperscript{157} All states provide for these exceptions. See, e.g., Mo. Ann. Stat. §§ 356.090, .100 (1966). Section 356.100 provides: “Upon the happening of a disqualifying event, the shareholder may transfer the shares . . . either to the corporation, or to any other qualified person . . . .”


\textsuperscript{159} Michigan originally enacted a professional corporation law without any time limit
holder to retain his stock for 90 days,\textsuperscript{160} while a deceased shareholder's representative may be allowed to hold stock for 90 days,\textsuperscript{161} six months,\textsuperscript{162} one year,\textsuperscript{163} or a reasonable time.\textsuperscript{164} During the period of temporary ownership, no state permits a disqualified shareholder to vote, but a small minority may allow the executor or administrator or successors in interest of a deceased shareholder to vote on decisions unrelated to the rendering of professional services.\textsuperscript{165} This minority position would appear undesirable: not only do most decisions in a professional corporation involve the rendering of professional services, but the delineation between professional and financial decisions is often unclear.\textsuperscript{166} Furthermore, granting nonprofessionals even temporary and limited voting rights is inconsistent with the provisions in all state statutes that a shareholder must be licensed\textsuperscript{167} and that voting rights can be transferred only to other licensed professionals.\textsuperscript{168} Thus, professional corporation statutes should provide for divestment of stock ownership upon death or disqualification, specifying time limits for holding the stock and denying temporary voting rights to nonprofessional shareholders.\textsuperscript{169}

**MANAGEMENT OF THE CORPORATION**

One of the fundamental distinguishing characteristics of a corporation is centralization of management. Although 37 states specifically designate those persons who may be officers or directors,\textsuperscript{170} 10 states make

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\textsuperscript{160} Those states that allow a 90-day holding period include: Arizona, California, Hawaii, Maryland, Minnesota, Missouri, Nevada, Oklahoma, Utah, Vermont, and Wisconsin. One state, New Jersey, allows 30 days.

\textsuperscript{161} Arizona, Maryland, Minnesota, Missouri, Nevada, Oklahoma, Utah, Vermont, and Wisconsin.

\textsuperscript{162} California, Hawaii, and Oregon.

\textsuperscript{163} Kentucky, New Jersey, North Carolina, and West Virginia.

\textsuperscript{164} Alabama, Delaware, Georgia, Michigan, New Hampshire, and North Dakota.

\textsuperscript{165} Delaware, Georgia, and North Dakota. See, e.g., Delaware Professional Service Corporation Act \textsuperscript{\textsuperscript{1}} (CCH 1969 \textit{STAND. FED. TAX REP.} \textsuperscript{\textsuperscript{2}} 6819 (effective June 7, 1969)), to be codified as \textit{DELCODE ANN.} tit. 8, \textsuperscript{3} 610: "[T]he estate of a shareholder . . . may continue to hold stock . . . for a reasonable period of administration of the estate, but shall not be authorized to participate in any decisions concerning the rendering of professional service."

\textsuperscript{166} See p. 514 infra.

\textsuperscript{167} See note 118 supra and accompanying text.

\textsuperscript{168} See notes 238 & 240 infra and accompanying text.

\textsuperscript{169} See Harvard Student Legislative Research Bureau, supra note 123, at 411-12.

\textsuperscript{170} Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massa-
no reference to management in their professional corporation laws.\textsuperscript{171} It would seem, therefore, that in these latter states there are no restrictions as to who can be an officer or director.

Of the 37 states with limitations, 20 provide that an individual must be licensed to practice the same profession as that of the professional corporation in order to be an officer or director.\textsuperscript{172} A professional corporation is engaged in a specialized field of activity, and many of its decisions necessarily relate to the rendering of professional services, such as whether to offer the corporation's services to a client or patient, whether to settle or litigate a legal case, and whether to employ a particular strategy in handling a specific legal or medical problem. Since these decisions typically would be rendered by the professional corporation's officers or board of directors and since lay persons would not have the specialized knowledge necessary to do so, state statutes justifiably have prohibited nonprofessionals from exercising any voice in corporate decisions that so vitally affect the public interest.

A possible disadvantage of this requirement, however, could arise if the professional corporation seeks outside financing.\textsuperscript{173} A creditor might demand that he be given a position on the board of directors in order to protect his interest, but this security procedure would be prohibited if he is not licensed to render the same services as the corporation; consequently, the corporation could lose a source of outside financing. Nevertheless, this restriction can be circumvented if shareholders personally guarantee the corporate note. Alternatively, creditors should be able to obtain sufficient control over certain corporate decisions through provisions in the indenture agreement.\textsuperscript{174}

In addition to requiring that directors and officers be licensed pro-

\textsuperscript{171} Idaho, Maryland, Michigan, Mississippi, Montana, North Dakota, Ohio, Pennsylvania, Tennessee, and West Virginia.

\textsuperscript{172} Arizona, Arkansas, Connecticut, Florida, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Nebraska, New Hampshire, New Mexico, Oklahoma, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. In Arizona, New Hampshire, and New Mexico, the statutes do not specifically require a license; disqualified persons, however, are prohibited from remaining as directors.

\textsuperscript{173} For example, professional corporations might utilize outside financing for office expansion, remodelling, or major equipment purchases. Substantial capital, however, also will be available from a variety of internal sources. Cash from the sale of stock should provide an initial source of capital. Since dividends would be taxed twice, some earnings of the professional corporation probably would be retained as a further source of funds, within the limits posed by the accumulated earnings tax and personal holding company rules. See notes 72-101 supra and accompanying text.

professionals, eight states also require that they be shareholders of the corporation.\textsuperscript{175} The statutes in these states, however, appear unduly restrictive, because a professional employee who is unwilling to invest the capital necessary to become a shareholder nevertheless may be desirable as a director or officer. Furthermore, the shareholder requirement unnecessarily discriminates against professional corporations, since it imposes a burden to which ordinary business corporations are not subjected. Any benefit to the corporation as the result of requiring officers and directors to be shareholders, such as an incentive to good management, would seem outweighed by the corporate disadvantage of being denied the managerial skills of qualified and experienced nonshareholder professionals.

Nine states provide specifically that an officer or director of a professional corporation need be neither a licensed professional nor a shareholder.\textsuperscript{176} This apparent unrestricted freedom, however, is qualified in five of these states by a provision that nonlicensed directors and officers cannot participate in decisions that involve the rendering of professional services to the public,\textsuperscript{177} thus limiting managerial participation to decisions involving purely financial matters. Nevertheless, the problem remains that no clear line separates financial and professional decisions; for example, when a decision involves both elements, such as whether to accept a client or patient, nonprofessional directors would not be permitted to participate. Thus, perhaps the best way to avoid difficult problems of interpretation in determining whether a nonprofessional director can participate in a particular decision would be for state statutes to require that all directors and officers be licensed to practice the profession of the corporation. Furthermore, such an exclusion of lay


\textsuperscript{176} Alabama, California, Colorado, Delaware, Georgia, Hawaii, New Jersey, North Carolina, and South Carolina. A typical statute provides that "[m]embers of the board of governors need not be members or shareholders of the professional association . . . [p]rovided that no officer or member of the board of governors who is not duly licensed to practice the profession for which the professional association was organized shall participate in any decision constituting the practice of said profession." \textit{Ga. Code Ann.} § 84-4308 (Supp. 1968).

\textsuperscript{177} Alabama, California, Colorado, Georgia, and South Carolina. The South Carolina statute specifies that "[n]o officer or member of the board of governors who is not duly licensed to practice the profession for which the professional association was organized shall participate in any decision constituting the practice of the profession." \textit{S.C. Code Ann.} § 56-1608 (Supp. 1968).
persons from boards of directors would not preclude their employment
by professional corporations; corporations still could retain the services
of management specialists.

Another managerial restriction imposed by some states is that a person
may not serve concurrently as a director of more than one professional
corporation.\textsuperscript{178} Moreover, eighteen of the nineteen states that do not re-
quire a director to be licensed also do not prohibit simultaneous board
membership in professional corporations,\textsuperscript{179} thus giving rise to two situa-
tions that possibly could create conflicts of interest. One conflict might
occur when an individual who is licensed in one profession becomes a
director of a professional corporation rendering a different service.
Thus, a practicing physician sitting on the board of a law corporation
might refer accident patients to the law corporation for which he is a
director.\textsuperscript{180} A second conflict could arise when a director of a profes-
sional corporation is a nonprofessional and therefore not subject to an
ethical requirement that he avoid abusing his professional status to the
detriment of his patients or clients. For example, the owner of a dental
laboratory sitting on the board of a professional dental corporation
might arrange to have all dental work of the corporation referred to
his laboratory. Because of these potential conflicts of interest, state
statutes should require both that directors be licensed in the profes-
sion of the corporation and that they not sit simultaneously on the
boards of two professional corporations.

In addition to state statutory requirements regarding qualifications to
be an officer or director of a professional corporation, the various codes
of professional ethics also impose limitations. Under the American
Medical Association's \textit{Principles of Medical Ethics}, ownership and man-
agement of a professional medical corporation must remain "directly and
solely under the control of licensed physicians."\textsuperscript{181} Similarly, the re-
cently adopted American Bar Association's \textit{Code of Professional Re-
responsibility} requires officers and directors of a professional law cor-
poration to be licensed attorneys.\textsuperscript{182} The restriction on attorneys is based

\textsuperscript{178} Alaska, Massachusetts, Missouri, Nebraska, North Dakota, Rhode Island, and
Vermont.

\textsuperscript{179} \textit{Compare} notes 171 \textit{and} 176 \textit{supra, with note 178 \textit{supra}.}

\textsuperscript{180} This situation not only would lead to conflict of interest problems, but also would
be conducive to bribes, kickbacks, and splitting of fees.

\textsuperscript{181} AMA, \textit{OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL} $\S$ 6, Opinions 13-14 (1969);
\textit{see} note 106 \textit{supra} and accompanying text.

\textsuperscript{182} "A lawyer shall not practice with or in the form of a professional corporation or
association authorized to practice law for a profit if: . . . (2) a non-lawyer is a cor-
porate director or officer thereof . . . . ." ABA \textit{CODE OF PROFESSIONAL RESPONSIBILITY},
\textit{Canon 5, DR 5-107(c) (2).}
upon the fear that a layman director or officer might be more interested in his own personal aggrandizement than in the attorney’s professional responsibility to his clients.\textsuperscript{183} Nevertheless, if courts adopt the rationale of \textit{State Bd. of Accounting v. Eber},\textsuperscript{184} the ethical prohibitions on physicians and attorneys may be of questionable validity, although physicians and attorneys probably will still hesitate to challenge professional ethics.

**PERMISSIBLE CORPORATE ACTIVITIES**

Four states prohibit professional corporations from engaging in another licensed profession, but not from participating in an unrelated business.\textsuperscript{185} The other 43 states with professional statutes, however, more severely restrict the activities of the corporation by proscribing participation in even another business.\textsuperscript{186} Nevertheless, these states permit professional corporations to invest in stocks, bonds, real estate, and other types of property.\textsuperscript{187} The difficulty in these states, therefore, is to distinguish between active engagement in another business and mere passive investment.

In no state, however, are there specific guidelines as to what consti-
tutes participation in another business as opposed to investment—such as whether it is necessary to participate actively in the decision making of the company or whether a certain percentage of stock ownership transforms an investment into active engagement. Because of this total absence of statutory criteria, an examination of the professional codes of ethics may help provide a basis for determining permitted professional corporate activities.

The American Medical Association's *Principles of Medical Ethics* provide some guidelines on permitted activities for physicians. For example, physicians are prohibited absolutely from having either a direct or indirect financial interest in wholesale drug companies. Since there would be an incentive for a physician to prescribe only those drugs produced by companies in which he owned stock, such a situation would compromise his relationship with his patient, who places full confidence in his physician.

A more controversial question is whether a physician may own an interest in a pharmacy. The AMA permits a physician to own and operate a pharmacy, provided he does not use it to the detriment of his patients. A few states, however, have statutorily prohibited physicians from owning such an interest, thus nullifying the AMA's sanction. Moreover, in California, the constitutionality of such a statute has been upheld as a valid exercise of the state's police power. By con-

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188 See Harvard Student Legislative Research Bureau, supra note 123, at 410. The Bureau adopts the restriction against unrelated business activities, but permits unrelated investments, suggesting that the distinction between ownership and investment should be resolved in terms of control over the activity.

189 The solution of these problems also may have significant tax consequences. See notes 80-85 supra and accompanying text.

190 Pervading the history of ethical regulation of professional activities has been the desire to prevent conflicts of interest conducive to exploitation of the public for self-serving purposes. To appreciate the conflict of interest problem, it is necessary to realize that ordinary business corporations are not bound by any formal ethical principles; the law provides the sole means of regulation. In contrast, professionals are governed by statutes and by self-regulating principles, which inure to the personal relationship between professionals and the public.

191AMA Principles of Medical Ethics § 1, ¶ 13.

192 Id. § 7, ¶ 41.

193 For example: California, Maryland, Michigan, North Dakota, and Pennsylvania.

194 "No person licensed under Chapter 5 [medicine may] have any membership, proprietary interest or co-ownership in any form in or with a pharmacy . . . ." Cal. Bus. & Prof. Code § 654 (West 1962), as amended, (West Supp. 1969).

trust, the Supreme Court of Montana has overruled the refusal of the State Board of Pharmacy to license a physician-owned pharmacy, finding no statutory prohibition against physicians having such an interest.\textsuperscript{196} In California, the court's decision was based upon an express statutory prohibition, while the Montana ruling reflects the court's refusal to uphold a state board's action prohibiting activity that was not statutorily proscribed and permitted under the profession's code of ethical conduct.\textsuperscript{197} Such a distinction could be significant in other areas of professionals' activities.

The AMA's \textit{Principles of Medical Ethics} also permit physicians to own stock in medical laboratories,\textsuperscript{198} nursing homes,\textsuperscript{199} and optical dispensary shops;\textsuperscript{200} they emphasize however, the physician's professional and ethical responsibility to recommend the best services at the most reasonable price.\textsuperscript{201} Nevertheless, these standards appear unrealistic, since as in the situation of wholesale drug companies, physicians still will have an economic incentive to refer patients to facilities in which they own an interest. Furthermore, a physician's referral of patients to his own medical laboratory or optical shop may amount to illegal conduct.

\textit{Magan}, the court stated:

The state clearly has the power to regulate professions in the interest of public health, safety and welfare. The police power is the broadest in scope of any field of government authority . . . . "The Legislature might well conclude that it is in the best interest of the public to specifically prohibit a person who writes prescriptions for medicine from owning an establishment which fills such prescriptions. . . ."

"[T]he Legislature has the power to prohibit physicians and surgeons from owning pharmacies."

249 Cal. App. 2d at 131, 142, 57 Cal. Rptr. at 261, 268-69.


197 In explaining its decision the court stated that "[t]here being neither a grant of power to the board to deny a license to operate a pharmacy on the basis of ownership by physicians, nor a legislative policy to exclude physicians from ownership of pharmacies, the board simply has no such authority." \textit{Id.} at 622.

198 AMA \textit{Principles of Medical Ethics} \S 6, ¶ 18. A physician having a financial interest in a medical laboratory, however, is not allowed to lend his name for use by the laboratory, unless he actively supervises and performs work for it.

199 \textit{Id.} \S 7, ¶ 46.

200 \textit{Id.} \S 7, ¶ 47.

201 The physician's ethical responsibility is to provide his patients with high quality services. This includes services which he performs personally and those which he delegates others. . . . Medical considerations, not cost, must be paramount when the physician chooses a laboratory. . . . However, if reliable quality laboratory services are available at lower cost, the patient should have the benefit of the savings.

\textit{Id.} \S 6, ¶ 18.
under state law as a rebate, refund, or commission in connection with the referral of patients.\footnote{202}

In \textit{Day v. Inland Empire Optical Co.},\footnote{203} a group of ophthalmologists owned an optical shop, which is expressly permitted by the AMA’s \textit{Principles of Medical Ethics}.\footnote{204} They also displayed a sign in their eye clinic advising patients that the optical shop was “downstairs for your convenience.” When the state board refused to prohibit this practice, several physicians sought to enjoin the ophthalmologists for simultaneously practicing ophthalmology and conducting an optical dispensing business. Although the court did not attack this practice on the basis of unethical conduct, it did find that under the applicable state statute it constituted an illegal patient referral.\footnote{205} In a sweeping opinion, the court reasoned that since ownership of the optical show carried with it the right to profit from its operations, by referring patients to their shop the physicians were engaging in an illegal patient referral for profit.\footnote{206} The result in \textit{Day}, as well as in the California decisions prohibiting ownership of pharmacies by physicians, has yet to be adopted in other states. Nevertheless, these cases should serve as a warning to both physicians and other professionals that in the presence of a prescriptive state statute, the courts may prevent professionals from engaging in related business activities.

Another problem associated with the activities a professional corporation is permitted to undertake is whether it may expand its business through acquisition and merger. Seventeen states permit professional corporations to enter into mergers, but only with other domestic professional corporations engaged in the same profession.\footnote{207} This restriction is

\footnote{202} “It shall be unlawful for any person . . . licensed to engage in the practice of medicine . . . to request, receive or allow, directly or indirectly, a rebate, refund, commission, unearned discount or profit . . . in connection with the referral of patients . . . .” \textsc{Wash. Rev. Code} § 19.68.010 (Supp. 1969); \textit{accord, Cal. Bus. & Prof. Code} §§ 2122.5, 2392.5 (West Supp. 1969); \textsc{Mich. Comp. Laws Ann.} § 750.428 (1968).

\footnote{203} 456 P.2d 1011 (Wash. 1969).

\footnote{204} See note 200 \textit{supra}.

\footnote{205} See note 202 \textit{supra}.

\footnote{206} “Defendant doctors . . . have a right to own stock in a dispensing optical company provided they neither directly nor indirectly, either verbally or in writing, or by sign, symbol or gesture, or by physical arrangement of their offices, refer their patients to the optical company, or indicate in any way their hopes that the patient take his prescription there.” 456 P.2d at 1019.

\footnote{207} Alaska, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, and Washington. The New Jersey statute provides that “[a] professional corporation organized under this act may consolidate or merge only with another professional corporation organized under this act, empowered to render the same specific professional service; and a merger or consolidation with any foreign corporation is pro-
consistent with the licensing requirements of all states, because it prevents foreign professionals from practicing in states in which they are not licensed. Thus, although most states do not specifically impose restrictions on mergers, the licensing requirement will still serve to prevent foreign corporations from practicing within the borders of another state. Moreover, the restriction that a professional corporation render only one type of professional service will impose a further limitation in these states.

A more complex problem in the area of permissible business activity relates to multistate practice through one professional corporation. The large nationwide accounting firms that operate through a single partnership, with hundreds of partners and offices throughout the states, also may wish to incorporate. Assuming the few remaining jurisdictions presently without professional corporation or association statutes enact such legislation, these large accounting partnerships could attempt to achieve corporate status by either one of two possible approaches: (1) formation of a single corporation practicing in each state; or (2) formation of 51 separate corporations, one for each state and the District of Columbia.

Professional corporations presently are not permitted to practice nationwide based simply upon incorporation in one state. For a professional corporation to practice in a state, it is necessary that the professionals rendering the corporation’s services be licensed in that state. The professionals of a nationwide corporation, therefore, would have to acquire a license in each state; otherwise a waiver from each state would be necessary in order to enable nationwide practice. Even if such waivers could be obtained, however, the nationwide corporation would still confront serious problems. For example, the corporation would want distributions to shareholders to reflect the relative profitability of each shareholder’s local office, thereby ensuring optimum performance by local offices. In light of the large number of shareholders, such a


208 See note 118 supra and accompanying text.


210 See notes 185-86 supra and accompanying text.


212 See note 118 supra and accompanying text.
computation would be quite complex. Furthermore, it would depend upon financial data not necessarily available at the close of the taxable year.

The second approach, incorporating in 51 separate jurisdictions, would also be troublesome, since use of a common parent corporation in order to exercise control over each of the 51 separate corporations would not be possible without a waiver of the licensing requirement by each state.\textsuperscript{213} Furthermore, with 51 separate corporations, unity, standardized firm policies, interoffice exchange of personnel, and national training programs would not be feasible. Likewise, pooling of profits among the various offices, a common practice among partners of national accounting firms, would be unrealistic, since the separate corporations would be competitive.

**PROFESSIONAL RESPONSIBILITY AND EXTENT OF CORPORATE LIABILITY**

The traditionally privileged relationships of professional-client and physician-patient have not been abridged by any professional corporation statute. Furthermore, every member of a professional corporation still will be subject to the same fiduciary relationships as exist in partnerships.\textsuperscript{214} Because of the desire to preserve the high standards of professional conduct, however, the traditional concept of limited corporate liability has been modified for professional corporations.

**Tort Liability.** Under the state professional corporation statutes, the professional's financial liability now is more limited. One type of statutory provision, found in 16 states, declares that the corporation is liable for all torts of its shareholder-employees and that shareholder-employees are personally liable for their torts and for the torts of employees directly under their supervision.\textsuperscript{215} By retaining individual tort

\textsuperscript{213} Id.

\textsuperscript{214} For example, the Kentucky statute provides: "The provisions of this chapter shall not . . . affect the fiducial, confidential, or ethical relationship between a person rendering professional services and a person receiving such services." KY. REV. STAT. ANN. § 274.055 (1969). In at least one state this fiduciary relationship specifically extends to the professional corporation's officers and employees. See MO. ANN. STAT. § 356.150 (1966).

\textsuperscript{215} Alaska, Connecticut, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, North Dakota, Texas, and Washington. A typical statute specifies that "[a]ny shareholder . . . shall remain personally and fully liable . . . for any negligent or wrongful acts . . . committed by him while rendering professional services on behalf of the professional corporation . . . . Such shareholder shall not . . . be personally liable for . . . the acts or omissions of, the professional corporation or of another shareholder or employee of the professional corporation . . . ." Hawaii Professional Corporation Law § 1 (CCH 1969 STAND. FED.
liability for shareholder-employees, as well as vicarious liability for tortious acts of employees directly under their supervision, these statutes provide the ideal combination of personal liability of tortfeasors and limited liability for innocent shareholders. Furthermore, the traditional objection to professionals practicing in the corporate form, i.e., their services would diminish in quality because of limited tort liability, is removed. Despite the reasonableness and adequacy of this approach, however, seven states specifically provide that all shareholders of a professional corporation are personally liable for tortious conduct of all members. The public is sufficiently protected without imposing this additional burden of strict liability on all other shareholders. Moreover, such a rule nullifies any aspect of the limited liability enjoyed by ordinary corporations.

Twenty-four professional corporation statutes do not define the scope of shareholder tort liability, other than to state that existing law affecting professional liability to clients is not modified. Commentators, however, have disagreed on the proper interpretation of these statutes. Some have interpreted them to mean that the broad joint and several liability of partners is carried over to all shareholders of a professional corporation, others have interpreted them to mean that corporate emp-


216 While employees in an ordinary corporation would be personally liable for their own torts, the shareholders as such would not be liable. See Smith, Professional Corporations in Ohio: The Time for Statutory Revision, 30 Ohio St. L.J. 439, 448 (1969).

217 Arizona, Colorado, Maine, Montana, Oregon, Pennsylvania, and Wisconsin. One statute provides that “[a] shareholder of a professional corporation may be held: . . . (c) Jointly and severally liable . . . for the negligent or wrongful acts or misconduct committed by any shareholder, or by a person under the direct supervision and control of any shareholder in the rendering of professional services on behalf of the corporation to a person receiving the service.” Oregon Professional Corporation Act, ch. 592, § 15(2), [1969] Oregon Laws 1224.


219 See Bittker, Professional Associations and Federal Income Taxation: Some Questions and Comments: 17 Tax L. Rev. 1, 8-10 (1961). Professor Bittker argues that the phrase would be meaningless if it preserved only the shareholder-employee’s personal
ployees are liable only for their own torts, not even for the torts of employees under their supervision.220 Between these two extremes, however, is a compromise view, which seems the most reasonable: the professional is liable if either he or assistants under his supervision participate in tortious activity.221 Thus, without imposing liability characteristic of a partnership, this interpretation preserves sufficient protection for the public. Moreover, since much of a shareholder-employee's work will be conducted by associates in the firm, it is reasonable to hold a shareholder-employee liable for torts of associates working under him. Indeed, the district court in O'Neill v. United States,222 which involved a state statute that preserved previous bases of liability, concluded that shareholders of an Ohio professional corporation enjoyed at least some form of limited liability.223

Contract Liability. Fourteen states impose contract liability only on the corporation for corporate debts and obligations, limiting the shareholders' liability to their capital investments.224 Thus, this approach eliminates the joint liability imposed upon partners for contractual obligations, while restricting the contract liability of shareholders of a professional corporation to what it is in an ordinary business corporation.225 Furthermore, the public is adequately protected without imposing a personal liability on shareholders, since most of the contractual obligations of a professional corporation will be similar to those of an ordinary business corporation. There is no reason why creditors of pro-

liability, since he already would be personally liable in this capacity in an ordinary corporation. The phrase, therefore, must have been intended to impose the mutual agency-mutual liability relationship as it exists in partnerships. Id. at 10. See also Comment, Professional Associations and Professional Corporations, supra note 15, at 486-87.

220 See Vesely, supra note 187, at 203.

221 See Note, Professional Corporations and Associations, 75 Harv. L. Rev. 776, 781 (1962).


223 Id. at 362; see Ohio Rev. Code Ann. § 1785.04 (Page 1964): "Sections 1785.01 to 1785.08, inclusive, of the Revised Code, do not modify any law applicable to the relationship between a person furnishing professional services and a person receiving such service, including liability arising out of such professional service."


fessional corporations should be entitled to an additional cushion for their debts.

Although most desirable, this type of provision is found in only a minority of states. In four states, a shareholder is personally liable for the corporation’s contractual obligations if he participates in the transaction.\textsuperscript{226} The crucial issue under this type of provision is the extent of participation required to impose liability. The statutes fail to provide any guidelines to answer such questions as whether a person who simply orders, pays for, or receives equipment or supplies is liable. Moreover, this type of provision imposes an unnecessary liability upon professional shareholders not present in other business corporations. Another type of statutory provision, found in only one state, specifically imposes joint liability on all shareholders of the professional corporation for the corporation’s contractual obligations.\textsuperscript{227} To impose such extensive liability on shareholders, however, completely contradicts the corporate concept of limited liability.

In the 28 remaining states, the statutes merely preserve professional liability as it previously existed for partners.\textsuperscript{228} At least one commentator believes that such provisions transfer the joint liability of partners over to the shareholders of a professional corporation.\textsuperscript{229} Nevertheless, the statutes also have been interpreted to impose personal liability only on those members whose participation in a transaction is personal rather than administrative.\textsuperscript{230} Based on either interpretation, however, the

\textsuperscript{226} Alabama, Alaska, Georgia, and South Carolina. See, e.g., \textit{Ala. Code} tit. 46, § 335 (Supp. 1967): “[T]he members or shareholders of any professional association . . . shall not be individually liable for the debts of, or claims against, the professional association unless such member or shareholder has personally participated in the transaction for which the debt or claim is made or out of which it arises.” In each of these states, there is a provision purporting to preserve existing professional relationships and liabilities. Professor Bittker, when discussing the retention of shareholder personal liability for corporate debts, used the Georgia statute as an example. See Bittker, supra note 219, at 8-13.


\textsuperscript{228} Alaska, Arizona, California, Delaware, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. For a sample statutory provision, see note 223 supra.

\textsuperscript{229} See Bittker, supra note 219, at 10-13; cf. note 220 supra. See also Comment, \textit{Professional Associations and Professional Corporations}, supra note 15, at 486-87.

statutes unnecessarily discriminate against shareholders in professional corporations.

VOLUNTARY TRANSFER OF STOCK AND VOTING RIGHTS

Stock. Every professional corporation statute restricts ownership of stock to professionals licensed to render the same service as the corporation.231 Consistent with this requirement, every state also restricts the transfer of stock to such professionals.232 Furthermore, 10 states impose the additional requirement that the transfer be consented to by a majority of shareholders,233 which seems a desirable procedure in the context of professional corporations.234 In those states that require shareholders to be professionals actively engaged in the affairs of the corporation,235 the consent requirement eliminates the problem of a transferee who is a professional, but who is unacceptable to the corporation, from demanding that he be permitted to participate actively in corporate affairs as an employee. Even in states without the “active engagement” requirement, however, shareholders should be able to control who will own stock, since as a practical matter, ownership carries with it the implication of employment; it is unlikely that a prospective minority shareholder would want to purchase shares without a concomitant employment contract. The statutory requirement that shareholders consent to all stock transfers obviates any problems in this regard. Another approach would be to include in the articles of incorporation or the bylaws a restriction on alienation236 or a provision

author states that by implying mutual agency, Professor Bittker has gone too far in interpreting the preservation of professional relationships. He argues that the phrase should be interpreted to impose personal liability only when it arises in a professional capacity. See also Note, Professional Corporations and Associations, supra note 221, at 781.

231 See note 118 supra and accompanying text.

232 See, e.g., Mass. Gen. Laws Ann. ch. 156A, § 7 (Supp. 1969): “A shareholder in professional corporation may voluntarily transfer his share only to a person who is duly licensed to render the same professional services as those for which the corporation was organized . . . .” Some states included such a provision because they feared people might interpret the restriction on ownership as applying only to the initial issuance of stock and not to its subsequent transfer. See Street v. Sugerman, 202 So. 2d 749 (Fla. 1967).

233 Alaska, Delaware, Idaho, Kansas, Maine, Michigan, Mississippi, Missouri, Montana, New Jersey, New Mexico, and North Carolina. “No shareholder . . . may sell or transfer his shares . . . except after the same shall have been approved, at a stockholders’ meeting . . . by such proportion, not less than a majority, of the outstanding stock . . . .” N.J. Stat. Ann. § 14:19-12 (Supp. 1968).

234 See Harvard Student Legislative Research Bureau, supra note 123, at 414-16.

235 See note 148 supra and accompanying text.

236 Such a provision is found in the statutes of Alabama, Arizona, Georgia, Kansas,
granting the professional corporation a right to redeem shares being transferred.\textsuperscript{237}

\textbf{Voting Rights.} In ordinary corporations, shareholders are entitled to transfer their voting rights, and the more liberal professional corporation statutes of five states permit transfer of voting rights to anyone—including nonshareholders—licensed in the profession of the corporation.\textsuperscript{238} At the other extreme, 14 states provide that voting rights cannot be transferred to anyone.\textsuperscript{239} Perhaps the most desirable type of statute, however, is that found in seven other states, which allow voting rights to be transferred only to other shareholders.\textsuperscript{240}

Individuals who although licensed are not owners of the corporation should not be allowed to vote on corporate decisions; the separation of authority from responsibility for decisions is undesirable for both shareholders, who remain personally liable for their torts,\textsuperscript{241} and the public. Nevertheless, to prohibit without exception the transfer of voting rights unduly restricts the privileges of corporate ownership and discriminates against professional corporations. Thus, those statutes permitting voting

\textit{Louisiana, Nevada, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, and Virginia. The Nevada statute declares that “[t]he articles of incorporation or by-laws of a professional corporation may contain . . . such other lawful restrictions on the issuance or transfer of shares as the stockholders or directors may consider appropriate.” Nev. Rev. Stat. \textsection{} 89.070(1) (1968). The Kintner Regulations suggest one permissible restriction on transferability: allowing other \textit{shareholders} a first option to purchase shares. Treas. Reg. \textsection{} 301.7701-2(e)(2) (1960).}

\textsuperscript{237} See Snyder & Weckstein, supra note 28, at 685; notes 242-44 infra and accompanying text.

\textsuperscript{238} Arizona, Arkansas, Minnesota, South Dakota, and Wisconsin. Minnesota's statute provides that “\textit{n}o proxy to vote any share of . . . such a corporation may be given to a person who is not so licensed, nor may any voting trust be established . . . unless all the voting trustees are . . . licensed.” Minn. Stat. Ann. \textsection{} 319.18 (1969). Furthermore, in the absence of provisions governing transfer of voting rights, statutes could be interpreted to permit the granting of proxies to unlicensed persons, a practice contrary to the licensing requirement of professional corporations. See Smith, supra note 216, at 456.

\textsuperscript{239} Connecticut, Delaware, Florida, Idaho, Indiana, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, New Jersey, North Carolina, and Washington. In Florida, “\textit{n}o shareholder . . . shall enter into a voting trust agreement or any other type agreement vesting another person with the authority to exercise the voting power of any or all of his stock.” Fla. Stat. Ann. \textsection{} 621.09 (Supp. 1969).

\textsuperscript{240} Alaska, California, Hawaii, Kansas, Missouri, Nevada, and Oregon. One typical statute directs that “\textit{n}o shareholder shall enter into any voting trust agreement, proxy, or any other type of agreement vesting another person, other than another shareholder of the same corporation, with authority to exercise this voting power of any or all of his stock.” Kan. Stat. Ann. \textsection{} 17-2712 (Supp. 1969).

\textsuperscript{241} See note 215 supra and accompanying text.
rights to be transferred only to shareholders impose sufficient, but not unreasonable, restrictions to insure that persons who are entitled to vote will be responsible for the corporations decisions.

**STOCK REDEMPTION**

Professional corporations in all states have the right to redeem shares of deceased and disqualified shareholders.\(^{242}\) This right is essential when the corporation must purchase the shares of a disqualified shareholder or a deceased shareholder's executor or administrator or successors in interest who are not licensed professionals,\(^{243}\) and who cannot find qualified purchasers for the stock.

If the professional corporation exercises its right of redemption, valuation of the shares becomes necessary. Although two state statutes require the articles of incorporation or bylaws to contain some formula for determining redemption value,\(^{244}\) 23 specify only that if valuation is not provided for in the articles of incorporation, bylaws, or a private agreement, a statutory formula will be imposed.\(^{245}\) Such a provision avoids undue delay in the transfer of shares, thus insuring that a non-professional does not hold the stock for an extended period of time.

In 18 states the statutory formula imposed is book value.\(^{246}\) If the cor-

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\(^{242}\) This right is accorded either by express language in professional corporation statutes or by the general business corporation act in each state. One state with an express provision provides that "the professional corporation shall have an option to purchase the shares of a deceased shareholder or a shareholder no longer qualified to own shares in such corporation . . . ." N.D. CENT. CODE § 10-31-11 (Supp. 1969).

One commentator has suggested that the absence of a provision in a professional corporation statute establishing the right to redeem stock might be interpreted as precluding the right, even though it exists in the general corporation law of the state. See Z. CAVITCH, OHIO CORPORATION LAW § 1824 (1969). Because of the magnitude of the resulting problems, it seems doubtful, however, that a court would accept this interpretation. See Smith, supra note 216, at 451.

\(^{243}\) See notes 157-64 supra and accompanying text.

\(^{244}\) Arizona and Massachusetts. See e.g., ARIZ. REV. STAT. ANN. § 10-909(d) (Supp. 1968): "Either in its articles of incorporation or by its bylaws, the corporation shall fix the price . . . . for acquiring such shares, in the event the shares are not otherwise acquired . . . . by persons qualified to own the same."

\(^{245}\) Alabama, Alaska, Arkansas, Delaware, Georgia, Kansas, Maryland, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, and Wisconsin.

\(^{246}\) Alabama, Alaska, Arkansas, Delaware, Georgia, Maryland, Mississippi, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Vermont, Virginia, and Wisconsin. See, e.g., Delaware Professional Service Corporation Act § 1 (CCH 1969 STANDARD FED. TAX REP. ¶ 6819 (effective June 7, 1969)), to be codified as DEL. CODE ANN. tit. 8, § 613: "[T]he price for such share or shares shall be the book value of such share or shares at the end of the month immediately preceding the death or disqualification of the shareholders."
poration has engaged in permitted investment activities, such a formula is patently unfair, since generally accepted accounting principles require valuation of securities and other investments at either cost or the lower of cost or market. Book value, therefore, will not reflect unrealized appreciation in the value of investments, resulting in an inadequate return upon redemption. In fact, courts usually have recognized this lack of correlation between fair market value and book value. Thus, the more equitable solution is that provided by the other five states, which in the absence of a provision in the charter or bylaws, require that the corporation pay the fair market value of the stock at the time of the shareholder’s death or disqualification. Although fair market value may be difficult to ascertain, it at least permits a more equitable valuation.

Neither of these approaches, however, will likely result in a price acceptable to all parties involved; they are merely stop-gap measures, applicable only in the absence of private agreement. The most desirable approach would be a private cross-purchase or stock redemption agreement. Using either of these methods, shareholders can develop a suitably tailored valuation formula to account for such complex factors as

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247 See note 187 supra and accompanying text.

248 See 2 AICPA ACCOUNTING PRINCIPLES BOARD, APB ACCOUNTING PRINCIPLES 6001, 6012 (1968).

249 See Borg v. International Silver Co., 11 F.2d 147, 152 (2d Cir. 1925) (book value held not measure of actual value in liquidation); Aldrich v. Geahrly, 367 Pa. 252, 80 A.2d 59 (1951) (book value in closely held corporation rarely an accurate representation of fair market value).

250 Kansas, Minnesota, North Carolina, Rhode Island, and Utah.

If the articles of incorporation or bylaws of a professional corporation fail to state a price or method of determining a price . . . then the price for such shares shall be the fair market value as determined by the board of directors . . .

MINN. STAT. ANN. § 319.19 (1969). The methods employed to determine fair market value may be arbitration, determination by the board of directors, or determination by a regulatory agency. A provision designating arbitration is found in the Kansas professional corporation statute, which provides for arbitration "pursuant to the rules of the American arbitration association." If a request for arbitration is not made within 30 days after the death or disqualification of a shareholder, then "the fair value shall be determined by a judge of the district court in which the principal place of business of the professional corporation is located." KAN. STAT. ANN. § 17-2714 (Supp. 1969). Kentucky, Missouri, and Utah bypass the initial arbitration procedure and designate the court as the forum for determining value. KY. REV. STAT. ANN. § 274.095(4) (1969); MO. ANN. STAT. § 356.100 (1966); UTAH CODE ANN. § 16-11-13 (Supp. 1969). The Minnesota statute requires the board of directors to determine market value. MINN. STAT. ANN. § 319.19 (1969). In Rhode Island, the regulatory agency of the profession in which the corporation is engaged determines value. R.I. GEN. LAWS ANN. § 7-5.1-5 (Supp. 1968).
limited marketability, 251 distribution of earnings, 252 goodwill, 253 unrealized receivables, 254 and possible collapsible corporation tax treatment. 255 Nevertheless, these private agreements do have some potential shortcomings. If there are a substantial number of shareholders, a cross-purchase agreement can become unwieldy. In addition, a stock purchase agreement may be impractical if there are limited funds available in the corporation to effect a stock redemption. 256 Although the corporation could provide for funds by purchasing insurance on the lives of its shareholders, 257 such a procedure has limited applicability, since a redemption may arise out of a shareholder’s disqualification from practice or merely his desire to sell his stock.

**Recommended Statutory Provisions**

In order to synthesize the previous discussion of state statutory provisions, the more desirable provisions in each area will be set forth. In light of the Internal Revenue Service’s acquiescence to permit profes-

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251 The market for shares of a professional corporation is significantly limited by the restriction that all shareholders must be licensed and, in a few states, that they must be actively engaged in the corporation’s activities. See notes 145 & 148 supra and accompanying text.

252 Typically, the corporation rarely will make distributions in the form of dividends. See note 147 supra and accompanying text.

253 Although the existence of goodwill does have economic significance, there may be ethical prohibitions against the sale of goodwill by a shareholder. See Snyder & Weckstein, supra note 28, at 688-90; ABA COMM. ON PROFESSIONAL ETHICS, Opinions, No. 266 (1945).

254 Including unrealized receivables in the value of redeemed stock may distort the value of the shares, since the corporation will recognize ordinary income as the receivables are collected without a corresponding deduction for the redemption payments. Suggestions for equalizing this tax burden include reducing the redemption price, discounting the value of the receivables in the redemption formula, payment of a severance bonus based on a percentage of receivables, and payments to the transferor-shareholder under a qualified deferred compensation plan. See Blackshear, Gissel & Hall, supra note 56, at 110.

255 If a substantial portion of the assets of a professional corporation are unrealized receivables, it may be deemed a collapsible corporation. See INT. REV. CODE OF 1954, §§ 341 (b) (1), (b) (3), (b) (4)(B). Gain from the sale, exchange, or redemption of a collapsible corporation’s stock is taxed as ordinary income rather than as a capital gain. Id. § 341 (a). There are, however, many exceptions to the rules. Id. §§ 341 (e)-(f). The determination of collapsibility, therefore, or the existence of an exception may have a significant effect on the value of shares. See Peterson, Weissman & White, supra note 62, at 837.

256 For the effect of a stock redemption on unreasonable accumulation of earnings, see notes 89-91 supra and accompanying text.

sionals to enjoy full benefits of incorporation, it is hoped that the state legislatures will amend their professional corporation statutes to permit optimum enjoyment of this form of business operation.

Any person licensed as a professional should be permitted to incorporate; to avoid possible interpretive ambiguities, however, specific professions should not be listed, not even as examples. Furthermore, there should be no minimum requirement on the number of professionals permitted to form a corporation. The state statutes should require that shareholders be licensed and actively engaged in the rendering of professional services. If a shareholder dies or becomes disqualified from practice, his stock should be transferred to a licensed professional; shareholder approval of the transferee, however, who must become actively engaged in the corporation's business and therefore an employee, should be a requisite. Nevertheless, these provisions in no way should prevent temporary ownership of stock by a deceased shareholder's executor or administrator or successor in interest or by a disqualified professional, but during this period before divestment, shareholders should not have voting rights in the professional corporation.

Directors and officers should be required to have a license to render the same service as the professional corporation. Moreover, a director or officer of one corporation should not be permitted to participate in the management of another professional corporation. Although the business of the corporation should be restricted to rendering a professional service, the corporation should be permitted to own real and personal property and to invest in stocks, bonds, and other types of securities that do not present conflicts of interest.

The traditionally confidential professional-client relationships should not be affected by state statutes. The individual shareholder's liability in tort should be confined to his own acts and omissions and those of persons directly under his supervision and control; the corporation, of course, should be liable for acts and omissions of its directors and employees rendered in the scope of their employment to the full value of the corporation's assets. The corporation, but not the individual shareholders, should be liable for contractual obligations and debts of the professional corporation.

Voluntary transfer of stock in a professional corporation should be permitted only to another individual licensed in the same profession; since the new shareholder must actively engage in the corporation's business, however, approval by a majority of shareholders should be required. Transfer of voting rights to another shareholder by proxy or voting trust should also be allowed. In the event of death or dis-
qualification of a shareholder, the professional corporation should be able to redeem its stock at fair market value. Finally for purposes of redemption, the corporation should be required to include in its articles of incorporation a formula for valuation of stock.

CONCLUSION

Professional corporations have been fraught with perils from their inception to their status today as an acceptable method of doing business. Unfortunately, many professionals avoided the professional corporation as a business form because of Internal Revenue Service opposition; only recently has this major threat to its existence been removed. Professionals will find that a professional corporation represents the most suitable vehicle for obtaining a plethora of income tax benefits. In anticipation of the large number of professionals who now will incorporate, state professional corporation statutes should be made more consonant with the demands of modern professional practice. Until state statutes are improved, however, professionals should examine all possible disadvantages and ambiguities in order to avoid unexpected pitfalls in both the tax and the professional corporation laws.
APPENDIX

STATE STATUTES

Those states appearing in roman type allow incorporation by professionals; those set in *italics* authorize professional associations.

**Alabama**


**Alaska**


**Arizona**


**Arkansas**


**California**


**Colorado**


**Connecticut**

Act of May 29, 1969, Pub. Act No. 332, §§ 1-11 (Conn. Legislative Serv. 335 (West 1969)).

**Delaware**


**Florida**


**Georgia**


**Hawaii**


**Idaho**


**Illinois**


**Indiana**


**Kansas**


**Kentucky**


**Louisiana**


**Maine**


**Maryland**

Massachusetts

Michigan

Minnesota

Mississippi

Missouri

Montana

Nebraska
Nebraska Professional Corporation Act, ch. 121, [1969] Laws of Nebraska 555.

Nevada

New Hampshire

New Jersey

New Mexico

North Carolina

North Dakota

Ohio

Oklahoma

Oregon

Pennsylvania

Rhode Island

South Carolina

South Dakota

Tennessee

Texas

Utah

Vermont

Virginia

Washington

West Virginia

Wisconsin
DISSENTING SERVICEMEN AND THE FIRST AMENDMENT

A democratic people must despair of ever obtaining from soldiers that blind, minute, submissive and invariable obedience which an aristocratic people may impose on them without difficulty. The state of society does not prepare them for it, and the nation might be in danger of losing its natural advantages if it sought artificially to acquire advantages of this particular kind.¹

Dissent over the nation’s involvement in the Vietnam war and the conscription of large numbers of youths opposed to both it and the military establishment in general have precipitated incidents in which servicemen have expressed publicly their disagreement with governmental and military policies. For example, servicemen have published “underground” newspapers that are blatantly antiwar and antimilitary, marched in demonstrations protesting the nation’s military objectives, and attempted to organize on governmental installations intramural discussions of the war and the military.² In the name of discipline and good order, the armed forces have been quick to respond to such expressions with courts-martial³ and transfers to hardship posts.⁴ Moreover, exercise of the communicative rights of speech, press, and assembly has been punished pursuant to laws and regulations specifically promulgated to curb such dissent.⁵ The controversy raised by such incidents has made clear the need to re-examine the relationship between the first amendment, the serviceman, and the armed forces. This Note will explore

¹ 2 A. De Tocqueville, Democracy in America 279 (H. Reeve transl. 1948).
² For general accounts of recent soldier dissent and military reaction, see Polner, 18 Minute Verdict—Military Justice and Constitutional Rights, Commonweal, Mar. 28, 1969, at 40; Sherman, Dissenters and Deserters, New Republic, Jan. 6, 1968, at 23; Sherrill, Must the Citizen Give Up His Civil Liberties When He Joins the Army?, N.Y. Times, May 18, 1969, § 6 (Magazine), at 25; Another Target of the “New Left”—The Armed Forces, U.S. News & World Report, May 26, 1969, at 58.
³ For example, a second lieutenant was court-martialed for marching, while in civilian clothing, in an off-post antia war demonstration in which he carried a sign alleged to be contemptuous of the President. United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967); discussed in text accompanying notes 42-51 infra.
⁴ A sergeant in the ceremonial honor guard (The Old Guard) at Fort Myer, Virginia, was transferred to Vietnam suddenly and under unusual circumstances shortly after a newspaper report attributed to him remarks critical of United States military involvement in Vietnam. Washington Post, June 5, 1969, § A, at 15, col. 1.
⁵ See notes 30-33 infra and accompanying text.
three considerations pertinent to such an examination: the role of the first amendment in the armed forces, the issues involved in vindicating the communicative rights of servicemen in military and civilian courts, and the procedural problems encountered in protecting servicemen from retaliatory administrative action. Throughout this discussion is the common thread of inquiry into the need for civilian judicial review of military actions.

The Soldier and Free Speech

It is well established that a citizen’s constitutional rights are not shorn with his hair when he becomes a member of the armed services. In declaring that military courts have the same duty as state and federal courts to protect the serviceman’s constitutional rights, the Supreme Court has abandoned the view it once held that as established under articles I and II of the Constitution, the military is a separate system of government and operates independent of other constitutional provisions, including the Bill of Rights. Furthermore, the Congress in 1950 enacted the Uniform Code of Military Justice (UCMJ), a comprehensive code of penal, procedural, and organizational provisions designed to insure due process of law for the serviceman. The United States Court of Military Appeals, established by the UCMJ, has declared expressly that the Bill of Rights applies to members of the armed forces. Senior officials of the Department of Defense have conceded that the Constitution extends its protection to members of the armed services.

Although it generally is recognized that constitutional safeguards against governmental abuse of power extend to servicemen as well as

6 1 C. Antieau, Modern Constitutional Law § 6:44 (1969). The Constitution, however, specifically exempts from the fifth amendment’s Grand Jury requirement “cases arising in the land or naval forces.” From this it has been implied that the sixth amendment right to trial by jury does not extend to members of the armed services. See id.

7 See Burns v. Wilson, 346 U.S. 137, 142 (1953).

8 “To those in the military or naval forces of the United States the military law is due process.” Reaves v. Ainsworth, 219 U.S. 296, 304 (1911); see Carter v. Roberts, 17 U.S. 496 (1900); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).


10 Id. § 867 (1964), as amended, (Supp. IV, 1969).


civilians, the Supreme Court has indicated that there are legitimate military interests justifying their restricted application. In addition, because of the doctrine of restrictive review, the Court of Military Appeals is the only judicial body to have fully reached the merits of a serviceman's first amendment claim. Consequently, no more than a sparse body of law has evolved defining the relationship between the military's interest in discipline and the serviceman's right to free speech. The need for a thorough analysis of first amendment rights in the military becomes apparent when one considers the matrix of constitutional law with which the courts have quantified the relationship between the civilian's freedom of expression and the state's various conflicting interests.

CIVILIAN CONSTITUTIONAL STANDARDS

Since establishing that the first amendment freedom of expression is not absolute, the Supreme Court has been faced with the task of defining the constitutionally acceptable limits of its restriction by the Government. This definition has evolved basically by means of verbal formulae, which delineate general standards for examining specific instances of governmental interference with communicative rights. During the twentieth century, two principal formulations have been recognized: the "clear and present danger" test and the "balancing of interests" test.

The clear and present danger test assesses the relationship between interests in terms of potential harm. Speech may be limited when considering the circumstances surrounding the utterance, there is "a clear and present danger that [it] will bring about the substantive evils that [the State] has a right to prevent." Not every assertion of state interest and causal connection between speech and harm to that interest, how-

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13 "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." Burns v. Wilson, 346 U.S. 137, 140 (1953).
14 See notes 108-16 infra and accompanying text.
17 Id.; see Note, Threatening the President: Protected Dissenter or Potential Assassin, 57 Geo. L.J. 533, 554-57 & n.7 (1969).
18 Dennis v. United States, 341 U.S. 494 (1951); see Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424 (1962); Note, Threatening the President, supra note 17, at 554-57.
ever, will suffice; the evil must be serious, and the danger that it will be caused by the speech in question must be imminent.\textsuperscript{20} In contrast, the balancing test undertakes to assess directly the relative merits of an asserted state interest counterpoised with the societal interest in free speech. When the interest asserted by the State outweighs society’s competing interest in individual freedom of speech, the State may restrict the latter to the extent necessary to serve the dominant state interest.\textsuperscript{21} The “weight” given each interest will vary according to the particular circumstances of each case; thus, a given state interest will not invariably outweigh the citizen’s rights, and vice versa.\textsuperscript{22} Reflecting an age of increased judicial realism, the balancing test more accurately assesses the significance of underlying societal interests and policy considerations and therefore has become the dominant test.\textsuperscript{23} Nevertheless, the clear and present danger formula has not been abandoned entirely,\textsuperscript{24} and depending upon the facts and issues involved, either test might be preferred. Furthermore, although it is convenient for analytical purposes to differentiate these tests conceptually, they are similar in that both require an articulation and examination of the state interest served by restricting speech.

**MILITARY INTERESTS IN RESTRICTING SPEECH**

There are several restrictions the Government imposes upon the free speech of servicemen that are neither peculiar to the military nor restricted to serving military interests.\textsuperscript{25} For example, it would be equally criminal for civilians as for military personnel to disclose state secrets,\textsuperscript{26} and in both cases the restraint is justified by the same state interest—national security. There is another class of restraints, however, that may be imposed upon the speech of servicemen simply because of their status as members of the armed forces. Some of these restraints derive from statutes or regulations specifically prohibiting certain types of speech. Article 117 of the UCMJ prohibits the use of provoking or reproachful words or gestures;\textsuperscript{27} article 88 prohibits any commissioned

\textsuperscript{21} See Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 88-105 (1961); American Communications Ass’n v. Douds, 339 U.S. 382, 393-400 (1950).
\textsuperscript{23} See Frantz, supra note 18.
\textsuperscript{27} 10 U.S.C. § 917 (1964).
officer from using contemptuous words in reference to the President or certain other specified officials;\(^{28}\) and article 91 punishes the use of disrespectful language directed toward noncommissioned and warrant officers.\(^{29}\) Furthermore, service department regulations require clearance for those writings and speeches by military personnel that discuss matters related to the armed forces.\(^{30}\)

Other restraints are effectuated indirectly by interpreting certain statutes or regulations to apply to speech, such as article 92, which punishes failure to obey a lawful order or regulation,\(^{31}\) article 94, which punishes mutiny and sedition,\(^{32}\) and the "General Article," article 134,

\(^{28}\) Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

10 U.S.C. § 888 (1964). This provision is interpreted by the Department of Defense to include "both words which are contemptuous in themselves . . . and words which are contemptuous because of the connection in which they are used and the surrounding circumstances." U.S. DEP’T OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 167 (rev. ed. 1969) [hereinafter cited as 1969 MANUAL]. Expressions of opinion made in a purely private conversation are not punishable; giving broad circulation, however, to a publication containing contemptuous words or using them in the presence of military subordinates is punishable, and truth or falsity "may be immaterial." Id. Similar to article 88 is article 89, which punishes disrespect toward a superior commissioned officer. 10 U.S.C. § 889 (1964). "Disrespect by words may be conveyed by opprobrious epithets or other contemptuous or denunciatory language." 1969 MANUAL ¶ 168.

\(^{29}\) Any warrant officer or enlisted member who—

\(\ldots\)

(3) Treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office, shall be punished as a court-martial may direct." 10 U.S.C. § 891 (1964).

\(^{30}\) See, e.g., Air Force Regs. 11-22 (Sept. 12, 1964), 190-12 (Jan. 15, 1963); Army Reg. 360-5 (Sept. 27, 1967); Navy Reg. § 1252 (Aug. 9, 1948). The Army regulation provides that all members of the active Army who write or speak on "military matters or foreign policy" must submit their material to appropriate headquarters for review. Army Reg. 360-5, para. 9(b) (2) (Sept. 27, 1967). "Military matters" is defined broadly to include any information "concerning or bearing on military subjects or the national defense . . . or actions of the Department of Defense." Id. para. 2(f). Navy regulations also require that unofficial writings carry a disclaimer of official endorsement. Navy Regs. § 1252 (3) (Aug. 9, 1948).


\(^{32}\) "Any person subject to this chapter who—

\(\ldots\)

(2) with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition . . . ." Id. § 894. Furthermore, article 82 punishes as a
which punishes "acts detrimental to good order and discipline in the armed services." 33 Indirect restrictions upon free expression also arise from exertion of administrative pressures, which gain their effectiveness through fear of punishment for failure to obey a lawful order. 34 Administrative sanctions can range from assignment of additional or more onerous duty at the barracks level 35 to official transfer to an undesirable or hazardous duty station. 36

These restrictions are based upon two valid state and societal interests uniquely concerning the armed services: the interest in maintaining discipline and good order in the military, 37 and the interest in maintaining the principle of civilian supremacy over the military establishment. 38 In theory, however, these are simply particular state interests, meriting no greater immunity from judicial scrutiny than any other state interest asserted to justify an abridgment of individual rights. 39 separate offense solicitation of mutiny, desertion, sedition or misbehavior before the enemy. Id. § 882.

33 Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (1964). The article is interpreted to include violations of customs of the service. 1969 MANUAL ¶ 213(b). Although the phrase, "to the prejudice of good order and discipline," is interpreted to apply only to acts "directly prejudicial" and not to acts prejudicial in a "remote or indirect" sense, the Manual suggests that such diverse offenses as adultery, bigamy, criminal libel, disloyal statements, and indecent or lewd acts would be punishable under the article. Id. ¶ 213(f); see id. ¶¶ 132(b)(1)-(14). Punishable under the discredit phrase is "conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem." Id. ¶ 213(c).


35 For reports of servicemen being harassed by extra duty, repeated inspections, and pass restrictions, see N.Y. Times, Apr. 6, 1969, at 2, col. 1; N.Y. Times, Apr. 2, 1969, at 1, col. 6.

Another reported type of harassment is interrogation by intelligence agents. See N.Y. Times, Aug. 12, 1968, at 1, col. 6. The editor of one "underground" newspaper asked to remain anonymous for fear of such reprisals. N.Y. Times, Apr. 6, 1969, at 3, col. 1.


38 Id. at 174-75, 37 C.M.R. at 438-39.

39 Regarding military interests as merely particular state interests does not ignore the relative gravity of the military interest in maintaining a disciplined combat force as compared, for example, with the state's interest in maintaining an orderly flow of traffic in its streets; it simply requires that the military interest be articulated and examined on its own merits.
Discipline. Before one can assess intelligently the military interest in maintaining discipline, it is first necessary to formulate a precise definition of the term. If the term contemplates a state of servile obedience to whatever caprice may be arbitrarily dictated, then of course any speech by a subordinate that displeases a superior per se would impair discipline.\(^40\) It is impossible, however, to discover a legitimate need on the part of the armed services for such an extreme degree of subservience.\(^41\) Because the interest in discipline is founded upon the necessity for men to obey orders directing them into combat situations, it is clear that the term contemplates a large, but nevertheless finite, degree of authoritarian command and automatic obedience. Judicial analysis, therefore, should include a close examination of the asserted interest in preserving discipline, and care should be exercised to distinguish between the desire to establish an environment in which only officially popular opinion may be expressed and the need for obedience to legitimate authority.

Once a court has defined "discipline," it is then necessary to determine whether the military's action in restricting a serviceman's freedom of expression satisfies current constitutional tests, as articulated by the Supreme Court. In \textit{United States v. Howe}\(^42\) the Court of Military


\(^{41}\) Not even the Army's official definition of discipline goes to this extreme:

(a) Military discipline is a state of individual and group training that creates a mental attitude resulting in correct conduct and automatic obedience to military law under all conditions. It is founded upon respect for and loyalty to properly constituted authority.

(b) While military discipline is enhanced by military training, every feature of military life has its effect on military discipline. It generally is indicated in an individual or unit by smartness of appearance and action; by cleanliness and neatness of dress, equipment, and quarters; by respect for seniors; and by prompt and cheerful execution by subordinates of both the letter and the spirit of the legal orders of their lawful superiors.

Army Reg. 600-20, para. 28 (Feb. 21, 1967).

\(^{42}\) 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). Lieutenant Howe, a reserve officer on active duty, joined an off-post demonstration against the war in Vietnam. He was in civilian clothes and carried a sign which stated: "Let's have more than a 'choice' between petty ignorant fascists [sic] in Vietnam in 1968" and "End Johnson's fascist [sic] aggression [sic] in Vietnam." \textit{Id.} at 168, 37 C.M.R. at 432. Because of his activities, Lt. Howe was charged with public use of language disloyal to the United States with intent to promote disloyalty and disaffection, use of contemptuous words against the President, and conduct unbecoming an officer and a gentleman. \textit{Id.} at 168, 37 C.M.R. at 432, \textit{see} 10 U.S.C. §§ 934, 888, 933 (1964). Although the disloyal language charge was dismissed, Howe was convicted of the other two and sentenced to dismissal from the armed forces, forfeiture of all pay and allowances, and confinement at hard labor for one year. 17 U.S.C.M.A. at 167, 37 C.M.R. at 431.
Appeals invoked the clear and present danger formula to test an officer's participation in an antiwar rally; however, it did not critically scrutinize its conclusory finding that the officer's conduct in fact constituted such a danger to discipline. Instead, without defining discipline, it held the point so obvious as "to require no argument." Considering that Lt. Howe was out of uniform, of relatively low rank, and in the presence of no more than "three or four" other servicemen amidst a crowd of some 2,000, it is not clear that his acts threatened to cause any specific individual or group to disobey orders; nor would it seem that either a particular or general collapse of discipline was even likely, much less "imminent," as the result of his acts. On the other hand, had Howe been a general officer, the danger to discipline and general order would have been more apparent; similarly, if Howe had chosen to make his protest in uniform and before a formation of troops, the threat would have been more obvious. These possible factual variations indicate that although the clear and present danger test may have been appropriate under the circumstances, it is necessary to apply critically the test in light of the given factual situation, the interest to be protected, and the disciplinary controls exerted.

Civilian Control. The interest in maintaining civilian control over the armed forces is the basis for the statutory prohibition against speaking contumaciously of civilian authorities, as well as for certain regulations directed to writings and speeches by servicemen. This principle, or interest, is embodied in the Constitution, which provides that the President, a civilian, shall be Commander in Chief of the Armed Forces. The ultimate evil to be prevented is a military coup, but inherent in such a state-asserted interest is the need to insure that the armed forces remain affirmatively responsive to the desires of the civilian governmental structure established by the Constitution. In upholding the

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43 17 U.S.C.M.A. at 174; 37 C.M.R. at 438; see notes 17-36 supra and accompanying text.
44 Although the court in Howe did not define the term "discipline," it did note that the purpose of article 88 is to avoid the impairment of discipline. 17 U.S.C.M.A. at 169-70; 37 C.M.R. at 433-34; see note 29 supra.
46 Id. at 168-69, 37 C.M.R. at 432-33.
48 10 U.S.C. § 888 (1964); see note 29 supra.
50 For an account of the confrontation between President Truman and General Douglas MacArthur, see D. Rees, KOREA: THE LIMITED WAR, 205-29, 264-83 (1964).
conviction of Lt. Howe, the Court of Military Appeals also considered the interest in civilian supremacy, but did not articulate expressly which constitutional test it applied. Although the court specifically utilized the "clear and present danger" test when it considered the military interest in discipline, certain factors suggest that in addressing the supremacy issue, it in effect applied the "balancing of interests" test. It is clear that the court's concern was not with a clear, present danger likely to be precipitated by Howe's conduct, since the court refused to consider Howe's reserve status, which would have been relevant to whether his particular act presented a "clear" danger. Rather, it limited itself to balancing the long term interest in preserving the principle of civilian supremacy against the interest in allowing servicemen to speak contemptuously of the President.

The issue, of course, is not the legitimacy of the interest in civilian control of the military. In addition to the difficult question of what particular expressions and circumstances constitute "contempt," there remains the problem of determining the weight to be given to the speaker's relative rank or position within the military hierarchy. Even the most vehement exhortations on the part of an obscure subaltern cannot rise to the level of threat that perhaps the casual comment of a general officer presents. This fact is recognized by both the statute forbidding speech contemptuous of the President, which on its face applies only to commissioned officers, and by the Department of the Army's regulations on clearances of speeches and articles, which impose special restrictions on higher ranking civilians and officers. For a court to balance effectively the interest in free expression and civilian supremacy, it should attach significance to the rank and position of the particular serviceman being punished, as well as the character of the speech and the objective facts surrounding its utterance.

RESTRICTIONS ON SPEECH AND VAGUENESS

The constitutional problem of vagueness encompasses two basic

52 See 10 U.S.C. § 888 (1964). Article 88 is interpreted to include both directly and indirectly contemptuous utterances. 1969 Manual ¶ 167. Neither the statute nor the Manual, however, specifically defines the term "contempt."
54 The public writings or speeches of civilians of civil service grade GS-16 or higher, all general officers, and all personnel of lesser rank whose assignments are of unusual prominence or authority are reviewed for conformity with department of defense and government policy. Army Reg. 360-5, paras. 9(3)(b), 9(9) (Sept. 27, 1967). The writings and speeches of lower ranking personnel are reviewed only for security matters. Id. para. 9 (3) (a); see note 30 supra.
concepts. The first is procedural due process—actual "vagueness"—which involves the issue of whether a penal statute is sufficiently clear and definite both to give fair notice to those who wish to avoid its prohibition and to provide a standard of guilt for judge and jury. The second is substantive due process—"overbreadth"—which raises the question of whether the language of a statute, given its normal meaning, applies to conduct protected by the Constitution.\textsuperscript{55} Vagueness is particularly objectionable when a regulation might extend to communication and expression, since individuals then would tend to forego the exercise of their rights of speech, press, and association for fear of breaking a law whose boundaries are uncertain.\textsuperscript{56} In such cases, society itself is harmed, because it is deprived of the free-flowing exchange of ideas and criticisms essential to an informed democracy. The courts, therefore, are especially critical in testing for vagueness statutes that restrict free communication.\textsuperscript{57}

Numerous statutes and regulations pertaining to military personnel may suffer from the constitutional infirmity of vagueness.\textsuperscript{58} The Adjutant General of the Army nevertheless has drawn to the attention of commanders several vaguely phrased statutes and regulations that "may be relevant in considering problems of dissent in the armed forces." \textsuperscript{59} Among these is the General Article, which punishes "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces." \textsuperscript{60}

Other regulations are equally suspect. For example, Navy regulations forbid language that "may tend to diminish the confidence in or


\textsuperscript{58} "[M]ilitary law is replete with norms that utterly fail to give reasonable guidance to the members of the military." 1 C. Antieau, Modern Constitutional Law § 6:45 (1969).

\textsuperscript{59} Letter from (Acting) The Adjutant General to All Commanders, June 23, 1969. The letter, which listed 13 statutes and seven regulations as applicable to manifestations of dissent by members of the Army, was careful to emphasize the responsibility of commanders to maintain "good order, loyalty, and discipline."

respect due" to a superior officer and prohibit making a public speech or publishing an article that is "prejudicial to the interests of the United States." Combined with article 92, which punishes failure to obey an order or regulation, and the General Article, such regulations become a powerful restraining force. It is unquestionable that no legitimate military interest is served by vagueness per se. Thus, courts should not hesitate to scrutinize such statutes and regulations in order to determine whether they have been drawn with sufficient precision to limit their applicability to legitimately restricted conduct and to adequately inform servicemen of the boundaries of that conduct.

MILITARY OR CIVILIAN COURTS AS CONSTITUTIONAL ARBITERS

MILITARY COURTS

Assuming that military personnel have constitutional rights which should be protected by the same safeguards applied in civilian cases, it is necessary to examine the military judicial system to determine whether it is competent to serve as the final arbiter of these rights.

As the result both of congressional incorporation in the UCMJ and of the Court of Military Appeals' decisions reviewing courts-martial, an elaborate structure of procedural safeguards now surrounds military trials. For example, the Court of Military Appeals has held that Miranda v. Arizona, which excludes from evidence illegally obtained statements by persons in custody, is applicable to the trial of a serviceman. For a member of the armed forces charged with ordinary service-connected crimes, these procedural safeguards are undoubtedly adequate. When, however, a serviceman stands trial for an offense that involves an act of ideological nonconformity and that requires resolution of difficult and controversial constitutional questions, serious doubts arise as to the wisdom of leaving the final judgment to the military courts.

Courts-Martial. The very structure of the military judicial system presents a difficult obstacle to impartial judgment. Apart from the Court of Military Appeals, there is no permanent and independent

61 Navy Regs. § 1252 (Aug. 9, 1948).
62 Id. § 1252 (1).
64 Id. § 934.
system of military courts; each court-martial is an ad hoc creature.\textsuperscript{69} The authority to convene courts-martial is delegated to commanding officers,\textsuperscript{70} who also select the courts’ members\textsuperscript{71} and appoint counsel for both the prosecution and the defense.\textsuperscript{72} Usually, members of a court-martial and counsel for both sides are subordinate members of the convening authority’s command.\textsuperscript{73} In any case, all parties to a court-martial, with the exception of private counsel whom the defendant may retain,\textsuperscript{74} ultimately are subordinate to the total military chain of command and thus subject to its decisions regarding promotions and duty assignments.

Given these controls, it is not surprising that the system has been plagued by command influence—the pressure superior authority can bring to bear upon the judgment of a court-martial.\textsuperscript{75} Although article 37 of the UCMJ prohibits any attempt to influence the decision of a court-martial\textsuperscript{76} and although the Court of Military Appeals has reversed convictions in which such influence has been apparent,\textsuperscript{77} no commanding officer has ever been convicted of exerting undue command pres-


\textsuperscript{70} 10 U.S.C. §§ 822-24 (1964); see 1969 Manual ¶¶ 36-38.

\textsuperscript{71} 10 U.S.C. § 825(d) (2) (1964); see 1969 Manual ¶¶ 36(b)-(c).


\textsuperscript{73} 1969 Manual ¶ 36(c).

\textsuperscript{74} If provided by himself, an accused has a right to be represented by civilian counsel before a general or special court-martial. 10 U.S.C. § 838(b) (1964), as amended, (Supp. IV, 1969); see 1969 Manual ¶ 48. Private counsel, however, may be denied access to documents relevant to the charges because they are classified under military security regulations. For example, in the court-martial of Capt. Howard B. Levy, a medical officer charged with disobedience of orders, civilian counsel won an admission that charges had been preferred on the basis of a secret intelligence dossier, but because it was classified, was not permitted to review it. von Hoffman, The Conviction of Levy, New Republic, June 17, 1967, at 9. See also N.Y. Times, Aug. 6, 1969, at 1, col. 1.

\textsuperscript{75} See S. Rep. No. 1601, 90th Cong., 2d Sess. 4 (1968); cases cited note 77 infra.


sure. It is not unrealistic to credit such a record to difficulties of proof and reluctance to prosecute, rather than to a paucity of offenses.

Taking note of this particular deficiency in the court-martial system, Congress incorporated several reforms in the Military Justice Act of 1968. One such reform was to amend article 37 to forbid consideration of a serviceman’s court-martial performance when preparing his efficiency ratings or considering him for assignment or advancement. In light of the total absence of convictions under the older provision, however, there is little reason to believe that this amendment will be any more effective in deterring unlawful influence. A more important reform designed to help remedy the problem of command control was the creation of the office of “military judge.” As the result of this provision, a military judge now must preside at all general courts-martial and under certain conditions, at special courts-martial. Required to be a commissioned officer, a member of the bar of a federal court or of the highest court of a state, and to be certified as a qualified military judge by the Judge Advocate General of the appropriate service, the military judge “[rules] upon all questions of law and all interlocutory questions arising during the proceedings.”

While the military judge reform adds a definite measure of assurance that a court-martial proceeding will be conducted in a professional and impartial manner, it is unrealistic to suppose that Congress thereby has

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79 “In the nature of things, command control is scarcely ever apparent on the face of the record . . . .” United States v. Moore, 17 U.S.C.M.A. 147, 149, 37 C.M.R. 411, 413 (1967).
80 The Commanding Officer of Ft. Leonard Wood was accused but acquitted of a charge alleging massive influence of the courts-martial on the post. See N.Y. Times, July 1, 1967, at 1, col. 5; N.Y. Times, Oct. 27, 1967, at 1, col. 5.
85 There are three grades of courts-martial; jurisdiction is primarily a function of the punishment which may be prescribed. They range from the least serious summary court-martial, through the special court-martial, to the general court-martial, the only court-martial authorized to order the death penalty. 10 U.S.C. §§ 816-21 (Supp. IV, 1969), amending 10 U.S.C. §§ 816-21 (1964); 1969 Manual ¶¶ 9-16.
86 10 U.S.C. § 826(b) (Supp. IV, 1969), amending 10 U.S.C. § 826(b) (1964). The statute does not set out the details by which the armed services shall provide military judges, but does provide that a person certified as a military judge may perform those duties only when he is assigned and directly responsible to the Judge Advocate General or his designee. Id. § 826(c).
solved the problem of command control or as some commentators have implied, that the military justice system is now provided with an independent judiciary.\textsuperscript{88} The length of an officer's tour of duty as a military judge is controlled by neither law nor regulation; he therefore is subject to rotation out of the review circuit into other assignments within the Judge Advocate General's Corps, in which as a subordinate staff officer, he would be responsible to senior line commanders.\textsuperscript{89} Even while serving on the review circuit, the military judge is subject to the possibility of assignment to an unpleasant or hazardous duty station.\textsuperscript{90} Furthermore, as their titles declare, such judges are members of the armed forces and thus cannot remove themselves either from contact with other officers\textsuperscript{91} or from the institution of which they are a part. Under such circumstances, it is not probable that military judges can approach delicate questions of free expression with the detached freedom of a federal civilian judge, who has life tenure,\textsuperscript{92} and the possibility that an extremely controversial ruling by a military judge would result in administrative retaliation cannot be ignored.\textsuperscript{93} Furthermore, military judges are not provided for summary courts-martial\textsuperscript{94} and are required only at those special courts-martial having authority to award a bad conduct discharge.\textsuperscript{95} In sum, command influence is likely to continue to be a serious difficulty in the military system of justice.\textsuperscript{96}


\textsuperscript{89} JAG officer duty assignments are made upon recommendation of the respective service's Judge Advocate General. 10 U.S.C. § 806(a) (1964). A JAG officer receives technical guidance from the Judge Advocate General, but is a staff member of the command to which he is assigned; he is responsible only to his commanding officer and "is fully subject to his command just as any other member of the command." Army Reg. 27-1, para. 14(a) (Jan. 19, 1968).

\textsuperscript{90} The Judge Advocate General of the Army, for example, has the power to create, alter, or abolish the judicial circuits to which the military judges are assigned and to make assignments thereto. Army Reg. 27-10, para. 9-4 (Nov. 26, 1968).

\textsuperscript{91} "Each military judge will be responsible for . . . . [c]ooperating with staff judge advocates within his circuit." Id. para. 9-5(b).

\textsuperscript{92} "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . . ." U.S. Const. art. III, § 1.

\textsuperscript{93} Senator Charles Goodell stated that while in the service, he was reassigned from defense to prosecution duties after winning acquittal in a controversial trial. Sherrill, supra note 2, at 125.

\textsuperscript{94} See note 85 supra.

\textsuperscript{95} 10 U.S.C. § 819 (Supp. IV, 1969), amending 10 U.S.C. § 819 (1964). Thus, without benefit of a military judge, defendant may be sentenced to confinement for a maximum of six months, hard labor without confinement for a maximum of three months, or forfeiture of pay not exceeding two-thirds pay per month for a maximum of six months. Id.

Because of the power of the military hierarchy to prosecute offenses, establish courts-martial, and exert command influence, it is relevant to ask how sensitive it can reasonably be to the difficult and complex constitutional questions raised by expressions of dissent from within the ranks. Although in many respects military society is not unlike the typical bureaucracy, it is peculiarly authoritarian in nature. Tradition and respect for rank and order are valued touchstones. The dissenting serviceman, however, is the antithesis of these values, and many commanding officers, who believe that in the military there is no room for compromise with dissent, have reacted to it with a combination of disciplinary repression and crude harassment.

_Court of Military Appeals._ Although serious doubt has been cast on the efficacy of courts-martial in determining delicate first amendment issues, it is still necessary to determine whether the existence of the Court of Military Appeals remedies this infirmity. The Court of Military Appeals is a civilian forum, distinct from the court-martial system; however, whether it is considered a “military tribunal” or a “specialized Federal court,” it is not a court created under article III of the Constitution and subject to the latter’s protective provisions. Its judges do not enjoy tenure as do those who sit on courts created under article III; rather they are appointed by the President to 15-year terms. Salaries for Court of Military Appeals’ judges are set statutorily at the same level as those provided for judges of the United States

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97 See Sherrill, _supra_ note 2, at 26 (interviews with high ranking army officers).

98 For specific accounts of harassment, see authorities cited note 2 _supra_. High-ranking army officials have conceded that repressive reactions have resulted in the “politicalization” of many soldiers who otherwise would not have become involved in dissent. _N.Y._ Times, Apr. 6, 1969, at 2, col. 1. Among the reasons commanding officers have offered for repressing dissent is the belief that rigid discipline was the reason for the low collaboration rate among U. S. Marine Corps and Turkish prisoners of war during the Korean war. Polner, _supra_ note 2, at 42. This belief is based largely on a study of the record of prisoners of war in Korea, which blamed a “relaxation of discipline” for alleged failures in resisting enemy “brainwashing.” E. KINKEAD, _WHY THEY COLLABORATED_ 158 69, 170-86 (1959). Kinkead’s conclusions were refuted in a later study, which indicated that the different reaction of prisoners of war were a function of the time at which they were captured and which suggested that soldiers subjected to rigid discipline were least capable of resisting indoctrination. A. BIDERMAN, _MARCH TO CALUMNY_ 147-88 (1963).


100 C. WRIGHT, _FEDERAL COURTS_ § 11, at 31 (2d ed. 1969).


102 See _U.S. CONST._ art. III, § 1.

Courts of Appeals, but the statute can be amended or repealed to reduce their salaries while they are in office. Thus, judges on the Court of Military Appeals do not enjoy the protections that "the Framers, and all succeeding generations, have thought of vital importance in preserving judicial independence."

CIVILIAN COURTS—RESTRICTED REVIEW

Although the military judicial system is by its nature an inadequate protector of the serviceman's first amendment rights, civilian courts have not been a satisfactory substitute because they have been virtually inaccessible. It has long been held that there is no direct review of military judgments by civilian tribunals, article 76 of the UCMJ reciprocates by stating that once reviewed within the military system, sentences imposed by courts-martial are "final and conclusive." The Supreme Court has allowed a military sentence to be challenged by writ of habeas corpus, and other decisions suggest that alternate means of collateral attack may be available. These avenues, however, have been greatly restricted.

Traditionally, the scope of collateral review of military judgments has been limited to formal questions of jurisdiction. First enunciated by the Supreme Court in Dynes v. Hoover, this doctrine of nonintervention was subsequently buttressed by other decisions, culminating in Hiatt v. Brown, which emphatically stated that in reviewing military judg-

104 Id.
106 In re Vidal, 179 U.S. 126 (1900); Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 251-52 (1863); Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968).
107 10 U.S.C. § 876 (1964). Moreover, actions taken pursuant to court-martial proceedings are "binding upon all departments, courts, agencies, and officers of the United States." Id.
109 The Court of Claims has long entertained suits for the recovery of pay and allowances withheld or forfeited as a result of an invalid court-martial conviction. See Runkle v. United States, 122 U.S. 543 (1887); Hooper v. United States, 164 Ct. Cl. 158, 326 F.2d 986 (1964). The Court of Appeals for the First Circuit has granted a writ of mandamus to compel the Secretary of Defense to change the conditions of a discharge based on an invalid court-martial from dishonorable to honorable. Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965). See also Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968).
111 See, e.g., Hiatt v. Brown, 339 U.S. 103, 111 (1950); Keyes v. United States, 109 U.S. 336 (1883); Ex parte Mason, 105 U.S. 696 (1881); Ex parte Reed, 100 U.S. 13 (1879); cf. In re Yamashita, 327 U.S. 1, 8, 23 (1946); Carter v. Roberts, 177 U.S. 496 (1900); Johnson v. Sayre, 158 U.S. 109 (1895).
ments, "the single inquiry . . . is jurisdiction." 118 More recently, in Burns v. Wilson, 114 the Court did use language 115 which some lower courts have utilized in order to expand their inquiry to whether the military system "fully and fairly" considered the constitutional issues raised by the defendant. 116 Nevertheless, this expanded test usually has been applied so cautiously that in practice it allows no greater examination of substantive constitutional issues than does the doctrine of non-intervention. 117 With the increasing availability of habeas corpus in recent years, however, the scope of collateral attack on constitutionally defective judgments has expanded rapidly, 118 and in light of this expansion, the doctrine of restricted review has become an anachronism. Thus, if there is any justification for its perpetuation, it logically should lie in some rationale peculiar to the armed services and their needs.

A rationale, at one time judicially accepted, was that the armed forces are a constitutionally autonomous body. 119 The form and process of

118 Id. at 111. The Fifth Circuit had found that the record of the court-martial was "replete with highly prejudicial errors and irregularities," which deprived petitioner of due process of law. Among the court's findings were that the law officer and defense counsel were grossly incompetent, the murder conviction was supported by no evidence of malice, premeditation, or deliberation, the statutorily required pretrial investigation had not been made, and the reviewing authorities had misconceived the applicable law.


116 'When a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence . . . . Petitioner's applications . . . were sufficient to depict fundamental unfairness . . . . Had the military courts manifestly refused to consider those claims, the District Court was empowered to review them de novo.'

Id. at 142.

118 See cases cited note 116 supra.


119 See, e.g., Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858); DeCoste v. Madigan, 223 F.2d 906, 909 (7th Cir. 1955). More succinctly stated: "To those in the military or
military government was considered a matter solely within the discretion of Congress and the President in his role as Commander in Chief. As a result, whatever Congress and the President dictated was due process of law for the serviceman, and if a military court had jurisdiction in a particular case, there was nothing for a civilian court to review. Although this reasoning has been revived occasionally in recent years, the Supreme Court has made it clear that the "government" of the armed forces does not constitute an enclave of autocracy immune from the rest of the Constitution.

Another rationale for restricted civilian review is that military tribunals have unique expertise which is not possessed by civilian judges, thus, civilian courts should limit their review to jurisdictional questions and defer to the military tribunal's expertise in military law and custom. The difficulty with this view is that aside from the Court of Military Appeals, there never has been a standing system of military courts to develop such expertise. Furthermore, notwithstanding the Court of Military Appeals, the Supreme Court alone should be the ultimate adjudicator of constitutional issues.

A third rationale is that because in the past Congress has acted liberally and quickly to protect the rights of soldiers, civilian courts should exercise judicial restraint and defer to congressional action. While it is true that the UCMJ and its subsequent amendments were products of congressional concern for the protection of servicemen's rights, Congress was not intended to be the final arbiter of constitutional rights. In addition, the efficacy in consigning protection of the dissenting serviceman's rights to Congress is questionable, since influential members of Congress, especially those associated with the Armed Services Committees, may well be the subject of criticism by those dissenting.

The most significant rationale in support of restricted review is that naval service of the United States the military law is due process." Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).


121 Id.

122 "Due process of law for military personnel is what Congress has provided for them . . . ." Burns v. Wilson, 346 U.S. 137, 147 (1953) (Minton, J., concurring).

123 This "express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights." O'Callahan v. Parker, 395 U.S. 258, 273 (1969).


125 The Court of Military Appeals was established in 1950. Act of May 5, 1950, ch. 169, 64 Stat. 129. No equivalent permanent judicial body existed prior to that time.

126 See, e.g., Burns v. Wilson, 346 U.S. 137, 140-41 (1953); DeCoster v. Madigan, 223 F.2d 906, 909 (7th Cir. 1955).
the armed services have a peculiar need for a swift and orderly system of discipline.127 Although this need is undeniable, courts and commentators have failed to consider carefully the individual effects on discipline of the distinct issues of timing of review, scope of review, and standard to be applied on review.128

Protecting in the interest of discipline the military’s need for a relatively swift and simple mechanism to administer punishment and effect restraints involves considerations of timing and standard of review, but not of scope. Thus, in determining the proper point in time at which civilian courts should be allowed to review military actions, allowance must be made for the proper functioning of the military command structure, particularly for the difficulties involved in world-wide deployment and combat conditions. Similarly, the military interest in discipline must be taken into account by the court when applying the constitutional standards governing restraints on communicative freedom. Expanding the scope of review by civilian courts, however, to include an examination of the constitutional issues involved in military cases would not interfere with the military disciplinary system, since the court would not take jurisdiction until such time as the mechanics of discipline would not be disrupted. Then, in evaluating the constitutionality of the military’s action, it could weigh objectively the interest of discipline.

Relying on the Supreme Court’s language in Burns v. Wilson,129 several courts in recent years have begun to disregard the doctrine of restricted review. The Court of Claims apparently has abandoned it in favor of full review of constitutional questions,130 and the Fifth131 and

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128 The question of timing concerns the proper point in the chronology of a military case at which a civilian court should be able to take jurisdiction; scope of review focuses on the range of issues that the civilian court should consider once it has taken jurisdiction; the standard to be applied on review focuses on which test—clear and present danger or balancing—the court should apply to those freedom of expression cases it has decided to entertain.
129 346 U.S. 137 (1953); see notes 114-16 supra and accompanying text.
A year later, the court held that erroneous legal rulings by a court-martial and
Tenth Circuit has cautiously distinguished their earlier, more restrictive views. Furthermore, in *Kauffman v. Secretary of the Air Force*, the United States Court of Appeals for the District of Columbia unequivocally renounced the doctrine. In *Kauffman*, the District of Columbia Circuit set the capstone on a short line of lower court decisions by defining the scope of collateral review to include consideration of constitutional errors and by describing the standard of review as no “different from that currently imposed in habeas corpus review of state convictions.” Although affirming the district court’s summary judgment in favor of the Air Force, the court did so only after specifically considering Kauffman’s constitutional arguments and finding that the Court of Military Appeals had disposed of them in accordance

board of review had denied plaintiff a “full and fair hearing” on his due process claim. Augenblick v. United States, 180 Ct. Cl. 131, 377 F.2d 586 (1967), rev’d on other grounds, 393 U.S. 348 (1969). Implicit in this decision was the proposition that when the military system has erred on a constitutional question, it has ipso facto denied defendant a “full and fair hearing” on such question, which then becomes subject to full review. *Id.* at 147-49, 377 F.2d at 604-07. The Court of Claims thereafter specifically held that it had jurisdiction to rule on a claim that a court-martial was void simply because it had denied a constitutional right. Gearinger v. United States, 188 Ct. Cl. 512, 412 F.2d 862 (1969).

The Fifth Circuit initially interpreted *Burns* to have expanded the scope of civilian review to include an inquiry into whether there was “such a want of due process” as to deny the court-martial jurisdiction. Fischer v. Ruffner, 277 F.2d 756 (5th Cir. 1960). Then, in *Williams v. Heritage*, it pronounced dead this “short-lived more liberal view.” 323 F.2d 731, 732 (5th Cir. 1963). In 1965, however, when confronted with a claim that petitioner had been denied effective assistance of counsel, the court stated that “if [Burns] accomplished nothing else, [it] conclusively rejected the concept . . . that habeas corpus review should be restricted to questions of formal jurisdiction.” Gibbs v. Blackwell, 354 F.2d 469, 471 (5th Cir. 1965). Ruling that it was not necessary to decide the exact scope of review and implying that civilian courts should not confuse deference to the special needs of the military with the duty to hear and decide questions of constitutional law, the court remanded to the district court for a full hearing on petitioner’s claim. *Id.* at 472.

The Tenth Circuit initially required only that the military court consider constitutional questions. Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953). Subsequently, the court held that the consideration be “full” and “fair”, but that a constitutional claim not raised before the military court could not be raised later in a civilian tribunal, since the military court could not be said to have refused to fairly consider an unasserted claim. Suttles v. Davis, 215 F.2d 760, 763 (10th Cir. 1954), cert. denied, 348 U.S. 903 (1955); accord, Gorko v. Commanding Officer, 314 F.2d 858 (10th Cir. 1963). In 1967, however, the court distinguished those situations in which the constitutional issue “involves a factual determination” from those in which the issue involves purely legal questions, limiting its earlier restricted view to the former. Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967).

*Id.* at 996-97.
with Supreme Court standards. Although Kauffman represents a clear break from the doctrine of restricted review, it would be premature to pronounce the doctrine dead. It is by no means clear that the majority of the federal circuits would be willing to follow Kauffman; thus, a serviceman challenging his court-martial conviction on the ground that his first amendment rights had been violated still could be faced with the problem of a civilian court unwilling to go beyond jurisdictional arguments.

CIVILIAN REVIEW OF ADMINISTRATIVE ACTIONS

Military punishment of dissenters is not limited to judicial prosecutions; similar to actions taken by local selective service boards, which independently have exercised their powers in order to induct vociferous protesters, the military has resorted to administrative action—punitive transfers—as a means of quashing dissent. A transfer is obviously more efficient, since it is quick, involves less time and effort than a court-martial, and removes the problem both permanently and physically. It is more invidious, however, because it can be implemented under the guise of shifting manpower needs to punish a man without due process of law. Considerations similar to those involved in recommending civilian, rather than military, review of courts-martial also support civilian review of administrative actions involving an abridgment of constitutional rights. Thus, it is necessary to analyze the extent of civilian review available to a serviceman who is transferred for exercising his communicative rights, as well as the procedural difficulties involved in obtaining such review.

HABEAS CORPUS

Habeas corpus is clearly the most effective procedure for obtaining jurisdiction in a federal court and relief against punitive transfers.  

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135 Id. at 998-99.
136 In United States v. Augenblick, the Supreme Court noted the Court of Claims contention that the scope of collateral review of courts-martial should include resolution of constitutional questions, but found that the questions presented in the case were not of constitutional significance, thus avoiding a decision on this issue. 393 U.S. 348 (1969); see United States ex rel. Thompson v. Parker, 399 F.2d 774 (3d Cir. 1968), cert. denied, 393 U.S. 1059 (1969).
137 See Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).
138 See note 4 supra.
139 A more desirable, but likely unavailable, alternative to habeas corpus would be an action in federal district court for mandamus to compel the transferred serviceman’s commanding officer, as well as others responsible for the transfer, "to perform
Guaranteed by the Constitution, the writ recently has been used with increasing success to challenge restrictions on freedom of movement other than physical imprisonment for criminal acts. Historically, and now skeletally implemented by statute, the two primary conditions for issuing a writ of habeas corpus are exhaustion of all other potential remedies and current illegal detention.

Exhaustion. When the exhaustion doctrine is judicially rather than statutorily created, the judiciary consistently has refused to apply it blindly, emphasizing a flexible case-by-case approach. Failure to exhaust administrative remedies has not barred relief when the potential a duty owed to the plaintiff by cancelling his transfer orders. See 28 U.S.C. § 1361 (1964). Since such an action may be brought in any district where defendant resides, where the cause of action arose, or as the action does not involve real property, where plaintiff resides, petitioner may have a greater choice of forums in which to bring a suit than if he were petitioning for a writ of habeas corpus. See 28 U.S.C. § 1391(e) (Supp. IV, 1969). Furthermore, no custody is required. Also unlike habeas corpus, transfer out of the district does not necessarily terminate the district court’s jurisdiction; nor does it require initiating a new action.

Mandamus is available, however, only when a ministerial, as opposed to discretionary, duty is owed to the plaintiff. E.g., Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318 (1958); Prairie Band of Pottawatomi Tribes v. Udall, 355 F.2d 364, 367 (10th Cir.), cert. denied, 385 U.S. 831 (1966); Ashe v. McNamara, 355 F.2d 277, 282 (1st Cir. 1965). Accordingly, since transfer is a discretionary function, it is unlikely that mandamus jurisdiction would be available. See Morbeto v. United States, 293 F. Supp. 313, 320 (C.D. Cal. 1968); Petition of Green, 156 F. Supp. 174, 181 (S.D. Cal. 1957); cf. Orloff v. Willoughby, 345 U.S. 83 (1953).


144 See notes 154–59 infra and accompanying text.

145 See notes 166–67 infra and accompanying text.


tial administrative remedy is clearly inadequate, 148 when application for the remedy would have been futile, 149 when constitutional issues are involved, 150 when irreparable injury would have resulted from pursuing the administrative remedy, 151 or when special considerations have necessitated immediate review. 152 Since each of these circumstances, as well as the first amendment chilling effect, is present when a serviceman who has been ordered transferred seeks relief without having to disobey orders, immediate review is not only proper, it is imperative.

Because the military heirarchy orders the transfer, it seems a reasonable assumption that appeal to military superiors, on the ground that a transfer is punitive, would be a useless and time-consuming gesture. Likewise, disobeying a transfer order and presenting the first amendment claim at a subsequent court-martial hardly would be an effective remedy. 153 A serviceman ordered transferred has no power to convene a court-martial, 154 and although there is little doubt that one would be convened promptly when transfer orders are disobeyed, there is also little doubt that under such circumstances a conviction could be regarded as inevitable. 155 While a disinclination to grant habeas corpus after a


151 See Parker v. Lester, 112 F. Supp. 433, 440 (N.D. Cal. 1953), rev’d on other grounds, 227 F.2d 708 (9th Cir. 1955). Since a convicted serviceman normally is required to begin serving his sentence before appeals have been exhausted, regardless of the final outcome, requiring a transferee to present his defense to a court-martial almost inevitably will result in incarceration. See Noyd v. Bond, 395 U.S. 683, 689 (1969).


154 See Hammond v. Lenfest, 398 F.2d 705, 714 (2d Cir. 1968).

155 "[W]e are referred to no case that suggests presenting a conscientious objector claim as a defense to a charge of violating military law by failing to obey orders
court-martial has been ordered can be justified on the ground that the offense already has been committed and any defense soon will be heard,156 it makes little sense to require that a crime be committed in order to present a defense,157 at least absent a statutory command to do so.158 Furthermore, it is doubtful whether the illegality of a transfer can be presented as a defense to such a court-martial.159 Accordingly, once having received the punitive transfer order, a serviceman petitioning for habeas corpus should be considered already to have effectively exhausted all other potential remedies.

Such an interpretation of the exhaustion doctrine is not uncommon. Because of the inhibiting effect of possible criminal prosecution upon the exercise of first amendment freedoms, the Supreme Court in certain instances has not required that all those persons subject to overbroad regulations risk prosecution in order to test their rights,160 reasoning that the threat of sanctions, whatever the probability that they ulti-

would be anything more than a futile and ritualistic gesture. The law knows no such requirement." ld. at 713.

156 See In re Kelly, 401 F.2d 211, 212-13 (5th Cir. 1968); Hammond v. Lenfest, 398 F.2d 705, 713 (2d Cir. 1968).


158 The Universal Military Training and Service Act of 1967 expressly forbids judicial review of selective service classifications prior to induction or refusal to be inducted. 50 U.S.C. App. § 460(b) (3) (Supp. IV, 1969), amending 50 U.S.C. App. § 460(b) (1964). This section is a specific disapproval of cases such as Wolff, which disregarded the rule against pre-induction review. S. Rep. No. 209, 90th Cong., 1st Sess. 10 (1967); H.R. Rep. No. 267, 90th Cong., 1st Sess. 30-31 (1967).

159 In United States v. Noyd, petitioner's attempts during his court-martial to raise the defense that he had been unconstitutionally denied a conscientious objector discharge were rejected in part on the ground that the UCMJ does not grant military tribunal jurisdiction to review administrative determinations. 39 C.M.R. 937 (1968), aff'd 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969). Similarly, another court has noted the Navy's position that an illegal denial of a conscientious objector petition is not a defense to a court-martial for refusing to obey an order. Cooper v. Barker, 291 F. Supp. 952, 960 n.11 (D. Md. 1968); see United States v. Dunn, 38 C.M.R. 917, 920 (1968); United States v. Taylor, 37 C.M.R. 547, 552 (1966). In United States v. Signon, however, refusal to board a bus destined for a Vietnam-bound aircraft resulted in a court-martial in which defendant was permitted to raise the defense that he had been illegally denied a conscientious objector discharge. 38 C.M.R. 356 (1968).

nately will be declared unconstitutional, deters exercise of those rights almost as potently as the actual imposition of sanctions.\textsuperscript{161} Vindication of the freedom of expression after protracted litigation by those "hardy enough to risk criminal prosecution" may come too late to rectify the intangible damage resulting in the interim.\textsuperscript{162} Even if the restraint upon communicative rights is not invalid on its face,\textsuperscript{163} its chilling effect on speech may justify an immediate judicial decision.\textsuperscript{164} Thus, when first amendment rights are threatened, the courts are not hesitant to intervene in areas normally left to other branches of government.\textsuperscript{165} Since in the case of a punitive transfer in retribution for the exercise of first amendment rights not even a vague statute or regulation defines the bounds of disapproved activities, the exercise of these rights will be inevitably and substantially inhibited.

\textit{Custody.} The second precondition to issuance of a writ of habeas corpus is that the petitioner be "in custody." Although it generally is agreed that active duty in the armed services or being under orders to report for active duty amounts to "custody" for the purposes of challenging an illegal induction or enlistment,\textsuperscript{166} district courts have been reluctant to entertain petitions when the legality of the original enlistment or induction was unchallenged.\textsuperscript{167} While such reticence is understandable in light of the nonintervention doctrine,\textsuperscript{168} it is illogical to consider one man in custody and another not, when both suffer precisely the same restrictions on their movements and actions.\textsuperscript{169}

Arguably, a serviceman seeking prospective relief is not "in custody" until the transfer actually has been consummated, since until then, he is subject to essentially the same restrictions as before the first amendment violation. The mere issuance of a transfer order, however, is disruptive, since the transferee must prepare for departure at the specified time.\textsuperscript{170}

\textsuperscript{163} Id.
\textsuperscript{165} See Bond v. Floyd, 385 U.S. 116 (1966).
\textsuperscript{168} See notes 110-13 supra and accompanying text.
\textsuperscript{170} See Hammond v. Lenfest, 398 F.2d 705, 711 (2d Cir. 1968); \textit{Ex parte} Fabiani, 105 F. Supp. 139, 148 (E.D. Pa. 1952).
Thus, it is also arguable that illegal custody begins upon issuance of the transfer orders and not merely when petitioner physically has been transferred to a location where application for habeas corpus might be difficult if not impossible.\footnote{171}{See notes 179-81 infra and accompanying text.}

An historical maxim regarding habeas corpus is that it will be issued only when it can lead to ultimate release from custody.\footnote{172}{See, e.g., Glenn v. Ciccone, 370 F.2d 361 (8th Cir. 1966); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963); United States ex rel. Binion v. Ryan, 201 F. Supp. 802 (E.D. Pa. 1961). But see Peyton v. Rowe, 391 U.S. 54 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Walker v. Wainwright, 390 U.S. 335 (1968).} Discharge from the service of course would satisfy this requirement; however, such an extreme remedy may not always be appropriate.\footnote{173}{See notes 196-229 infra and accompanying text.} Nevertheless, relief from the punitive transfer can be considered a complete release from “custody,” since the restrictions resulting from the illegal transfer, not from military status itself, constitute the “illegal custody.” Furthermore, in most cases involving habeas corpus, the district courts have conditioned release upon the refusal of the custodian or committing agency to take designated remedial action.\footnote{174}{See, e.g., Chessman v. Teets, 354 U.S. 156, 165-66 (1957); Dowd v. United States, 340 U.S. 206, 209-10 (1951).} Accordingly, an order requiring petitioner’s discharge from the service unless the punitive transfer is rescinded would satisfy any technical requirement for complete release.\footnote{175}{In exceptional circumstances, the requirement of complete release has been ignored. See, e.g., La Rose v. Young, 139 F. Supp. 516 (N.D. Cal. 1956). In Carafas v. LaVallee, the Supreme Court suggested that even if complete release were once the only remedy, Congress has now empowered the district courts to grant other remedies as justice requires. 391 U.S. 234, 239 (1968).}

Applying for a writ of habeas corpus has at least two substantial tactical advantages. First, application can be made to any federal district or appellate judge having jurisdiction over the applicant and the custodial agency;\footnote{176}{28 U.S.C. § 2254(a) (Supp. IV, 1969), amending 28 U.S.C. § 2254 (1964).} second, consideration on the merits will be speedy,\footnote{177}{See In re Green, 156 F. Supp. 174 (S.D. Cal. 1957).} a matter of vital concern, since usually the challenged transfer will be imminent. Another possible advantage is that because of the short period of time in which to decide whether the writ should issue, the courts may not be as reluctant to preliminarily enjoin a transfer as they would be in other situations. Furthermore, the Supreme Court rule which requires that permission be obtained to remove a petitioner from the district court’s jurisdiction during pendency of an appeal challenging
a denial of habeas corpus\textsuperscript{178} might discourage the military from implementing the transfer.

If a punitive transfer is completed before a writ of habeas corpus is sought, or if the transfer takes place before a determination is made on the merits, additional problems arise in meeting the requirements of "custody." Although physical transfer indisputably places a serviceman in illegal custody, it also may place him beyond the territorial limits of the federal courts and arguably beyond the statutory jurisdiction of any federal court.\textsuperscript{179} Historically, there are no particular territorial limits to habeas corpus; Congress, however, in statutorily expanding the scope of habeas corpus, clearly intended to limit the district courts to their respective territorial jurisdictions.\textsuperscript{180} This jurisdictional limitation remains in force\textsuperscript{181} and if read literally, precludes anyone held outside the territorial United States, although under custody of American authorities, from resorting to habeas corpus to test the legality of his confinement. Nevertheless, the D.C. Circuit has interpreted this statutory jurisdictional limitation to apply only when a prisoner is held within the territorial limits of another district court.\textsuperscript{182} The Supreme Court has not decided the issue.\textsuperscript{183}

\textsuperscript{178} U.S. Sup. Ct. R. 49.


\textsuperscript{180} When the initial bill was introduced in Congress, objection was made that it would permit "a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont." CONG. GLOBE, 39th Cong., 2d Sess. 730 (1867). This objection has been mooted by statutory limitation of the jurisdiction of each district court to its territorial limits, 28 U.S.C. § 2241(a) (1964).

\textsuperscript{181} "Writs of habeas corpus may be granted by . . . the district courts and any circuit judge within their respective jurisdictions," 28 U.S.C. § 2241(a) (1964). The jurisdiction of the district courts was expanded in 1966 so that in states having more than one district, any district court can entertain petitions from individuals confined in other districts within that state. 28 U.S.C. § 2241(d) (Supp. IV, 1969), amending 28 U.S.C. § 2241 (1964).


\textsuperscript{183} Justice Douglas, however, in a separate concurring opinion in \textit{Hirota v. MacArthur}, regarded the District of Columbia as the proper place for a United States
OTHER BASES FOR CIVILIAN REVIEW

Of the various statutory provisions allowing access to the federal courts for redress of wrongs, only the newly codified Administrative Procedure Act\(^\text{184}\) seems to offer even a possibility of relief for the serviceman subjected to punitive transfer.\(^\text{185}\) Under the Administrative Procedure Act, actions of federal agencies are generally reviewable,\(^\text{186}\) and the relief available includes declaratory judgments, prohibitory and mandatory injunctions, and writs of habeas corpus.\(^\text{187}\) The statute begins with a broad statement encompassing review of all federal agency actions,\(^\text{188}\)

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\(^{186}\) Absent physical injury following a serviceman's transfer, however, it is difficult to argue that he has suffered monetary damages. In fact, the transfer may result in a pay increase, since any serviceman on duty in an area subject to hostile fire receives additional pay. 37 U.S.C. § 310(a) (Supp. IV, 1969), amending 37 U.S.C. § 310(a) (1964). Furthermore, even if monetary damages result from a transfer, the Act has been interpreted to exclude jurisdiction for service connected claims. See, e.g., Feres v. United States, 340 U.S. 135, 138 (1950); United Air Lines, Inc. v. Wiener, 335 F.2d 379, 404 (9th Cir.), petition for cert. dismissed, 379 U.S. 951 (1964); Small v. United States, 219 F. Supp. 659, 662 (D. Del. 1963), aff'd, 333 F.2d 702 (3d Cir. 1964). But cf. United States v. Muniz, 374 U.S. 150, 159 (1963). Also militating against use of the Act is the fact that the Government can be liable only to the same extent and in the same manner as a private citizen. See 28 U.S.C. § 1346(b) (1964), as amended, 28 U.S.C. § 1346(e) (Supp. IV, 1969). Accordingly, the Government has been found immune to suit for negligence of the armed services in illegally activating an officer in the standby reserve; since a private citizen can not operate an army, the Government can not be liable "in the same extent and manner" as a private citizen. Small v. United States, 219 F. Supp. 659, 668 (D. Del. 1963); cf. Winston v. United States, 305 F.2d 253, 257 (2d Cir. 1962), aff'd, 374 U.S. 150 (1963) (immunity for negligent treatment of prisoner).

\(^{187}\) The Act also has been interpreted as not waiving immunity when discretionary functions are involved, and the transfer of troops is clearly a discretionary function. See, e.g., Dalehite v. United States, 346 U.S. 15 (1953); United States v. Morrell, 331 F.2d 498 (10th Cir.), cert. denied, 379 U.S. 879 (1964); White v. United States, 317 F.2d 13 (4th Cir. 1963).


\(^{189}\) Id. § 703.

\(^{188}\) "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Id. § 702.
but excludes from the definition of agency, "courts-martial and military commissions [and] military authority exercised in the field in time of war or in occupied territory." 189 This specific exclusion, however, possibly suggests a congressional intent to permit review of other military actions, including punitive transfers. Furthermore, the congressional report explaining the Administrative Procedure Act indicates that a statute precluding review must provide clear and convincing evidence of such an intent,190 and the Supreme Court has emphasized that these "'generous review provisions' must be given a 'hospitalable' interpretation." 191

Generally courts are not empowered to review the judgments of an agency performing a discretionary function, but an abuse of discretion192 or refusal to exercise discretion may be challenged.193 Although title V and its predecessor, the Administrative Procedure Act, usually have not been invoked to review military decisions, a punitive transfer is clearly an abuse of discretion and therefore should be reviewable. Moreover, the presence of a constitutional right further militates in favor of judicial review,194 as do considerations of hardship and irreparable injury arising from a failure to review.195

ADMINISTRATIVE DECISIONS AND THE NONINTERVENTION DOCTRINE

A reluctance on the part of civilian courts to review military activity is present in the context of administrative as well as courts-martial decisions.196 In Orloff v. Willoughby,197 the Supreme Court declined

189 Id. §§ 701 (b) (1) (F)-(G). Preinduction review of selective service classification is likewise excluded. See 50 U.S.C. App. 463(b) (1964).
196 See United States ex rel. Creary v. Weeks, 259 U.S. 336, 343 (1922); Reaves v. Ainsworth, 219 U.S. 296, 305-06 (1911). Historically, military administrative decisions were considered under the exclusive aegis of the Executive and thus immune from judicial review. See Decatur v. Pauling, 39 U.S. (14 Pet.) 497 (1840). In American
Orloff's appeal for review of his duty assignment and the Army's denial of a Medical Corps commission. In widely cited dictum the Court noted that judicial review of specific duty assignments would result in thousands of similar complaints, which would create a disruptive force within the military organization.

Six years later, in Harmon v. Brucker, the Supreme Court intimated a more relaxed version of the nonintervention doctrine, at least in the context of military administrative actions. Emphasizing that even for those in the military, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers," the Supreme Court found that the district court had jurisdiction to review Harmon's discharge, which in part because of preinduction activities, had been "general under honorable conditions." Subsequent to Harmon, lower federal courts have further relaxed the nonintervention doctrine to permit review of discharges based upon constitutionally defective courts-martial and to prevent discharges when military procedures violate constitutional rights.

Another administrative area in which the courts have begun to intervene involves the discharge of conscientious objectors whose views

_School of Magnetic Healing v. McAnnulty_, however, the Supreme Court abolished the immunity of the Executive's administrative departments. 187 U.S. 94, 108 (1902).

197 345 U.S. 83 (1952).


199 345 U.S. at 94-95. In seeking judicial review of a punitive transfer, however, it is the illegal manner in which the transfer was made and not the location and nature of the assignment, which is challenged.


201 Prior to Harmon, the Supreme Court reviewed on the merits a suit for a certificate of honorable discharge, but denied relief. See Patterson v. Lamb, 329 U.S. 539 (1947).

202 355 U.S. at 581-82. This statement summarizes the intent behind the Administrative Procedure Act and the subsequent enactment of title V, implying that it is available as a jurisdictional basis for judicial challenges to military administrative decisions.


204 See Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).

205 Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965); see Reed v. Franke, 297 F.2d 17, 21 (4th Cir. 1961).
crystallize or develop after induction. In *Noyd v. McNamara*, the Tenth Circuit affirmed the district court’s refusal to review Noyd’s claim that disapproval of his conscientious objector petition was not in accordance with applicable regulations, was in violation of due process, and was discriminatorily denied. Although confusing the concepts of exhaustion and nonintervention, the district court clearly adhered to the traditional nonintervention doctrine. In *Hammond v. Lenfest*, however, the Second Circuit rejected the strict Noyd approach and held not only that refusal to discharge is reviewable, but that the exhaustion doctrine does not require disobedience and a subsequent court-martial in order to present a defense. Later decisions have more closely followed *Hammond* than *Noyd*.

Suits seeking discharge on grounds other than conscientious objection or illegal induction, however, have been less successful. Actions

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206 The basis for such a discharge is a Department of Defense (DOD) directive, which first was promulgated in 1962 and later revised in 1968. See DOD Directive No. 1300.6 (May 10, 1968), revising DOD Directive No. 1300.6 (Aug. 21, 1962). See generally Sherman, *Judicial Review of Military Determinations*, 55 VA. L. REV. 483, 505-06 nn.118, 121 (1969). The directive provides that “claims of conscientious objection by all persons, whether existing before or after entering military service should be judged by the same standards,” and accordingly, the military refers applications for conscientious objector discharges to the Director of the Selective Service System for an opinion, which is normally decisive. Sherman, *supra* at 506 n.123.

The strictness with which applications for conscientious objector discharge have been evaluated, however, has resulted in a relatively large number of suits seeking review of application denials. See, e.g., Minasian v. Engle, 406 F.2d 137 (9th Cir. 1968); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Brown v. McNamara, 387 F.2d 150 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968); Noyd v. McNamara, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968). See also Sherman, *supra* at 519 n.181.


210 Noyd, however, can be interpreted as only a refusal to review a specific military assignment, since Noyd was opposed to the war in Vietnam but willing to accept assignments not in conflict with this opposition. 267 F. Supp. at 704. By this interpretation, Noyd can be regarded simply as another example of the general principle that specific duty assignments are not reviewable. See Orloff v. Willoughby, 345 U.S. 83 (1952); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).

211 398 F.2d 705 (2d Cir. 1968).

212 *Id.*


opposing transfer to Vietnam based upon the alleged illegality and unconstitutionality of the Vietnam war have encountered an almost uniform reluctance on the part of the federal courts either to intervene in military affairs or to consider political questions involving foreign policy and defense.\textsuperscript{215} Likewise, review of activation orders\textsuperscript{216} and of failure to promote\textsuperscript{217} have usually been unsuccessful.

The arguments advanced in favor of the nonintervention doctrine in general are twofold: (1) The possibility of raising the expectation that orders may be reversed by civilian courts, and thus undermining discipline by encouraging disobedience, or at least encouraging questioning when instant obedience is required;\textsuperscript{218} and (2) the inability of civilians and civilian courts to appreciate fully the intricacies of military life.\textsuperscript{219}

Civilian review of punitive transfers, however, would not affect adversely the legitimate exercise of military discipline any more than it does when other activities on the part of the armed forces are subject to review. Since military discipline is not absolute,\textsuperscript{220} its exercise must be weighed against other interests, such as free expression, and not be employed in an extra-legal manner. Furthermore, review of punitive transfers would not involve questions particularly within the expertise

\textsuperscript{v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968), stay denied, 393 U.S. 1009 (1969) (refusal to grant hardship discharge to activated reservist upheld).}

\textsuperscript{215}In \textit{Luftig v. McNamara}, the assignment of an enlisted man to Vietnam was challenged on the ground that the military lacked lawful authority to force him to participate in an illegal war. 126 U.S. App. D.C. 4, 5-6, 373 F.2d 664, 665-66, \textit{cert. denied}, 387 U.S. 945 (1967). The D.C. Circuit denied the petition, holding that "the fundamental division of authority . . . established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power." \textit{Id.} at 4-5; 373 F.2d at 665-66.


Possibly the only successful accomplishment in challenging activation orders has been the issuance of stay orders by Justice Douglas. See Winters v. United States, 89 S. Ct. 58 (Douglas, Circuit Justice, 1968); Smith v. Ritchey, 89 S. Ct. 54 (Douglas, Circuit Justice, 1968).


\textsuperscript{218}Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28-30 (1827).

\textsuperscript{219}See note 125 \textit{supra} and accompanying text.

\textsuperscript{220}See note 40 \textit{supra} and accompanying text.
of the military, as do challenges, for example, to adequacy of training, failure to promote, and assignment to a particular duty.221 The only inquiry would be whether the transfer was intended as punishment or resulted from valid military requirements.

Because of the obvious difficulties that a serviceman would have in proving the absence of a rational military reason for a transfer, once a prima facie case has been made by showing participation in a disapproved activity and a subsequent transfer not in the ordinary course of events, the burden of producing a justification for the transfer should be on the military. If the transfer can be justified by reasons that are nonpunitive and not patently untenable, then relief should be denied. Furthermore, requiring the military to make such a showing would be neither time-consuming nor complex, and when balanced against the fragile nature of first amendment rights, it hardly would seem unreasonable. While such a simple burden probably would enable the military also to justify many punitive transfers and thus preclude relief in all but exceptional cases, the mere existence of a potential remedy might substantially deter their use.

A Trend

In O'Callahan v. Parker,222 the Supreme Court held that a crime must be "service-connected" in order to be under military jurisdiction.223 To justify punishment in the name of discipline, there must be some nexus between the definition of an act as criminal and a military interest. Absent this "service connection," a court-martial has no jurisdiction over an alleged offense, even though the defendant happens to be a serviceman. In reversing the Third Circuit's denial of O'Callahan's petition for habeas corpus, however, the Court did not provide a lucid definition of the "service connection" test,224 thus leaving open to argu-

221 See note 215 supra.

222 395 U.S. 258 (1969). While on leave and in civilian clothing, O'Callahan, an army sergeant, forcibly entered the hotel room of a young civilian girl in Honolulu, assaulted her, and attempted to commit rape. He was tried and convicted by a court-martial for housebreaking, assault with attempt to rape, and attempted rape, offenses in violation of the UCMJ. See 10 U.S.C. §§ 880, 930, 934 (1964).

223 Conceding the need for a military judicial system to maintain discipline, the Court nevertheless pointed out that military courts provide for neither indictment by grand jury nor trial by jury, and that by their very nature they are ill-suited for deciding issues of constitutional law. Thus, the Court noted, military jurisdiction historically has been restricted to only those matters relevant to their special purpose as disciplinary tools. 395 U.S. at 262-63.

224 The Court mentioned several factors in O'Callahan which might be critical in determining whether an activity is service connected: (1) The crimes were not com-
ment the precise nature of the link between a given crime and the military interests necessary to sustain court-martial jurisdiction.

O'Callahan has important implications in the context of dissent in the armed forces. A soldier might argue that there is no legitimate service interest upon which to base a finding that his particular protest activities were "criminal." For example, O'Callahan argued that the military court did not have the power to convict him of attempted rape or other related crimes because there is no general federal criminal jurisdiction; although Congress can enact criminal statutes, its definition of conduct as criminal must be related to a legitimate federal interest, not to the general community interest, the protection of which is exclusively within the jurisdiction of the states.\textsuperscript{225} Moreover, if the federal interest is found only in defendant's status, there must be some direct relationship between that status and the prohibited conduct; "certainly Congress could not provide that rape when committed by a federal employee thereby becomes a federal offense."\textsuperscript{226} In the context of a restriction upon a serviceman's first amendment rights, it would be necessary to determine whether proscribed speech, when uttered by a soldier, becomes a federal offense. Furthermore, in order to meet the historical requirement that the jurisdiction of a court-martial be affirmatively established,\textsuperscript{227} such a determination would require more than an unsupported assertion of governmental interest and a connection between that interest and the definition as criminal of otherwise constitutionally protected activity.

Of greater significance in O'Callahan, however, is the open skepticism with which the Supreme Court viewed the military judicial system's ability to decide constitutional issues.\textsuperscript{228} When read with Kaufman,\textsuperscript{229} 


\textsuperscript{226} Id.


\textsuperscript{228} After noting Congress' 1968 reforms to the UCMJ, the Court remarked that "[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved," pointed out "sobering accounts of the impact of so-called military justice on civil rights," and quoted an article describing "travesties of justice perpetrated under the U.C.M.J." 395 U.S. at 265, 266 & n.7.

\textsuperscript{229} Kaufman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969); see notes 133-36 supra and accompanying text.
O'Callahan indicates an increasing willingness on the part of civilian courts to discard obsolete concepts fashioned for the resolution of problems bearing little resemblance to current issues, when such concepts operate to deny constitutional rights.
COMMENTS

SECRET FILES: LEGITIMATE POLICE ACTIVITY OR UNCONSTITUTIONAL RESTRAINT ON DISSENT?

Be not reasonable with inquisitions, anonymous informers, and secret files that mock American justice. . . . Exercise the full judicial power of the United States; nullify them, forbid them, and make us proud again.¹

THE NEW JERSEY EXPERIENCE

On April 23, 1968, the attorney general of New Jersey circulated a memorandum to municipal and county officials discussing the legal and practical implications attendant government prevention and control of civil disorders.² To facilitate coordination between state and local police, the attorney general suggested that local officers,³ utilizing two comprehensive standard security forms, report certain information about incidents in their respective jurisdictions to the State Police Central Security Unit.⁴ By selectively disseminating this information, the State Security Unit then would be able to apprise police in various communi-

²The attorney general’s memorandum was sent to officials of New Jersey’s 567 municipalities following a conference on Apr. 16, 1968, between the Governor and mayors of the state. Letter from Attorney General Arthur Sills, to Local Officials of the State of New Jersey, Apr. 23, 1968, copy on file at Georgetown Law Journal. The memorandum dealt with a variety of subjects: municipal planning, role of disaster control and civil defense units, designation of authority and powers, establishment of a rumor control clinic, role of the public defender, state intervention, and potential problems. A Sills, Memorandum: Civil Disorders, The Role of Local, County and State Governments, Apr. 23, 1968 (copy on file at Georgetown Law Journal) [hereinafter cited as Sills Memorandum].
³The memorandum did not constitute a mandate since the attorney general is not empowered to issue directives to local police officials. Brief of Attorney General in Support of Motion for Reconsideration at 6, Anderson v. Sills, 106 N.J. Super. 545, 256 A.2d 298 (Ch. 1969), certification granted, No. A150-69 (Sup. Ct., Dec. 16, 1969). The power “to preserve the public peace and order [and] to prevent and quell riots, disturbances and disorderly assemblages” rests with the municipality in which such a disorder occurs. N.J. REV. STAT. § 40:48-1(6) (1937).
ties of potential civil disorder problems. Form 420, the Security Incident Report, was designed to gather information about such incidents as civil disturbances, riots, rallies, protests, demonstrations, marches, and confrontations;\(^5\) form 421, the Security Summary Report, sought data about persons involved in these incidents—name, address, marital status, age, race, employer, business, social security number, and driver's license number.\(^6\) Neither of the security forms suggested techniques for obtaining the required information.

Challenging the statewide information collection system established pursuant to the attorney general’s memorandum, plaintiffs in *Anderson v. Sills*\(^7\) sought a declaratory judgment that the maintenance of such secret files violates the first amendment, since a compilation and distribution of such a wide range of data has a deterrent effect on the exercise of freedom of speech, assembly, and association. In response, the State contended that this intelligence system could prevent the outbreak of civil disorders, as well as quell potential disturbances, and that no one would be genuinely deterred from exercising his rights by knowing such a system exists.

As a threshold determination, the New Jersey superior court acknowledged plaintiffs’ standing,\(^8\) pointing out that recent Supreme Court

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\(^6\) Id. at 562, 256 A.2d at 310.

\(^7\) 106 N.J. Super. 545, 256 A.2d 298 (Ch. 1969), certification granted, No. A150-69 (Sup. Ct., Dec. 16, 1969). Although six individuals joined the Jersey City branch of the NAACP as plaintiffs, the court made no distinction between the investigation of a political-social organization and the investigation of individuals. While it might be argued that collecting information about the NAACP involves suppression of political views, nothing in the *Anderson* decision suggests that there would have been a different result had all plaintiffs been individuals.

\(^8\) The police admitted the existence of a central file for use during civil disorders, but plaintiffs had no evidence to indicate that the file contained information about them. In fact, only one of the plaintiffs, who had an arrest record dating from 1963, was indexed in the file. Brief of Attorney General, supra note 3, at 20. Furthermore, plaintiffs claimed a threat of prejudice in applying for employment and admission to schools without alleging that the file was made available to private parties. Brief for Plaintiffs at 19, Anderson v. Sills, 106 N.J. Super. 545, 256 A.2d 298 (Ch. 1969), certification granted, No. A150-69 (Sup. Ct., Dec. 16, 1969).

If the files were truly secret, no one but the police would know of their existence and, therefore, there would never be an action to enjoin their compilation and use. When the existence of such files is publicly admitted, however, the deterrent effect operates upon the entire community, irrespective of who actually is a subject of the file's contents. Thus, the *Anderson* court found that since everyone is injured by broad investigatory police action, any person has the requisite standing to challenge its validity. "First Amendment rights are of transcendent value to all society and are not merely to those exercising their rights. . . . Thus, the injury to be remedied is considered not only personal but also as one affecting society as well." 106 N.J. Super. at 554, 256 A.2d at 303.
decisions have "shown a marked relaxation of standards of justiciability where governmental action inhibits the exercise of First Amendment rights." Although conceding that the purpose of the information collection system was to prevent and control civil disorders, for which the police power of the state legitimately could be exercised, the court nevertheless found the state's actions constitutionally impermissible, noting three primary reasons: (1) The attorney general was unable to demonstrate how the intelligence collection plan would be helpful in preventing riots; (2) the plan suffered from an inherent vagueness and overbreadth, traditional constitutional infirmities; and (3) "any burden placed upon First Amendment rights that might reasonably be expected to interfere or to prevent their exercise [is] an impermissible infringement on those rights." The court ordered that use of the information collection system be discontinued and that all file dossiers compiled be produced and destroyed.

Anderson v. Sills is the first case to enjoin police information gathering per se, without regard to the method by which the information is obtained or the manner in which it is to be employed; the mere scope of the information sought was deemed to transgress constitutional limitations. Thus, if the Anderson rationale gains widespread acceptance,

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10 Id. at 553, 256 A.2d at 302.

11 Id. at 556-57, 256 A.2d at 304.

12 Id. at 554, 256 A.2d at 303.


14 Although the Supreme Court has condemned certain types of information collection, it has not based its decisions solely on the scope of the data sought or obtained. Instead, it generally has found that the method of collection resulted in a violation of a particular constitutional right, although the scope of the information sought can be relevant in determining if such right has been infringed. For example, electronic eavesdropping and wiretapping have been held unconstitutional when amounting to an unreasonable search and seizure in violation of the fourth amendment. See Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967). Absent a knowing and voluntary waiver of fifth and sixth amendment rights, the government is not permitted to "gather" information from a criminal suspect under custody. See Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

An information gathering and dissemination network similar to the New Jersey system is in operation on a national level and has been criticized chiefly on first amendment grounds. The United States Army has 100 plainclothes investigators monitoring political protests in order to provide early warnings of civil disorders which the Army might be called to quell. Such a system, it has been contended, can have deleterious effects on constitutionally protected protest and dissent. Washington Post, Feb. 18, 1970, § A, at 15, col. 2; see Pyle, CONUS Intelligence: The Army Watches Civilian Politics, Washington Monthly, Jan. 1970, at 4.
a shadow may be cast upon the constitutionality of many current police practices,\textsuperscript{15} as well as sections of the Omnibus Crime Bill.\textsuperscript{16} In addition, the frequently voiced notion that effective centralization and dissemination of police intelligence is an efficient and legitimate way to combat both civil disorders\textsuperscript{17} and organized crime\textsuperscript{18} is questioned by Ander-

Although the Court has found certain congressional inquiries into Communist activities violative of the first amendment, it has not questioned Congress' broad power to investigate; rather, it has focused its proscriptions on the power to compel a witness to disclose his activities and on the threat of publicizing a witness' unpopular views as a means of punishment. Watkins v. United States, 334 U.S. 178, 200 (1957); accord, Barenblatt v. United States, 360 U.S. 109 (1959).

\textsuperscript{15} There is no reason to suppose that the New Jersey system of collecting and coordinating information is unique. At least 12 cities now have special investigating units. \textsc{President's Comm'n on Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime} 12 (1967); see \textit{Note, Police Undercover Agents: New Threat to First Amendment Freedoms}, 37 \textit{Geo. Wash. L. Rev.} 634 (1969). Perhaps \textit{Anderson} is simply indicative of the prophecy that "current investigatory practices thought by the police to be proper and effective will be held to be unconstitutional or subject to increasingly specific rules," \textsc{President's Comm'n on Law Enforcement and the Administration of Justice, Task Force Report: The Police} 23 (1967) [hereinafter cited \textit{Task Force Report: Police}].

\textsuperscript{16} The Omnibus Crime Control and Safe Streets Act of 1968 authorizes the federal government to assist local law enforcement agencies to combat organized crime by developing a system for collecting, storing, and disseminating information. 42 U.S.C. \textsection 3731(b)(5) (Supp. IV, 1969). One section of the Act authorizes electronic surveillance under the supervision and control of a court order. 18 U.S.C. \textsection 2516 (Supp. IV, 1969). Relying upon \textit{Anderson}, a person who suspects he is the target of judicially approved wiretapping might seek an injunction on the ground that because he believes his conversations are being monitored, he is deterred from exercising his freedom of speech. Thus, even if the Act's electronic surveillance provisions can survive a fourth amendment attack, by adopting the rationale of \textit{Anderson}, a court still could prohibit wiretapping on the first amendment grounds.

\textsuperscript{17} The absence of accurate information both before and during a disorder has created special control problems for police. Police departments must develop means to obtain adequate intelligence for planning purposes, as well as on-the-scene information for use in police operations during a disorder.

An intelligence unit staffed with full-time personnel should be established to gather, evaluate, analyze, and disseminate information on potential as well as actual civil disorders. . . . It should use undercover police personnel and informants, but it should also draw on community leaders, agencies, and organizations in the ghetto.

\textsc{National Advisory Comm'n on Civil Disorders, Report} 269 (1968) [hereinafter cited as \textit{Kerner Comm'n Report}].

\textsuperscript{18} See Kennedy, \textit{The Program of the Department of Justice on Organized Crime}, 38 \textit{Notre Dame Law.} 637, 638 (1963). Besides gathering information on organized crime, the federal government has been compiling data on political activists since 1965. See Pyle, \textit{supra} note 14, at 4-5. Additionally, proposals have been advanced at the federal level for a national data bank to store and compile the separate pieces of information each government agency possesses on the average citizen. For explanation and criticism of these proposals, see \textit{Symposium: Computer Data Banks and Individual Privacy}, 53 \textit{Minn. L. Rev.} 211 (1968).
son. To harmonize society’s interests in police effectiveness and individual liberty, this Comment first will analyze the limits of valid police information gathering and the scope of first amendment rights. Proposals then will be advanced that should satisfy the police need for information while concomitantly protecting the “uninhibited, robust, and wide-open” debate and discussion contemplated by the first amendment. 19

BALANCING SOCIETAL INTERESTS

When litigation involves a conflict between police power and individual rights, the court has the “delicate and difficult task [of weighing] the circumstances and [appraising] the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.” 20 Although an absolutist approach to the protection of first amendment rights has been advanced, 21 a majority of the Supreme Court has consistently recognized that when competing societal interests collide, the “difficult task” is to balance these interests, a process that has been articulated in varying terms. Thus, it has held that before a state interest or purpose can justify a restriction on first amendment rights, it must be “compelling,” 22 or “sufficiently compelling to subordinate the [individual’s first amendment] interest;” 23 on several occasions, it has used the very term “balancing.” 24 In determining the

21 Justice Black has been the chief advocate of this approach, which emphasizes the language in the first amendment that government “shall make no law” abridging the freedoms specified.
To apply the Court's balancing test . . . is to read the First Amendment to say “Congress shall pass no law abridging freedom of speech, press, assembly, and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.”
Barenblatt v. United States, 360 U.S. 109, 143 (1959) (Black, J., dissenting). The Anderson court vacillated between the absolutist and balancing approaches, at one point stating that any burden on first amendment rights is impermissible while at another noting that the State had not shown a compelling interest in maintaining the files. Compare 106 N.J. Super. at 554, 256 A.2d at 303, with id. at 553, 256 A.2d at 302.
24 “Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.” Barenblatt v. United States, 360 U.S. 109, 126 (1959) (emphasis added); cf. United States v.
constitutionality of a first amendment restriction, the court will examine the importance of the state interest to be served, the relationship between such interest and the alleged restriction, the reasonableness of the means chosen to implement the governmental goal, and the severity of the inhibition on the exercise of relevant first amendment rights. Furthermore, these considerations must be examined with due regard for the national commitment to the principle that “speech concerning public affairs is more than self-expression; it is the essence of self-government.” If, therefore, employing a system of secret files has a deterrent effect on the exercise of constitutionally protected rights, this practice should be sustained or prohibited depending upon the outcome of the balancing process.

STATE INTEREST

Although it would seem axiomatic that preventing riots by conducting anticipatory investigations should be within the constitutional power of the State, to hold that police investigation is harassment per se would

Robel, 389 U.S. 258, 266-68 n.20 (1967); UMW v. Illinois Bar Ass’n, 389 U.S. 217, 222 (1967). The balancing test has been criticized both for being too vague to be applied uniformly by the courts and for being too broad to allow valid comparisons of the specific competing interests. See Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 912-14 (1963); Frantz, The First Amendment in the Balance, 71 YALE L.J. 1424 (1962); Meiklejohn, The Balancing of Self-Preservation Against Political Freedom, 49 CALIF. L. REV. 4, 7-14 (1961).

The need to balance competing interests arises only when a constitutionally protected right comes into conflict with a valid exercise of government power. For example, the Supreme Court often has held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press; consequently, state restrictions on obscene speech and literature would not have to be balanced against an individual’s right to speak or write obscenely. Roth v. United States, 354 U.S. 476, 485 (1957); accord, Smith v. California, 361 U.S. 147, 152 (1959). Similarly, when government is clearly without authority to act, there is no valid interest to be balanced. Thus, the Court will not sanction an invasion of privacy by an attempt to regulate the use of contraceptive devices by married couples. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). Nor may the state tell a person, sitting alone in his own home, what books he may read or what films he may watch. Stanley v. Georgia, 394 U.S. 557, 565-68 (1969).

A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to furtherance of that interest.


Brief for Plaintiffs, supra note 8, at 4.
imply that police investigatory activity should be instigated only "in connection with the apprehension of individuals who will be charged with criminal conduct." 28 Admittedly, secret police and confidential dossiers are characteristic of a political system that is inimical to American ideals; 29 the government's duty to prevent crime, however, has been recognized since the inception of the Republic and should not be considered a "long step down the totalitarian path." 30

While the contemporary role of the police is primarily remedial—investigating a completed crime, sifting the evidence, and apprehending the criminal 31—historically, police in the United States served only a preventive function—"order maintenance" as opposed to "law enforcement." 32 Moreover, not only has the role of order maintenance, which subsumes crime prevention, been revitalized by the need to avert civil disorders, 33 but to a certain degree it also has re-

28 Brief of Attorney General, supra note 3, at 28. This view is not without its advocates. "[T]he opinions of men are not the object of civil government, nor under its jurisdiction. . . . [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . .!" T. Jefferson, A Bill for Establishing Religions Freedom, in JEFFERSONIAN CYCLOPEDIA 976 (J. Foley ed. 1906), quoted in Schneider v. Smith, 390 U.S. 17, 25 (1968). But cf. text accompanying notes 31-34 infra.

29 The government's use of informers is both distasteful and characteristic of a totalitarian police state; the Supreme Court, however, consistently has sustained such activity on "the premise that the informer is a vital part of society's defensive arsenal." State v. Burnett, 42 N.J. 377, 385, 201 A.2d 39, 44 (1964), quoted in McGray v. Illinois, 386 U.S. 300, 307 (1967). The issue in cases involving informers has not been whether the prosecution had a right to utilize them, but rather whether they have been used in an improper manner. See, e.g., Hoffa v. United States, 385 U.S. 293 (1966); Sherman v. United States, 356 U.S. 369 (1958); Roviaro v. United States, 353 U.S. 53 (1957).

Anderson arguably presents a basis upon which to challenge the right to use informers. If an organization or group has been infiltrated by government agents and if its members have reason to believe this, they might be able to enjoin such practice on the ground that this knowledge deters them from the free exercise of their first amendment rights.


32 See J. WILSON, VARIETIES OF POLICE BEHAVIOR 31-32 (1968). Traditionally, the police were essentially watchmen, whose only duty was to make rounds and maintain order; detecting crime, ferreting out criminals, and bringing them to trial was charged to private detectives. It was not until the 19th century, with the rising fear of riots and rebellions and the corresponding growth of local police units, that the police assumed the dual roles of order maintenance and law enforcement.

33 "Preserving civil peace is the first responsibility of government." KERNER COMM'N REPORT, supra note 17, at 171. See also TASK FORCE REPORT: POLICE, supra note 15, at 13. Police officials had stressed the order maintenance role before the general outbreak of disorders in the mid-60's. See Purdy, Riot Control—A Local Responsibility, FBI LAW ENFORCEMENT BULL., June 1965, at 3; McManus, Practical Measures for Police Control of Riots and Mobs, FBI LAW ENFORCEMENT BULL., Oct. 1962, at 3.
ceived court approval, notwithstanding potential limitations on constitutional rights.\textsuperscript{34}

Although the Anderson court held that the Constitution forbids police activity that reasonably can be expected to interfere with the exercise of first amendment rights,\textsuperscript{25} the Supreme Court has upheld restrictions on individual rights when the purpose and effect is to further a sufficiently compelling state interest.\textsuperscript{36} In some instances, government actions that have been sustained have been closely akin to centralized information gathering. Perhaps most obvious is congressional investigation of communist organizations, which forced the Supreme Court to consider whether Congress, by invoking its contempt power, can compel disclosure of an association's membership, doctrines, and activities. As a result, three principles relevant to all modes of information gathering have emerged. First, not only does the government have a right to gather data about subversive activities, but it also can compel disclosure of personal matters, despite possible adverse effects on constitutional rights;\textsuperscript{37} second, although the state has a strong interest in

\textsuperscript{34} In Terry v. Ohio, petitioner challenged the Ohio practice of "stop and frisk" on the ground that the fourth amendment forbids "a variety of police activity ... which stops short of an arrest based upon probable cause to make such an arrest." 392 U.S. 1, 11 (1968). The Supreme Court, however, refused to take this approach. Instead, it held that it was necessary to "focus upon the government interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen." Id. at 21, quoting Camara v. Municipal Court, 387 U.S. 523, 534 (1967). The Court then held that the state's legitimate interest in crime prevention recognizes that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." Id. at 22.

Recent state court decisions also have held it is the duty of the police to prevent crime. E.g., State v. Valstad, 282 Minn. 301, 131, 165 N.W.2d 19, 26 (1969); State v. Sorenson, 270 Minn. 186, 197, 134 N.W.2d 115, 123 (1965); State v. Carpenter, 181 Neb. 639, 645, 150 N.W.2d 129, 133 (1967), cert. denied, 392 U.S. 944 (1968).

\textsuperscript{35} 106 N.J. Super. at 554, 256 A.2d at 303.

\textsuperscript{36} See, e.g., United States v. O'Brien, 391 U.S. 367, 376 (1968); Uphaus v. Wyman, 360 U.S. 72, 80 (1959); Barenblatt v. United States, 360 U.S. 109, 134 (1959). When the Court has refused to sanction certain state actions restricting first amendment rights, it generally has done so on the ground that the requisite state interest had not been demonstrated. See, e.g., Sherbert v. Verner, 374 U.S. 398, 407 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Thomas v. Collins, 323 U.S. 516, 530 (1945).

preventing the violent overthrow of the government, the validity of an investigation of a particular subversive organization will depend upon the specificity and restraint with which it is conducted and the relationship between the information compelled and the protection afforded the government; and third, an investigation’s “chilling effect” upon first amendment rights results from public disclosure of the witnesses’ unpopular views.

Furthermore, reasoning that the government interest outweighs the restriction placed on individual rights, lower courts have sustained certain methods of information collection and compilation by the police themselves, although in effect the result is the same as that condemned in *Anderson*. For example, when a person is booked for a crime and subsequently charges are dropped, or for some reason guilt is not established, the police are permitted to retain on file all information gathered. Such a situation presents circumstances similar to those found

between the legislative investigating committee and its witnesses, see Morehead, *Congressional Investigations and Private Persons*, 40 S. Cal. L. Rev. 189 (1967).


40 E.g., *Hershel v. Dyra*, 365 F.2d 17, 20 (7th Cir.), cert. denied, 385 U.S. 973 (1966); *Sterling v. City of Oakland*, 208 Cal. App. 2d 1, 4-8, 24 Cal. Rptr. 696, 698-700 (1962); *Roesch v. Ferber*, 48 N.J. Super. 231, 251, 137 A.2d 61, 73 (App. Div. 1957). In *Sterling v. City of Oakland*, arrest records were allowed to be retained although charges were dropped and suit against the complaining witness for malicious prosecution was successful. 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962). However, in *United States v. McLeod*, the records of Negroes who had been arrested en route to the polls were ordered expunged after the arresting officers were convicted of depriving the Negroes of their voting rights under the Civil Rights Act of 1957. 385 F.2d 734, 750 (5th Cir. 1967). See also *Morrow v. United States*, 417 F.2d 728 (D.C. Cir.
in *Anderson*; the police have a file on a person who has not committed a crime and who may be deterred from exercising modes of speech or association simply because he knows of the file’s existence. Although a variety of justifications have been advanced for allowing police retention of such records, in general they concern “[promoting] the public safety, by achieving greater success in preventing and detecting crimes and apprehending criminals.” 41 This justification would appear equally applicable to the centralized intelligence system in *Anderson*.42

**NEXUS BETWEEN STATE INTEREST AND IMPOSED RESTRICTION**

A sufficiently strong state interest may justify an infringement of first

1969) (power of district judge to expunge police records upon dismissal of charges upheld).

41 Voelker v. Tyndall, 226 Ind. 43, 47, 75 N.E.2d 548, 550-51 (1947). See also Note, *The Right of Persons Who Have Been Discharged or Acquitted of Criminal Charges to Compel the Return of Fingerprints, Photographs, and Other Public Records*, 27 Temp. L.Q. 441 (1954). It also has been held that whether arrest records should be returned is a matter of legislative enactment or public policy. Sterling v. City of Oakland, 208 Cal. App. 2d 1, 6, 24 Cal. Rptr. 696, 699 (1962); Kolb v. O’Connor, 14 Ill. App. 2d 81, 91, 142 N.E.2d 818, 824 (1957). Additionally, because the records are limited to police use only and are not available to the public, the possibility of prejudice is mitigated sufficiently to justify their retention. See Kolb v. O’Connor, 14 Ill. App. 2d 81, 88, 142 N.E.2d 818, 822 (1957). See also United States v. Kelly, 55 F.2d 67, 70 (2d Cir. 1932); McGovern v. Van Riper, 140 N.J. Eq. 341, 344 A.2d 469, 471 (Ch. 1947).

42 The courts also have sanctioned other forms of activity that serve an information-gathering purpose but admittedly interfere with the unfettered exercise of constitutional rights. For example, a federal narcotics registration statute requires narcotics addicts or persons with narcotics conviction to register with the Government upon entering or leaving the country under pain of criminal sanction. 18 U.S.C. § 1407 (1964). Its constitutionality has been sustained under repeated attacks. E.g., Allen v. Meier, 374 F.2d 447 (9th Cir.), cert. denied, 390 U.S. 972 (1967); Weissman v. United States, 373 F.2d 799 (9th Cir. 1967); Palma v. United States, 261 F.2d 93 (5th Cir. 1958); Reyes v. United States, 258 F.2d 774 (9th Cir. 1958); United States v. Eramdzian, 155 F. Supp. 914 (S.D. Cal. 1957).

Similar criminal registration statutes have also been upheld. E.g., State v. Ulesky, 100 N.J. Super. 287, 241 A.2d 671 (Law Div. 1968); State v. Garland, 99 N.J. Super. 383, 240 A.2d 41 (Law Div. 1968). In addition, a nationwide study made in 1954 revealed that at least 49 communities had local criminal registration statutes. See Note, *Criminal Registration Ordinances—Police Control Over Potential Recidivists*, 103 U. Pa. L. Rev. 60 (1954). The Supreme Court has struck down one state statute on the narrow ground that defendant had insufficient notice of his obligation to register, but has otherwise not ruled on the constitutionality of such laws. See Lambert v. California, 355 U.S. 225 (1957).

amendment rights, but the particular governmental action resulting in the infringement actually must promote the interest.\textsuperscript{43} Thus, if no reasonable nexus exists between the maintenance and availability of a centralized intelligence data bank and the valid government interest in preventing civil disturbances, then an information collection system such as in \textit{Anderson} should not be permitted.\textsuperscript{44} Although the attorney general of New Jersey apparently was unable to explain either the relationship between protest activities and civil disorders or the role of secret files in preventing riots,\textsuperscript{45} the National Advisory Commission on Civil Disorders—the Kerner Commission—\textsuperscript{46} has documented the relationship, finding that 22 percent of the “prior incidents” triggering riots studied involved “Negro demonstrations, rallies, and protest meetings.”\textsuperscript{47} It further found that the “typical rioter” was likely to be involved in civil rights efforts, since 39.3 percent of “self-reported rioters” attended protest meetings or participated in civil rights activity.\textsuperscript{48} This relationship, therefore, at least suggests that there may be a possible nexus between police intelligence gathering and the prevention or control of civil disorders.

In the first place, intelligence data provided by a system of secret

\textsuperscript{43} In \textit{Barenblatt v. United States}, the Court held that compulsory disclosure of a witness’ associations furthered the goal of preventing communist subversion, since knowing the identity of those persons who embraced such a philosophy was essential to the self-preservation of the government. 360 U.S. 109, 127-28 (1959).


\textsuperscript{45} The State did point out, however, that the riots in Newark and Plainfield were preceded by protest gatherings, but it did not attempt to clarify “how the gathering of the data called for in Form 421 [would] be helpful in preventing civil disorders.” 106 N.J. Super. at 553, 256 A.2d at 302.

\textsuperscript{46} On July 29, 1967, President Johnson established the Commission and directed it to conduct an investigation and make proposals with respect to the causes of recent civil disorders, the development of methods for controlling or averting such disorders in the future, and the appropriate role of local, state, and federal authorities in dealing with riots. \textit{Kerner Commun’n Report}, \textit{supra} note 17, at 295. The Commission’s study covered 164 disorders, which had occurred in the first nine months of 1967. \textit{Id.} at 65.

\textsuperscript{47} \textit{Id.} at 70. Other “incidents” contributing to the outbreak of violence and the frequency with which they were found were allegedly abusive or discriminatory police actions (40%); activities by whites discrediting or intimidating Negroes (17%); official city actions (14%); and allegedly discriminatory administration of justice (33%). \textit{Id.} at 69-70.

Although these “triggering” incidents preceded the riots chronologically, they did not “cause” them in a sociological sense. The Commission concluded that the underlying reasons for the riots were pervasive discrimination and segregation, black migration and white exodus, black ghettos, frustrated hopes, legitimized violence, incitement to violence by Negro militants, and police actions. \textit{Id.} at 91-93.

\textsuperscript{48} \textit{Id.} at 77.
files may be necessary "for planning purposes, as well as [for furnishing] on-the-scene information for use in police operations during a disorder." Likewise, the information available in a central intelligence file could help the police anticipate a rise in tensions and unrest and enable them to take appropriate action in order to prevent an outbreak of violence. Additionally, by examining a central file, the police would be able to identify those individuals who have participated in various protest activities and who thus might be organizers or instigators of civil disturbances.

Assuming that a disorderly demonstration is rarely spontaneous, knowledge that certain individuals had been present at previous demonstrations that erupted into violent incidents would permit the police, as a security precaution, to dispatch more men before disorder occurs. Conceivably, a minimum number of police officers could observe a rally, determine the identity of its organizers and any known agitators taking part, and quickly assess the possibility that violence will or will not occur. Consequently, citizens could engage in legitimate protest activities without always being faced with the inhibiting presence of a large police force assembled to prevent possible illegal activities.

Furthermore, since the traditional mode of crowd dispersion, once a riot has broken out, is to separate the leaders from the mob, those

49 Id. at 269; see Task Force Report: Police, supra note 15, at 25.

50 See McManus, supra note 33, at 5. The riots of 1967, however, were "spontaneous" in the sense that they "were not caused by, nor were they the consequence of any organized plan or conspiracy." Kerner Comm'n Report 4. While not "planned," the disturbances in Newark and Plainfield did break out after public protest meetings. Id. at 30, 44. Although the majority of the 164 disorders in 1967 did not occur immediately after a public protest, the disturbances at the 1968 Democratic convention in Chicago began with mass rallies and protests; furthermore, the Government contended that such disorders were pre-arranged, charging eight of the protest leaders with conspiracy to riot and inciting to riot. Defendant Bobby Seale's case was severed during the course of the trial; the remaining seven defendants were acquitted of the conspiracy charge, but five of them were found guilty of travel in interstate commerce to incite to riot. United States v. Dellinger, No. 69 CR 180 (N.D. III., Feb. 18, 1970).

51 It is arguable that without intelligence data, police must either ignore the possibility that disorder will break out at a certain gathering and detail only the minimum force necessary for the traditional chore of maintaining order, or react to the possibility of violence by flooding the area with police in what may be both a futile and wasteful effort.

52 See generally R. Momboisse, Riots, Revolts, and Insurrections (1967). This rationale is based upon the assumption that rioters and those inciting to riot are recidivists, a theory that has not been fully substantiated.

53 See McManus, supra note 33. The usual methods of riot control, however, are ineffective in dealing with a roving bands of looters and arsonists. Kerner Comm'n Report 269.
persons with a history as instigators or as frequent participants in disturbances would be the logical ones to single out from an unruly gathering. Similarly, by having descriptions and photographs available to assist in witness identification, apprehension of rioters would be facilitated. Once a rioter is identified, resort to the files would reveal where he might be located, thus avoiding the delay often characteristic of arresting persons in metropolitan areas.\textsuperscript{54}

Finally, if it is true that compilation of police files has a “chilling effect” on the free exercise of first amendment rights, it seems equally plausible that it would have a deterrent effect on one’s proclivity to engage in civil disorders. Traditional theories of mob action usually postulate that an individual tends to lose his identity in an uncontrollable crowd and to assume the characteristics, feelings, and passions of the mob.\textsuperscript{55} It seems reasonable that one might be somewhat less susceptible to mob influence if he realizes that the police know his name, address, and description and that he can be identified through the use of a centralized file system.

\textbf{CONSTITUTIONAL LIMITATIONS ON POLICE INVESTIGATIVE POWER}

The authority of the police to investigate is circumscribed by the preferences for individual rights established both by the Constitution itself and by judicial decisions. Constitutional challenges to the police use of secret files are possible on several alternate theories,\textsuperscript{56} the most

\textsuperscript{54} See Kolb v. O'Conner, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957).


\textsuperscript{56} Arguably, the gathering and use of intelligence files could constitute an invasion of the right to privacy, which although not expressly protected by the Constitution, serves as the underlying purpose of the fourth amendment. See, e.g., Warden v. Hayden, 387 U.S. 294 (1967); Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949). In addition to being embodied in the fourth amendment, it is intimately associated with other constitutional provisions. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958). For a detailed examination of the right to privacy, see Symposium on Privacy, 31 Law & Contemp. Prob. 251 (1966).

Three recent Supreme Court cases have expanded significantly the right to privacy. Stanley v. Georgia, 394 U.S. 557 (1969) (obscene material in personal residence); Camara v. Municipal Court, 387 U.S. 523, 540 (1967) (warrant required for administrative search); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (dissemination of birth control information to married couples). Despite this liberalization, however, the right to privacy probably would not serve as an effective basis for challenging the constitutionality of secret files per se, since what a person knowingly discloses to the public is not constitutionally protected. See Katz v. United States, 389 U.S. 347, 351 (1967); Lewis v. United States, 385 U.S. 206, 211 (1966). Because attending a demonstration is a public disclosure of such attendance, observing and recording the fact of attendance would be legitimate police activity. Thus, the value of the privacy argument would only be to curb unreasonable police investigations, such as harassment,
persuasive of which was adopted in Anderson—the existence of such files deters the exercise of the first amendment freedoms of speech, assembly, and association. The language of the first amendment is among the most definitive in the Constitution, and the Supreme Court has stressed the primacy of the rights of free speech, press, and assembly on numerous occasions, describing them as "the most cherished of . . . ideals." Despite the lofty position in American jurisprudence to which the first amendment has risen, not only has the Supreme Court repeatedly declared that first amendment rights are not absolute, but it also has ruled that in some circumstances even a statute that arguably could restrain the exercise of first amendment freedoms enjoys a presumption of constitutionality. A person, therefore, who alleges that the State has violated his first amendment rights by restraining his participation in certain activities, must prove that such activities are protected by the first amendment and that he has been deterred from freely engaging in them. Only then must the State demonstrate that its actions were justified by a compelling interest.

which also could be prevented by the first amendment approach adopted in Anderson. See notes 91-102 and accompanying text.

87 The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for true political discussion to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.


90 In Gitlow v. New York, the Supreme Court concluded that the legislative determination that the public interest dictates a restriction of first amendment rights must be given great weight. "Every presumption is to be indulged in favor of the validity of the statute." 268 U.S. 652, 668 (1925). However, statutes which constitute a prior restraint on the exercise of first amendment rights are presumed invalid. E.g., Freedman v. Maryland, 380 U.S. 51, 56 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

91 First amendment rights apply to all citizens, including law enforcement officials in the performance of their duties. Since the police have a right to attend a public rally, in order to demonstrate an unconstitutional deterrence, it is necessary to prove more than mere police presence. Schneider v. New Jersey, 308 U.S. 147, 160 (1939); see Feiner v. New York, 340 U.S. 315, 321 (1951); Kovacs v. Cooper, 336 U.S. 77, 82 (1949).

92 See notes 35-42 supra and accompanying text.
Activities Protected by the First Amendment. In its simplest form, freedom of speech, assembly, and association,\(^{63}\) which recognizes the societal interest in advancement of personal beliefs and the communication of these beliefs to others,\(^{64}\) includes such activities as everyday conversations, group discussions, and "vigorous advocacy," at least "of lawful ends."\(^{65}\) Governmental limitations on such activities, whether intentional or incidental, are "subject to the closest scrutiny."\(^{66}\) Picketing and demonstrating, however, which were the activities found unconstitutionally restrained in \textit{Anderson}, involve some type of conduct in addition to pure speech, and the scope of the individual's constitutionally protected rights, although still substantial, is somewhat diminished.\(^{67}\) Thus, the constitutionality of picketing depends upon its purpose and manner and the justification for its restraint;\(^{68}\) if a statute regulating the conduct of demonstrators or picketers is narrowly and specifically drawn, such activity may be curbed.\(^{69}\)

\(^{63}\) Freedom of association is not expressly included in the first amendment, but "is a judicial construct appended to the First Amendment rights to speak freely, to assemble, and to petition for redress of grievances. . . . Whether the right to associate is an independent right carrying its own credentials and will be carried beyond the implementation of other First Amendment rights awaits a definitive answer." United States v. Robel, 389 U.S. 258, 282, 283 n.2 (1967) (White, J., dissenting). One commentator has argued that associational rights are not derived solely from the first amendment, but are inherent in the whole constitutional framework, which is designed to protect individual liberty. Emerson, \textit{Freedom of Association and Freedom of Expression}, 74 Yale L.J. 1, 5 (1964). The Supreme Court, however, has employed the first amendment almost exclusively in protecting the freedom of association. \textit{See} NAACP v. Alabama \textit{ex rel.} Patterson, 357 U.S. 449, 462 (1958); \textit{accord}, United States v. Robel, 389 U.S. 258 (1967); NAACP v. Button, 371 U.S. 415 (1963).

\(^{64}\) "[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That . . . is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); \textit{see}, \textit{e.g.}, United States v. Robel, 389 U.S. 258 (1967); \textit{New York Times} Co. v. Sullivan, 376 U.S. 254 (1964); NAACP v. Alabama \textit{ex rel.} Patterson, 357 U.S. 449 (1958).


\(^{68}\) Walker v. City of Birmingham, 388 U.S. 307, 315-16 (1967); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965); NLRB v. Packers Local 760, 377 U.S. 58, 63 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940). When picketing is accompanied by violent conduct or when the picketers' language indicates that violence is imminent, it may be enjoined, since preventing violence is an adequate justification for restraint. Youngdahl v. Rainfair, Inc., 355 U.S. 131, 138-39 (1957); Milk Wagon Drivers' Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

Advocating criminal or otherwise illegal conduct is another speech-related activity that would be restrained by the police’s use of a secret file system, but such activity would not appear to be protected by the first amendment. In the past, the Supreme Court has upheld convictions when a speaker "passes the bounds of argument or persuasion and undertakes incitement to riot," finding that such speech is beyond the scope of first amendment protection. Also outside the pale of the first amendment is speech that endangers the foundations of government and threatens its overthrow by unlawful means. Since the potential effect, if not the purpose, of speech exhorting criminal conduct is destruction of the constitutional framework and its institutions, the government should be justified in restricting it as an incident of maintaining internal security and insuring self-preservation. As the Supreme Court noted in American Communications Ass’n v. Douds, "it has long been established that [first amendment] freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive, it must have the power to protect itself . . . ."

Examination of the protection that the Constitution affords a given


Id. at 394. In Dennis v. United States, the Supreme Court sustained the validity of the Smith Act, holding that Congress has the power to prohibit speech intended to urge violent overthrow of the government. 341 U.S. 494 (1951). The Court, however, has further interpreted the Smith Act to require that a person must have knowledge of the organization’s illegal advocacy and of its specific intent to accomplish its aims by resort to violence. Scales v. United States, 367 U.S. 203, 224-30 (1961). Furthermore, the Government may not ask whether individuals were ever members of the Communist Party. Schneider v. Smith, 390 U.S. 17 (1968) (Coast Guard personnel); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (teachers); United States v. Robel, 389 U.S. 258 (1967) (defense employees).
activity also demands consideration of the specificity of the restrictive statutory or administrative directive. Even activities that constitutionally can be restricted may not be controlled by regulatory provisions that are unnecessarily broad.75 Overly broad statutes prohibit the free exercise of constitutional rights not only by those whom they are intended to cover, but also by those who are not the object of the enactments.76 Thus, such statutes suffer from two constitutional vices: they prohibit legitimate activities and encompass a larger group of persons than is permissible. Furthermore, a statutory or administrative provision may fail because of the traditional constitutional infirmity of vagueness.77 The Supreme Court on many occasions has found statutes restricting first amendment freedoms unconstitutional on the ground of vagueness,78 and recently has abandoned its policy of narrowly construing vague statutes in order to sidestep constitutional questions,79 thereby enhancing the importance of specificity as a constitutional mandate.

Deterrence Upon First Amendment Rights. After a person has shown that his activity is constitutionally protected, he still must prove that he has been deterred from freely exercising his protected rights. The quantum of deterrence in situations involving secret files will vary according to several factors: the information gathering techniques employed, the specific use to which the files are put, the prevailing political atmosphere, the nature of the safeguards available to protect against police harassment, and the individual's awareness of each of these factors.80 For example, a greater deterrent effect can be found81 if the


77 The danger of a vague statute is that it provides no predictive consistency, and it would be unreasonable to make one choose whether or not to engage in an activity that may be subject to penal or other sanctions when he has no basis upon which to determine if particular activity is statutorily prohibited. See Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Herndon v. Lowery, 301 U.S. 242, 261 (1937).


80 If a person does not know or suspect that secret files are being maintained, obviously he cannot be deterred by them. Generally, people will not be cognizant of specific details about how the police compile and use intelligence files, because the
police gather information by questioning personal acquaintances as opposed to merely examining public records, if the files are available to prospective employers instead of restricted only to police officials charged with preventing and controlling civil disorders, or if the political climate is one of violence and unrest rather than tranquility and amity.

Although the Supreme Court has been liberal in finding deterring effects, it has never held that collection and use of secret intelligence data, such as was done in *Anderson*, is per se unconstitutional. The threat of prosecution, however, has been found sufficient to deter the police do no publicize their investigative techniques, fearing that disclosure would impair the files’ effectiveness and that public awareness would result in their abolition. See Note, *Police Undercover Agents*, supra note 15, at 639. Although details about secret file systems may not be known by the community, an awareness of other police records and investigatory techniques is more widespread because of increased publicity and exposure of police tactics. See, e.g., *Kerner Comm’n Report*, supra note 17, at 487; *S. Dash, R. Schwartz & R. Knowlton, The Eavesdroppers* (1959). If the public knows only that secret files are maintained, but has no information regarding their use, scope, or limitations, the deterrent effect might be greater than if all the details of the files were revealed.

81 Deterrence in this context is not limited to the threat of penal sanctions, but also includes the threat of social sanctions. “Since every man is faced with the prospect of punishment . . . for visible deviation from patterned role-behavior, he has a vested interest in how he appears before others. If he can seem to be law-abiding and in conformity with manners and morals that prevail in his social milieu, he will be spared society’s sanctions.” Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROB. 307, 308 (1966). Deterrence based upon social disapproval or nonpenal sanctions, however, may not be as persuasive as criminal liability. In *Einborn v. Maus*, high school students and their parents sued to enjoin school officials from sending to all of the colleges to which the students had applied for admission a letter stating that they had worn armbands bearing the legend “Humanize Education” to school commencement exercises. The court denied the injunction because it “perceive[d] no threatened irreparable harm flowing from the proposed letter.” 300 F. Supp. 1169, 1171 (E.D. Pa. 1969). The court reasoned that “[s]chool officials have the right and . . . a duty to record and communicate true factual information about their students to institutions of higher learning, for the purpose of giving the latter an accurate and complete picture of applicants for admission.” Id. at 1171 (emphasis added).


83 See *Hoffa v. United States*, 385 U.S. 293, 311 (1966). *But cf*, *NLRB v. New England Upholstery Co.*, 268 F.2d 590 (1st Cir. 1959). Invoking the deterrence rationale, the court in *New England Upholstery* held that the surveillance by employers to learn about union activities is a violation of the National Labor Relations Act, even though the employees did not know that they were being watched. Furthermore, when an employer puts an employee in fear of being spied upon, regardless of whether he ever actually engages in such activity, he violates the National Labor Relations Act. *NLRB v. Clark Bros.*, 163 F.2d 373 (2d Cir. 1947); *NLRB v. Collins & Aikman Corp.*, 146 F.2d 454 (4th Cir. 1944).
free exercise of constitutional rights; thus, since "indirect 'discourage-
ments' undoubtedly have the same coercive effect upon the exercise
of First Amendment rights," protection is provided not only from
heavy-handed frontal attack, but also from subtle governmental inter-
ference. Nevertheless, the Court has not ruled that all state or local
actions posing a possibility of deterrence are impermissible; rather, it
has defined unconstitutionality in terms of a "chilling effect," such
as results from misuse of executive discretion, mandatory submission
of films to a censorship board before public showing, or required
statements by teachers declaring whether they have ever been mem-
bers of a communist organization. The Court, therefore, has employed
the principle of "chilling effect" in a number of circumstances to void
indirect governmental intrusions upon first amendment rights.

RECOMMENDATIONS

The state interest in preventing crime and maintaining civil order
perhaps justifies a centralized information gathering system, but only
to the extent that it serves the purpose for which it is established—riot

84 Dombrowski v. Pfister, 380 U.S. 479, 494 (1965); NAACP v. Button, 371 U.S. 415,
433 (1963). Plaintiffs in Anderson feared the possibility that the police might use the
information in the files for prosecution.

In addition, we feel obligated to point out that almost all information in
the State Police files someday might be used in connection with a
criminal prosecution. Information relating to incidents, some on the
surface completely innocuous, occurring over a period of time may be
introduced into evidence in a criminal proceeding, particularly one in-
volving a crime like conspiracy.

Defendant's Brief for Reconsideration at 10, Anderson v. Sills, 106 N.J. Super. 545,

85 American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950); cf. Osborn v.

86 Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); see Bates v.

87 The Court has never defined "chilling effect," using it rather as a conclusory term to denote unconstitutionality. "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitu-
tional rights. ... The question is not whether the chilling effect is "incidental" rather
than intentional; the question is whether that effect is unnecessary and therefore ex-

88 See Gregory v. City of Chicago, 394 U.S. 111, 120 (1969) (Black, J., concurring);
Cox v. Louisiana, 379 U.S. 536 (1965) (separate opinion); Dombrowski v. Pfister, 380
U.S. 479, 488, 494 (1965); A Quantity of Copies of Books v. Kansas, 378 U.S. 205


prevention and control. Such data, therefore, as credit information or draft status, which would appear unrelated to identification of a rioter or prediction of disorder, should be unacceptable subjects of inquiry. 91 In contrast, information such as personal description, driver’s license number, address, and participation in illegal activities during demonstrations usually would be appropriate for inclusion in a central file.

The methods of information gathering should conform to existing legal standards governing police investigatory practices. Although a police officer should be able to record activity at a demonstration or rally that is open to his plain view, 92 including the names of individuals he recognizes, he should be permitted to interrogate a participant only in accordance with the restrictions placed upon police investigative questioning, such as suggested by the Supreme Court in Terry v. Ohio. 93 If a police officer wishes to obtain any additional information, however, he must fulfill the traditional requirements of a constitutional search: probable cause to believe that a crime has been or is being committed 94 and except in exceptional circumstances, 95 a warrant issued upon an independent judicial determination of probable cause. 96

Furthermore, even information that constitutionally can be collected should be available only to those police officers charged with prevent-

91 Plaintiffs in Anderson questioned the relevance of “places frequented,” “parole/probation data,” “financial/credit status,” and “armed forces/draft status” to the handling of civil disorders. Brief for Plaintiffs, supra note 8, at 3.

92 See notes 56, 61 supra.

93 392 U.S. 1 (1968). In Terry, the Court held that even without probable cause for arrest, a policeman may stop an individual for questioning and frisk him for weapons. To prevent invoking this doctrine to justify harassment in police investigations, the Court required that “facts [be] available to the officer at the moment of the seizure or the search [that would] ‘warrant a man of reasonable caution in the belief that the action taken was appropriate.”’ Id. at 21-22. Thus, if a demonstrator wished to challenge a particular method of police questioning, the Terry test could serve as a guideline for determining its propriety; if the police technique is found “inappropriate,” a sanction could be imposed. See notes 99-101 infra and accompanying text.


ing and controlling civil disturbances. A policy that allows intelligence files to be scrutinized by potential employers, schools, relatives, or other law enforcement officers would be inconsistent with the purpose for which the files were compiled and thus be subject to constitutional attack.\footnote{See notes 49-55 supra and accompanying text.} If a court determines that the information was gathered and used lawfully, the police should be able to introduce it as evidence at any stage of the criminal process, subject to applicable rules of evidence. Likewise, discovery of a file’s contents should be permitted to defendants, who also should be able to use the information as evidence.

Finally, the files should be subject to unannounced, detailed inspections by an agency independent of the police.\footnote{Chief Justice Burger has questioned the lack of accountability of the police, denounced the exclusionary rule as ineffective, and proposed an “independent review body” to proscribe police abuses. See Burger, \textit{Who Will Watch the Watchman?}, 14 A.M. U. L. Rev. 1 (1964).} If such a “watchdog” agency should find evidence indicating that the police have been improperly gathering or using information in the files, a judicial hearing should be held to determine the propriety of the police conduct, and any file found improperly compiled or employed should be ordered destroyed.\footnote{Courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. Terry v. Ohio, 392 U.S. 1, 15 (1968).} Although the police sua sponte should destroy any file that no longer promotes a valid police purpose,\footnote{If, for example, files had been gathered because of the fear of civil disturbances in the District of Columbia in 1968 because of “Resurrection City,” they should have been destroyed after the “City’s” inhabitants had dispersed, since the possibility that the group would reassemble was remote.} such independent inspections could serve to insure that the police in fact are doing so. Since most of the information in the files would not be employed as evidence and therefore the exclusionary rule would not act to deter abuse,\footnote{Doubtless some police “field interrogation” conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be in securing convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights when the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal. Terry v. Ohio, 392 U.S. 1, 14 (1968); see note 93 supra and accompanying text.} strong safeguards would have to be implemented in order to guarantee that persons are not deterred unnecessarily from exercis-
ing first amendment freedoms because of police misconduct in the compilation and use of the files. The importance of public confidence in the propriety of such a police investigatory system cannot be overestimated. Citizens must know that their first amendment freedoms cannot be abridged by the unrestrained discretion of police administrators and that effective safeguards protect their individual rights. Only when such safeguards are instituted, should courts condone the use of secret files.\textsuperscript{102}

\textsuperscript{102} The \textit{Anderson} court perhaps would not have prohibited the use of secret files if there had been adequate safeguards to prevent abuse; however, "the directive in question and Forms 420 and 421 as used therewith, [were] violative of the First Amendment . . . in that they [overreached] in their attempt to achieve what is probably a legitimate governmental goal." 106 N.J. Super. at 556, 256 A.2d at 304.
SECTION 402(a)(23) OF THE 1967 SOCIAL SECURITY ACT AMENDMENTS: A FALSE HOPE?

Representing an attempt to compensate for the rising cost of living, the 1967 amendments\(^1\) to the Social Security Act of 1935,\(^2\) required that every state’s Aid to Families with Dependent Children (AFDC) plan\(^3\)

provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.\(^4\)

The proper meaning of this provision, section 402(a)(23), has given rise to considerable uncertainty as to whether it requires an actual dol-

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2. Ch. 531, 49 Stat. 620.

3. AFDC is designed to encourage:
   
the care of dependent children in their homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . .

42 U.S.C. § 601 (Supp. IV, 1969). The Supreme Court has construed the program as one “designed to meet need unmet by programs providing employment for breadwinners” and to protect “children in families without ‘breadwinner,’ ‘wage earner,’ or ‘father.’’’ King v. Smith, 392 U.S. 309, 328 (1968).

lar increase in the level of AFDC payments or whether it requires only that the amounts used to determine need—standard of need—be raised by a cost of living factor. Although this question has been con-

5 The "standard of need" is the amount each state defines as necessary for the subsistence of an individual within that particular state. This standard is subject to the federal requirements of 42 U.S.C. §§ 602-03 (Supp. IV, 1969). There is no prohibition against a state paying only a percentage of its standard of need, as many states do. See note 6 infra.

6 Although participation in the AFDC program is at the option of each state, all states and territories participate, 42 U.S.C. § 601 (Supp. IV, 1969). See generally U.S. Department of Health, Education, and Welfare, OAA and AFDC: Cost Standards for Basic Needs and Percent of Such Standards Met for Specified Types of Cases (National Center for Social Statistics Report D-2, July 1969) [hereinafter cited as NCSS Report]. The program is financed jointly by the federal government and each state on a matching fund basis, whereby federal funding is contingent upon the Secretary of Health, Education, and Welfare's approval of the state AFDC plan. 42 U.S.C. § 601 (Supp. IV, 1969). The state plans vary greatly, and subject to federal statutory guidelines, each state defines its own standard of need and pays whatever percentage of this standard it desires. Id. §§ 602-03; see King v. Smith, 392 U.S. 309, 318-19 (1968). The authority to reduce the percentage of the standard of need paid was never questioned prior to passage of the 1967 amendments.

According to recent figures, 20 participating states and territories pay 100% of their standard of basic needs for a family of four: Connecticut, District of Columbia, Guam, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin; four states—Maryland, North Dakota, South Dakota, and Virginia—pay more than 90% of their standard; seven—California, Colorado, Iowa, Kentucky, Montana, New Mexico, and Oklahoma—pay between 81 and 90%; four areas—Delaware, Oregon, Utah, and the Virgin Islands—pay 71-80%; four—Arizona, Georgia, Nebraska, and Wyoming—pay between 61 to 70%; eight—Arkansas, Florida, Indiana, Louisiana, Maine, Tennessee, Texas, and West Virginia—pay between 51 and 60%; four—Alaska, Missouri, Nevada, South Carolina—plus Puerto Rico, pay between 40 and 50%; Alabama pays 35% and Mississippi 30%. NCSS Report.

In addition, some states impose a ceiling on the amount of money that may be disbursed to any one family, regardless of the number of otherwise eligible recipients in the family. Thus, for example, although a state plan may allow $27 per month for each child, it may limit to $250 the total amount of AFDC benefits that the family can receive, even though the family's large size would make it otherwise eligible to receive more than the $250 maximum. Such a limitation on the amount of money any one family can receive, which is referred to as a "dollar maximum," recently has been attacked as being in violation of equal protection by discriminating against large families. See Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969); Dew v. Henry, 297 F. Supp. 587 (D. Ariz. 1969); Williams v. Danbridge, 297 F. Supp. 450 (D. Md. 1968), supplemental opinion filed, 297 F. Supp. 459 (D. Md.), prob. juris. noted, 396 U.S. 811 (1969). See generally Comment, Welfare Due Process: Maximum Grant Limitation on the Right to Survive, 2 Ga. L. Rev. 459 (1969). For statistical data on those states having maximums, see NCSS Report.

If a state's AFDC plan is administered in a manner prohibited by statute, the Secretary of Health, Education and Welfare, after complying with procedural safeguards, may discontinue payments to the state or limit payments to specified categories. 42 U.S.C. § 604 (Supp. IV, 1969), amending 42 U.S.C. § 604 (1964).
sidered by the federal courts in at least three jurisdictions, the provision's interpretive uncertainty has yet to be resolved.

CASE LAW BACKGROUND

In response to the enactment of section 402(a)(23), the Louisiana Department of Public Welfare increased the standard of need 20 percent. Shortly thereafter, however, it abolished the system of "family maximums" and instituted a "ratable reduction" of 42.13 percent against each family's "budgetary deficit," thus actually reducing the amount each AFDC participant received. Subsequently, in Lampton v. Bonin (Lampton II), several Louisiana AFDC recipients sought an injunction against any reduction in payments, in part alleging that such a reduction violated section 402(a)(23). In Lampton II, the Eastern District of Louisiana held that an increase in the actual level of AFDC payments was not required by section 402(a)(23), and therefore the state's action did not violate the federal statute.

Attempting similarly to comply with section 402(a)(23), Texas increased its AFDC standard of need 11 percent, but by simultaneously abolishing dollar maximums and reducing payments to only 50 percent

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8 See Resolution of the Louisiana State Board of Public Welfare, June 26, 1969 (copy on file at the Georgetown Law Journal). A "maximum" is a limitation upon the amount of money one family can receive. See note 6 supra.

9 See Resolution of the Louisiana State Board of Public Welfare, June 26, 1969 (copy on file at the Georgetown Law Journal). A "ratable reduction" is a decrease in the percentage of need that the state pays.

10 Lampton v. Bonin (Lampton II), 304 F. Supp. 1384, 1386 (E.D. La.), petition for cert. filed, No. 1,112 Misc. (U.S. Oct. 16, 1969). "Budgetary deficit" is the dollar difference, as determined by the state, between a family's need and its income. Id. at 1385 n.2.

11 Id. at 1386. As an example, assume a family has an income of $100 per month and the state's standard of need for a family its size is $150 per month. The family's budgetary deficit in this instance is $50, and if the state paid 100% of the budgetary deficit the family would receive $50. A 20 percent increase in the standard of need would raise the standard to $180 and the family's budgetary deficit would rise to $80 as long as the $100 per month income had remained constant. If the state were to institute a ratable reduction of 42.13 percent against each family's budgetary deficit the payments to the family would drop to $46.26 per month.

12 304 F. Supp. 1384 (E.D. La.), petition for cert. filed, No. 1,112 Misc. (U.S. Oct. 16, 1969). A suit for declaratory judgment had been brought prior to July 1, 1969, but the arguments concerning Louisiana's responsibilities under section 402(a)(23) were dismissed as premature since the states were not required to comply with the section before July 1, 1969. Lampton v. Bonin (Lampton I), 299 F. Supp. 336 (E.D. La. 1969).

13 304 F. Supp. at 1388.
of the new standard of need, AFDC payments in fact were reduced.14 Unlike the Eastern District of Louisiana, however, in Jefferson v. Hackney15 the Northern District of Texas, by a per curiam decision, held that the state had violated 402(a)(23) and enjoined the Texas Department of Public Welfare from implementing the reduction order.16 The court further enjoined Texas from receiving any federal funds for its AFDC program until it met the requirements of section 402(a)(23) as interpreted by the court.17

14 See Office Memoranda from Burton G. Hackney, Commissioner, Texas Department of Public Welfare, to all Field Staff, E-430, Feb. 28, 1969, and E-434, Mar. 13, 1969 (copies on file at the Georgetown Law Journal). If the state paid 100 percent of a standard of need of $150 per month, a family eligible for this particular need level would receive the entire $150 per month, assuming it had no other income. An 11 percent increase in the standard would raise the level of payments to $166.50, but if there was a family maximum of $100 per month on the amount any one family could receive regardless of its income or number of recipients, then the family could receive only $100. Abolishing family maximums and making a ratable reduction to 50 percent of the standard of need would make the family eligible for $88.25 per month. A larger family eligible to receive over $100 per month despite the reduction in the standard of need would now be able to receive its entire eligibility since the family maximum of $100 per month had been lifted.

15 304 F. Supp. 1332 (N.D. Tex.), appeal docketed, No. 1,345 Misc. (U.S. Nov. 28, 1969). The plaintiffs received the relief sought in the pleadings, but appealed from the Sept. 26, 1969 order of the court, which denied the plaintiffs' request to amend the court judgment to give AFDC recipients retroactive relief from the date of the initial reduction in payments. The plaintiffs' theory is that equal protection has been violated, since AFDC was the only Social Security Act program cut by the Texas Department of Public Welfare.

16 Id. at 1346.

17 Judgment of the Court at 2, Jefferson v. Hackney, 304 F. Supp. 1332 (N.D. Tex.), appeal docketed, No. 1,345 Misc. (U.S. Nov. 28, 1969). The Texas constitution had imposed an annual limitation of $60 million on state funds used for Old Age Assistance, Aid to the Permanently and Totally Disabled, Aid to the Blind, and Aid to Families with Dependent Children. Tex. Const. art. 3, § 51(a) (1965). This section of the constitution, however, was amended on Aug. 5, 1969, raising the ceiling to $80 million. Tex. Const. art. 3, § 51(a). Thus, Texas was enabled to satisfy the judgment in Jefferson, execution of which had been delayed for 60 days pending the outcome of the referendum. Subsequently, on Sept. 1, 1969, AFDC payments were increased from 50% to 75% of the standard of need. Memorandum from Burton G. Hackney, Commissioner, Texas Department of Public Welfare, to all Field Staff, E-450, Aug. 13, 1969 (copy on file at the Georgetown Law Journal).

Despite the holding of the court in Jefferson, the Texas Public Welfare Commission recently voted to make a ratable reduction in AFDC payments to 66 percent of budgeted need, in addition to reducing Medicaid payments. The cut was to be effective Apr. 1, 1970 and came as the result of cost overruns in the Medicaid program. The higher costs were bringing the level of welfare payments close to the constitutional ceiling of $80 million on welfare payments. Wall Street Journal, Feb. 10, 1970, at 12, col. 4. The Governor of Texas has since taken action to avoid making the reductions, at least temporarily, by shifting $13.5 million from new medical school appropriations into the state welfare fund. Washington Post, Feb. 22, 1970, § F, at 24, col. 4.
New York’s response to the 1967 amendments, which was challenged in *Rosado v. Wyman*, involved a slightly different factual situation. By consolidating its recipient categories, New York changed its

18 414 F.2d 170 (2d Cir.), *cert. granted*, 396 U.S. 815, *rev’d* 304 F. Supp. 1356 (E.D.N.Y. 1969). Oral argument was heard by the Supreme Court on Nov. 19, 1969. Argument focused on the questions of whether HEW should have ruled on the conformity of New York’s method of determining standard of need to section 402(a)(23) and whether New York had lowered its standard of need in the consolidation process.

The *Rosado* plaintiffs first sought to have the new AFDC disbursement section of the New York Social Services Law declared invalid on the ground that the statute violated both the equal protection clause of the fourteenth amendment and HEW regulations. See N.Y. Soc. Services Law § 131-a (McKinney Supp. 1969); note 19 infra. The basis of the action was that Nassau County AFDC recipients were to receive less under the new law than New York City recipients, even though the cost of living was at least as high in Nassau County. See *Rosado v. Wyman*, 304 F. Supp. 1350, 1352 (E.D.N.Y. 1969). The court held that a three-judge court should be convened to hear the equal protection question and also the attendant cost-of-living increase requirement issue. A temporary restraining order to halt implementation of section 131-a was issued. *Id.* at 1353.

The three-judge court in a per curiam memorandum and order held the constitutional issue moot and ordered the court dissolved. The dissolution was necessary because of an amendment to section 131-a allowing the State Commissioner of Social Services to make AFDC payments in accordance with cost-of-living differences. Recipients in Nassau County would no longer be discriminated against under the amended law. The case was remanded to the original single judge. *Rosado v. Wyman*, 304 F. Supp. 1354 (E.D.N.Y.) (three judge court), *aff’d*, 414 F.2d 170 (2d Cir.), *cert. granted*, 396 U.S. 815 (1969).


The Second Circuit Court of Appeals reversed the single judge court order granting summary judgment, vacated the injunctions, and affirmed the order of the three-judge court dissolving itself. This action was based on findings by the court that the district court lacked jurisdiction and that New York had not violated section 402(a)(23). Judge Feinberg dissented. *Rosado v. Wyman*, 414 F.2d 170 (2d Cir.), *cert. granted*, 396 U.S. 815 (1969).

19 See N.Y. Soc. Services Law § 131-a (McKinney Supp. 1969). New York changed its system of calculating a family’s need from an examination of each family’s individual needs to a computation based simply on the size of the family. See Brief for Respondents at 44, *Rosado v. Wyman*, 396 U.S. 815, *granting cert. to* 414 F.2d 170 (2d Cir. 1969). Lowering the standard of need by consolidating the items used in its determination is clearly prohibited by HEW’s interpretation of section 402(a)(23): “In such adjustment a consolidation of the standard (i.e., combining of items) may
method of determining the AFDC standard of need, but continued to pay 100 percent of the standard. The AFDC issue presented to the court, therefore, was whether New York in fact had reduced its standard of need as a result of the consolidation, and if it had, whether such action was consistent with the requirements of section 402(a)(23). In disposing of Rosado, the Second Circuit held that the only requirement section 402(a)(23) imposed was that the state must adjust its standard of need to reflect increases in the cost of living, and hence New York was free to lower the level of AFDC payments. The court failed, however, to make the important factual determination of whether the consolidation had this result.

These three decisions still leave unresolved and inadequately explained the proper interpretation of section 402(a)(23)—whether Congress intended an actual money increase in AFDC payments or whether the language in section 402(a)(23) is merely legislative window dressing, giving only the appearance of an increase. Furthermore, instinct in this controversy is a fundamental policy consideration regarding the American welfare system: the degree to which the states should be forced to shoulder the burden of increased public assistance payments, when in most states the present level of assistance provides,

not result in a reduction in the content of the standard.” 34 Fed. Reg. 1394 (1969). Although HEW is charged with administration of the Social Security Act, it thus far has declined to determine whether New York in fact has lowered its standard of need. Brief of United States as Amicus Curiae at 1, Rosado v. Wyman, 396 U.S. 815, granting cert. to 414 F.2d 170 (2d Cir. 1969).


21 414 F.2d at 180.

22 The average monthly number of families receiving AFDC payments increased from 644,000 in 1950 to 788,700 in 1960, only a 22% increase; as of February 1969, the number of families had increased to 1,591,000, a gain of more than 50% since 1960. U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE AND THE NEW YORK STATE DEPT. OF SOCIAL SERVICES, REPORT OF FINDING OF SPECIAL REVIEW OF AID TO FAMILIES WITH DEPENDENT CHILDREN IN NEW YORK CITY TO HOUSE COMMITTEE ON WAYS AND MEANS, 91st Cong., 1st Sess. 2 (Comm. Print 1969) (hereinafter cited as New York Study). Furthermore, recent Supreme Court decisions liberalizing AFDC eligibility requirements have resulted in additional recipients. See Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating residency requirement); King v. Smith, 392 U.S. 309 (1968) (invalidating “substitute father” regulation).

The increasing size of the AFDC program has been a matter of concern to many members of Congress, who have reflected this concern in attempts to reduce the size of the program. See, e.g., 113 Cong. Rec. 32,592-93 (1967) (remarks of Senator Long). In fact, a section of the 1967 amendments, which was repealed in 1969, placed a “freeze” on the number of AFDC recipients for whom federal financial participation would be provided to the extent that the number of recipients exceeded the proportion of such recipients to the total under-18 population of any state in the first quarter of 1968. Act of Jan. 2, 1968, Pub. L. No. 90-248, tit. II, § 208, 81 Stat. 894 (repealed 1969).
at most, little more than a bare subsistence. An examination of the Louisiana, Texas, and New York decisions reveals that they were based primarily upon a mixture of traditional welfare policy, the Department of Health, Education, and Welfare's (HEW) interpretation of section 402(a)(23), and legislative history. A closer analysis of these considerations, therefore, should aid in better understanding the proper import of this provision of the 1967 Social Security Act Amendments.

INTERPRETING THE PURPOSE OF SECTION 402(a)(23)

NO REQUIRED INCREASE

Because discretion to establish both standards of need and levels of benefits resides in the states, the Lampton II court concluded that requiring the states to raise their actual payments would be a "striking exception" to the normal procedure by which the AFDC program is operated; unless explicit showing of congressional intent could be found, the court felt that it could not depart from the established principle of state control. Speaking for the Lampton II court, therefore, Judge Wisdom considered the absence of congressional debate over section 402(a)(23) inconsistent with an intent to impose such new requirements upon the states. As further evidence that Congress

In addition, the high illegitimacy rate among AFDC recipients and the feeling that in some manner AFDC assistance encourages and rewards promiscuity also have fostered congressional criticism, and the congressional debates on the 1967 amendments indicate that some of the changes in the AFDC program were designed to mitigate this problem. See, e.g., 113 Cong. Rec. 23,051-55 (1967) (remarks of Congressman Mills). One provision of the 1967 amendments authorizes the Secretary of HEW to make grants to any state health agency and to any other public or nonprofit private agency, institution, or organization for the establishment of family planning services. 42 U.S.C. § 708 (Supp. IV, 1969).

Presently, the level of assistance paid by most states is clearly inadequate. The Bureau of the Census considers an income of $3,335 per year ($278 per month) as the poverty level for a nonfarm family of four and $4,345 per year ($362 per month) as the "near poverty" level. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 328 (table 483) (1969). Only six states—Massachusetts, Minnesota, New Jersey, New York, Rhode Island, and Washington—provide sufficient AFDC payments to elevate a family of four above the poverty level as defined by the Bureau of the Census. NCSS REPORT, supra note 6. For a general discussion of the problems of the poor, the programs currently available to assist them, and recommendations for additional assistance, see PREZIDENT'S COMM'N ON INCOME MAINTENANCE PROGRAMS, POVERTY AMID PLENTY: THE AMERICAN PARADOX (1969).

25 See note 6 supra.
26 304 F. Supp. at 1389-90.
27 Id. at 1387. Section 402(a)(23) went unmentioned in two congressional publica-
did not intend an increase in actual money payments, Judge Wisdom noted not only the defeat of an amendment introduced by Senator McGovern, which would have required a $4 per month increase in AFDC payments, but also the conference committee’s cost estimates of the Social Security Amendments, which did not reflect any required expenditures for section 402(a)(23).

As originally proposed, section 402(a)(23) would have required the states to update standards of need annually and to meet them in full; the final version of section 402(a)(23), however, required only one standard of need cost-of-living adjustment and made no provision that it be fully paid. To the Lampton II court, this difference clearly indicated that Congress did not intend to require the states to make full standard of need payments. Furthermore, the court pointed out that notwithstanding such an interpretation, section 402(a)(23) still would serve a significant purpose. Since an adjustment upward in


30 304 F. Supp. at 1389. Senator McGovern’s proposed amendment was debated briefly on the Senate floor, with only two Senators responding to it. Senator Long of Louisiana pointed out the large expenditures such an amendment would require and Senator Kennedy of New York expressed displeasure over the Senate’s failure to carefully consider it. 113 Cong. Rec. 33,559-60 (1967).


30 This proposal would have required each state to “meet the full need of eligible individuals [receiving AFDC benefits] as determined under the State’s standards ... which would] be reviewed annually and to the extent required by the Secretary updated to take account of cost of living increases.” H.R. 5710, § 202, 90th Cong., 1st Sess. (1967).


32 304 F. Supp. at 1388. As noted in the Brief for the State of New York before the Supreme Court, the difference in the proposals was illustrated dramatically by the senate vote. The original proposal was carried over the objections of Senators Bennett, Curtis, Holland, Stennis, Thurmond, and Williams of Delaware. The final version adopted following conference committee alterations was approved by all except Senators Brooke, Case, Harris, Hart, Javits, Kennedy of Massachusetts, Kennedy of New York, Mercal, Mondale, Nelson, Proxmire, Tydings, Williams of New Jersey, and Yarborough. “The disparity between these rosters speaks volumes.” Brief for Respondents at 49, Rosado v. Wyman, 396 U.S. 815, granting cert. to 414 F.2d 170 (1969).

33 304 F. Supp. at 1389. But see text accompanying note 61 infra.
the standard of need would not only increase the number of persons eligible for welfare payments, but also increase the number who would receive those welfare services that accompany AFDC eligibility, such as family counseling and work incentives, the standard of need adjustment would serve "to cut down in the long run the numbers dependent on welfare [payments]." The Lampton II court also relied upon the HEW regulation implementing section 402(a)(23), which provided that "[i]n the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions . . . ." Because HEW is the federal agency charged with the administration of the AFDC program, its interpretation was given considerable weight by the court.

Additional support for the Lampton II interpretation was provided in Rosado v. Wyman, in which the Second Circuit refused to require that New York raise its level of actual payments. As in Lampton II, Rosado specifically cited legislative history to illustrate the paucity of consideration given to section 402(a)(23) by Congress. Moreover, the court compared the language in the House-Senate conference committee's report relating to the section 402(a)(23) AFDC proposal with that relating to non-AFDC welfare proposals and found the difference significant. The part of the report relating to other types

38 Id. at 179.
of welfare assistance, which immediately preceded the section 402(a) (23) discussion, noted that each state would be required "to adjust its standard for determining need, the extent of its aid or assistance, and the amount of aid or assistance payable."\(^{40}\) The failure of section 402(a) (23) to require a similar adjustment indicated to the court not only that compulsory adjustment of AFDC payments had not been intended, but that such a requirement specifically had been excluded, since the original proposal to Congress had included mandatory amount payments.\(^{41}\) Speaking for the majority in *Rosado*, Judge Hays interpreted this movement by Congress away from the language of the original proposal as a manifestation of an intent to reject the imposition of federal requirements upon the states' determination of the actual amount of payments, an intent consistent with the traditional policy of state control.\(^{42}\)

While *Lampton I*\(^{43}\) and *Lampton II*,\(^{44}\) as well as *Jefferson v. Hackney*,\(^{45}\) dealt with a ratable reduction of actual payments, *Rosado* involved an alleged reduction in the standard of need itself. Prior to 1969, New York had provided a "personalized" welfare system, which took into account certain special and nonrecurring needs of individual families by basing the amount of AFDC payments distributed upon the age of the oldest child in each family receiving assistance.\(^{46}\) On March 30, 1969, however, the welfare laws were amended, replacing the "personalized" approach with a new family assistance schedule, which allocated standard, predetermined sums based upon family size.\(^{47}\) Although the district court found that the statute as amended resulted in "a reduction of . . . standards of need and levels of benefits,"\(^{48}\) and

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\(^{41}\) *See* notes 30-32 *supra* and accompanying text.

\(^{42}\) 414 F.2d at 179. The arguments in *Lampton II* and *Rosado* are persuasive. It is possible that Congress enacted a statute substantially altering the federal-state relationship in a long-standing and controversial program with neither serious debate nor a clear manifestation of such an intent; this interpretation, however, cannot be reconciled with the language of other welfare provisions and the difference in language between the original proposal and the proposal finally enacted. *See* note 32 *supra* and accompanying text.


\(^{46}\) *See New York Study, supra* note 6, at 8-10.


thus enjoined its operation, on appeal the circuit court reversed this decision, both on jurisdictional grounds and on the merits. The circuit court found that since the only requisite of section 402(a)(23) was that between its effective date and the July 1, 1969, deadline the standard of need had to have been adjusted to reflect the cost of living, and since the standardized sums of aid provided for in the new payment schedule were computed from prices as of a date within this period, the state had complied with section 402(a)(23).

MANDATORY PAYMENT INCREASE

Rosado, Lampton I, and Lampton II had vigorous dissents contending that the purpose of section 402(a)(23) was clear on its face and that it required a mandatory upward adjustment in actual AFDC payments. Dissenting in Lampton II, Judge Cassidy reasoned that

49 Id. at 1380. Plaintiffs in the district court also claimed that the difference in payments received by residents of Nassau County and those of New York City constituted a denial of equal protection as guaranteed by the fourteenth amendment. Rosado v. Wyman, 304 F. Supp. 1350, 1352 (E.D.N.Y. 1969). Since the New York welfare laws recently had been amended, permitting the Commissioner of Social Services to increase payments outside of New York City, a specially convened three-judge district court held that the equal protection question was not ripe for adjudication. Rosado v. Wyman, 304 F. Supp. 1354, 1356 (E.D.N.Y.), rev'd, 414 F.2d 170 (2d Cir.), cert. granted, 396 U.S. 815 (1969). Without deciding whether it had jurisdiction to hear the statutory claim, the three-judge panel remanded the case to Judge Weinstein of the district court, before whom the case originally had been presented. Id.

50 Speaking for the court, Judge Hays ruled that since the single-judge district court did not have jurisdiction over the constitutional claim to which the statutory claim was pendent, it could not invoke the doctrine of pendent jurisdiction in order to decide the statutory issue. Rosado v. Wyman, 414 F.2d 170, 176 (2d Cir.), cert. granted, 396 U.S. 815 (1969). He further held that the district court did not obtain independent jurisdiction on the basis of a federal question involving more than $10,000, because none of the claims for damages met the required amount. Id. at 176; see 28 U.S.C. § 1331 (1964). Since "indirect damage" was too speculative to permit jurisdiction under § 1331, Judge Hays overturned the district court's ruling that in order to satisfy the necessary sum, plaintiffs could claim any "indirect damage" they might sustain as a result of the smaller AFDC payments. Finally, Judge Hays rejected the plaintiffs' contention that they had a cause of action based upon a violation of their civil rights that would confer jurisdiction. 414 F.2d at 177-78; see 28 U.S.C. § 1343(3) (1964); 42 U.S.C. § 1983 (1964). Judge Hays also noted that even if jurisdiction had existed, it would have been an abuse of discretion for the district court to hear the case; since at the time HEW was in the process of examining the legality of the New York statute, the court first should have waited for a department ruling. 414 F.2d at 176. For a discussion of jurisdictional aspects of Rosado, see 38 Geo. Wash. L. Rev. 310 (1969).

51 414 F.2d at 180.

any increase in the standard of need necessarily requires an increase in actual payments. This conclusion rested upon the premise that the percentage of need paid by the state would remain constant, and Judge Cassibry argued that by requiring "any maximums [to be] proportionately adjusted" according to the increased cost of living, the second phrase of section 402(a)(23) precluded a decrease in AFDC payments effected through a ratable reduction. Because the amount of money a family receives depends directly upon the percentage of need paid, Judge Cassibry concluded that a percentage reduction would lower the maximum amount of aid received by a family as effectively as a dollar maximum. Thus, by referring to "any maximums," section 402(a)(23) also proscribed percentage reductions. Although the majority in Lampton II conceded that a percentage reduction translated into a money limitation, it accepted HEW's position that "maximums" is a term of art relating only to dollar maximums and found the second clause of section 402(a)(23) inapplicable to percentage reductions.

Judge Cassibry likewise rejected the majority's argument that a possible purpose of section 402(a)(23) was to increase the number of persons receiving nonmonetary AFDC benefits through an expansion of the program's eligibility rolls. Since the legislation embodying section 402(a)(23) also put a limitation on federal matching funds by tightening state eligibility standards and prohibiting increases in the number of AFDC recipients, Judge Cassibry concluded that it would have been contradictory for Congress to enact simultaneously a measure designed to increase eligibility rolls. This reason-

Lampton v. Bonin, 299 F. Supp. 336, 350 (E.D. La. 1969) (Cassibry, J., dissenting). Judge Cassibry had argued in his dissent to Lampton I that despite any language changes, the basic purpose of § 402(a)(23) was to require increased AFDC payments. 299 F. Supp. at 350.


54 42 U.S.C. § 602(a)(23) (Supp. IV, 1969); see text accompanying note 4 supra.

55 The adjustment in maximums was to be proportional to the adjustment in the standards of need. This view was a reversal from Judge Cassibry's position in the Lampton I decision; he attributed the change to further reflection and the persuasive opinion of Judge Weinstein in Rosado. 304 F. Supp. at 1389 (dissenting opinion).

56 Id. at 1398-99 (dissenting opinion).

57 Id. at 1388; see Brief for HEW as Amicus Curiae at 23-24, Lampton v. Bonin (Lampton I), 299 F. Supp. 336 (E.D. La. 1969).

58 304 F. Supp. at 1388.

59 Id. at 1391 (dissenting opinion).


61 304 F. Supp. at 1391-92 (dissenting opinion). Judge Cassibry briefly explained his
ing, however, is double-edged; such a limitation on matching funds also suggests that it would be inconsistent for Congress to enact simultaneously section 402(a)(23) with the purpose of increasing the amount of money spent on the AFDC program. Nevertheless, Judge Cassibry argued that the combined purposes of reducing eligibility rolls by limiting matching funds and spending more money on those already eligible for assistance were compatible goals.\[62\]

Dissenting in Rosado, Judge Feinberg agreed with the district court’s finding that New York in fact had reduced its standard of need in violation of section 402(a)(23).\[63\] Although expressing agreement with the holding in Jefferson v. Hackney\[64\] and the dissent in the initial Lampton v. Bonin (Lampton I)\[65\] decision, Judge Feinberg distinguished these two cases from Rosado, since he felt that New York had directly reduced its standard of need, whereas Texas and Louisiana had used percentage reductions to lower their level of payments.\[66\] Judge Feinberg maintained that even if an indirect system of reducing payments, such as a percentage reduction, were considered permissible under section 402(a)(23), the New York statute would still be invalid, for it “[had] done the one thing that section 402(a)(23)

reasons for rejecting the argument that other parts of § 402(a)(23) might have been intended to encourage a more equitable distribution of welfare funds or simply to highlight the difference between need and payments. Although he attributed the proposal of both of these possible purposes to the majority opinion, it appears he confused the majority opinion and HEW’s amicus curiae brief, since the majority did not argue that a principal purpose of § 402(a)(23) was to encourage the elimination of maximums. In discussing this argument, Judge Cassibry first directed himself to the contention that one of the goals of § 402(a)(23) was a more equitable distribution of welfare funds through elimination of dollar maximums. He maintained that no support for such a purpose existed in the section’s legislative history, and if elimination of maximums was a purpose, Congress would not have “so clouded its intent” but instead would have expressly abolished them. 304 F. Supp. at 1392 (dissenting opinion). Furthermore, he argued, since the 1967 Social Security Act Amendments were a series of single purpose provisions, a combined goal—the elimination of maximums and the expansion of eligibility rolls—would not be a proper construction of § 402(a)(23). Id. at 1392. In response to the contention that § 402(a)(23) served a useful purpose by highlighting the disparity between need and actual AFDC payments, Judge Cassibry cited the 18 months given the states to adjust their standards as an indication that the section had a more substantive function to perform than the mere spotlighting of a problem needing no further exposure.

\[62\] 299 F. Supp. at 355 (dissenting opinion).


\[66\] HEW has not decided whether it considers the New York statute as reducing the standard of need or as simply streamlining the standard in order to promote greater efficiency in administration of the AFDC program. See note 19 supra.
[was] undeniably designed to prevent;” 67 it had reduced the standard of need. The dissents in Lampton I, Lampton II, and Rosado served as the basis for the holding in Jefferson that section 402(a)(23) did require increased AFDC payments. 68 Although Jefferson did not explore in detail the issues discussed in the two earlier cases, it did respond to Judge Wisdom’s argument in Lampton that Congress had not contemplated section 402(a)(23) would have a “great cost effect.” 69 The Jefferson court was not persuaded by the failure of the conference committee’s report to contain estimated expenses for section 402(a)(23). Because the states were given 18 months within which to adjust their standards of need, it would have been impossible to formulate a realistic projection of required expenditures, and it was unlikely that the authors of the payment table would have been willing to “indulge in fiscal prescience.” 70 Furthermore, in a significant departure from the deference given HEW in Rosado and Lampton II, the court in Jefferson found that the Department had misinterpreted section 402(a)(23) and, therefore, its regulation could not be relied upon by the state. 71 The Jefferson court reached the conclusion that Congress would not enact such meaningless legislation. 72

EQUAL PROTECTION AND THE CIVIL RIGHTS ACT

Plaintiffs in both Lampton I and Jefferson argued that the state’s action in reducing AFDC benefit payments was a denial of equal protection in violation of the fourteenth amendment. 73 Although neither claim was successful, the widespread reliance upon equal protection in poverty law 74 necessitates an examination of the applicability of equal protection in AFDC reductions.

67 414 F.2d at 191 (dissenting opinion).
70 Id. at 1345.
71 Id. at 1344.
72 Id.
The basis for the equal protection argument is that because the four federal matching fund programs have the common purpose of alleviating need, any arbitrary funding reduction in one program without commensurate reductions in the others constitutes an unreasonable discrimination against that program’s recipients and thus is violative of equal protection. The courts in both the Jefferson and Lampton I decisions responded to this claim by finding that the four programs do not have a common purpose. While Old Age Assistance, Aid to the Partially and Totally Disabled, and Aid to the Blind were intended to furnish financial assistance in order to meet basic needs, such as helping recipients attain or retain the ability to care for themselves, the AFDC program was not designed to fulfill such a need, but simply to encourage raising children in a family atmosphere. Furthermore, the Lampton I court ruled that plaintiffs had failed to show that the reduction in AFDC payments was arbitrary and without a rational foundation.

Plaintiffs in Jefferson also advanced the argument that in testing the

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80 Id. at 1336; Lampton v. Bonin (Lampton I), 299 F. Supp. 336, 340 (E.D. La. 1969). The Lampton I court distinguished the purpose of the AFDC program on the basis of the legislation establishing the program; appropriations are authorized “[f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives . . . to help maintain and strengthen family life . . .” Lampton v. Bonin (Lampton I), supra at 340, quoting 42 U.S.C. § 601 (Supp. IV, 1969).

Both the Lampton I and Jefferson courts suggested that raising a child in a family atmosphere with his parents or relatives is not a basic need; this conclusion, however, seems tenuous in light of the importance sociologists place upon it. The emotional injury due to a lack of a family atmosphere can be severe, and in the ghetto, where many children are fatherless, the importance of the mother’s presence is magnified and easily can be considered a basic need. Cf. President’s Comm’n on Income Maintenance Programs, Poverty Amid Plenty: The American Paradox 124 (1969).

validity of a reduction in AFDC payments, the stricter compelling state interest standard of equal protection should be applied. Plaintiffs based their argument on the premise that a constitutionally protected right had been violated—the right to welfare; the court, however, held there was no such constitutional right and hence the "compelling interest" standard was inapplicable.

Since the AFDC programs in both Texas and Louisiana had a greater proportion of Negro participants than the three other federal assistance programs, plaintiffs in Jefferson and Lampton I further contended that the reduction in payments was a violation of the Civil Rights Act of 1964, which prohibits racial discrimination in any program or activity receiving federal financial assistance. Again rejecting plain-


83 Plaintiff's Memorandum, supra note 76, at 43.

84 304 F. Supp. at 1336. In Sweeney v. State Bd. of Public Assistance, a federal district court held that public welfare is not a property right, but a gratuity from the state. 36 F. Supp. 171 (M.D. Pa. 1940), aff'd mem., 119 F.2d 1023 (3d Cir.), cert. denied, 314 U.S. 611 (1941). The court in Jefferson noted that plaintiffs did not dispute the Sweeney holding. 304 F. Supp. at 1335. Nevertheless, plaintiffs did state that "[w]elfare assistance . . . is surely as basic [a right] as anything hitherto considered." Plaintiff's Memorandum 43.

Although plaintiffs contended there is a constitutional right to welfare assistance, most of their argument was directed to the proposition that there is a right to live. See Plaintiff's Memorandum 42-44. This distinction, which plaintiffs failed to make, is important. There is something of a recognized right to live: "[n]o person . . . shall be deprived of life . . . without due process of law." U.S. Const. amend. V. There is, however, no constitutional right to have a state provide the means necessary to sustain life—a right to welfare. Plaintiffs in Jefferson were not being deprived of the right to live, but of an unrecognized right to welfare. Although no court has ever found a right to welfare, there is growing support for such a theory. See Graham, Public Assistance: The Right to Receive, the Obligation to Repay, 43 N.Y.U. L. Rev. 451 (1968); Harvith, Federal Equal Protection and Welfare Assistance, 31 Albany L. Rev. 210 (1967).

85 304 F. Supp. at 1336.

86 In Louisiana, 80% of those receiving AFDC payments were Negroes, while only 61% of Aid to the Blind recipients were Negro. See Lampton v. Bonin (Lampton I), 299 F. Supp. 336, 343 (E.D. La. 1969). In Texas, 78% of those receiving AFDC payments were nonwhite, whereas 56% of those in the Aid to the Blind program were nonwhite. See Jefferson v. Hackney, 304 F. Supp. 1332, 1339 (N.D. Tex.), appeal docketed, No. 1,345 Misc. (U.S. Nov. 28, 1969).

87 "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to
tiffs' claim, the Lampton I court held the greater percentage of Negroes in the AFDC program was insufficient in itself to show racial discrimination in the reduction, since there was still a significant proportion of Negroes in the other assistance programs and grants to these programs had not been cut.

Faced with the same argument, the Jefferson court also ruled that the reduction in AFDC payments was not racially discriminatory, basing its determination upon several factors. First, because this was the only time the legislature had ever reduced AFDC payments and because state AFDC appropriations had been increased 410 percent since 1943, as compared to increases of 211 percent for Old Age Assistance and 200 percent for Aid to the Blind, the court could find no pattern of racial discrimination. Second, the court noted that the Texas legislature had approved an appropriation to pay 100 percent of need in all categories of welfare assistance if a constitutional amendment that would revise upward the limitation on welfare appropriations was approved. Finally, the court considered the depositions taken of state welfare officials to have established conclusively that prior to or at the time the AFDC reductions were ordered, the welfare department officials were ignorant of the racial makeup of the various assistance categories, thus implying that under the Civil Rights Act, intent is a necessary element of racial discrimination.

Conclusion

Interpreting section 402(a)(23) to require an actual increase in discrimination under any program or activity receiving Federal financial assistance."  
88 299 F. Supp. at 343-44.
89 Id. at 344; see note 86 supra.
90 299 F. Supp. at 344.
92 Id. at 1340. The court's conclusion is based upon questionable factual data. Its use of the rise in program appropriations rather than a rise in the actual level of individual payments makes it difficult to ascertain whether the increased expenditures evidence a lack of discrimination in the AFDC reduction, or whether a disproportionate increase in the number of AFDC recipients necessitated a greater increase in expenditures simply to maintain the level of payments.
93 Id. The legislature's appropriation of sufficient funds to pay 100 percent of need did not necessarily indicate a nondiscriminatory motive for the assistance reduction. In effect, all the legislature did was make up its previous cut in the level of AFDC payments and add on the statutorily required cost of living increase. See generally Office Memorandum from Burton G. Hackney, Commissioner, Texas Department of Public Welfare, to All Field Staff, E-456, Sept. 4, 1969 (copy on file at the Georgetown Law Journal).
94 304 F. Supp. at 1340.
money payments as was done in Jefferson is not persuasive. Congress’ apparent rejection of the original AFDC proposal and the Senate’s defeat of efforts to strengthen the House version of section 402(a)(23) suggest a congressional mood that is difficult to reconcile with an intent to impose new and costly welfare assistance measures. Moreover, it is unrealistic to believe that Congress would change the state control structure of the AFDC program without a serious and prolonged debate. While the need for more adequate assistance programs is manifest, section 402(a)(23) simply does not provide an improvement by way of increased AFDC payments. Despite such a conclusion, however, equal protection may still present an avenue for revision of welfare practices. Although rejected in Lampton I and Jefferson, claims based upon the fourteenth amendment will likely continue in an attempt to gain more adequate funds for AFDC.

95 See note 32 supra.
96 See note 6 supra.
97 The Nixon administration has submitted a bill to Congress that would replace the current AFDC system with a new program of family assistance. Among its most significant aspects are (1) a federal guaranteed income to every family, (2) an improved work incentive program, whereby AFDC recipients would be allowed to earn a certain amount of money without a reduction of welfare benefits, (3) a system of training centers, and (4) establishment of day care centers for children whose mothers wish to seek employment. See S.2486, 91st Cong., 1st Sess. (1969).
98 See Comment, Legal Problems Involved in the Administration of the ADC Program in Ohio, 3 Akron L. Rev. 35 (1969).
RECENT DECISIONS

STRUCTURAL RECIPROCITY: NEW ATTACK ON CONGLOMERATES

Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc. (3d Cir. 1968)

The relative ease with which courts have invalidated horizontal and vertical mergers under the Celler-Kefauver Amendment to section 7 of the Clayton Act\(^1\) has been conspicuously absent in cases involving conglomerate mergers.\(^2\) Although Congress' clear intent was that the

\(^1\) No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.


Horizontal mergers involve directly competing companies, and given the presence of only a slight trend toward concentration, a merger between competitors who together accounted for only 7.5% of a relevant market has been found illegal. United States v. Von's Grocery Co., 384 U.S. 270 (1966); see United States v. Pabst Brewing Co., 384 U.S. 546 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 343-45 (1962). Vertical mergers take place between suppliers and their customers, and if there is a trend toward concentration, a vertical merger foreclosing as little as 1 to 2 percent of a relevant market will violate § 7 of the Clayton Act, provided the foreclosure is quantitatively substantial. Brown Shoe Co. v. United States, 370 U.S. 294, 327-34 (1962).

\(^2\) A conglomerate merger is commonly defined as one that is neither horizontal nor vertical. Three subcategories of such mergers exist: market extension, product extension, and pure diversification. In the market extension merger, the companies operate in the same product market, but in different geographic markets. The product extension merger involves companies with different but closely related products, thereby enabling integration of the producing, distributing, or marketing operations of the two firms. The pure conglomerate merger involves companies with totally unrelated products and services. See C. Oppenheim & G. Weston, Federal Antitrust Laws 323 (3d ed. 1968).

Between 1951 and 1966, 27% of horizontal mergers and 17% of vertical mergers were attacked by either the Department of Justice or the Federal Trade Commission; in contrast, the Government challenged only 3% of conglomerate mergers. Staff of the Antitrust Subcomm. of the House Comm. on the Judiciary, 90th Cong., 1st Sess., The Celler-Kefauver Act: Sixteen Years of Enforcement 7 (Comm. Print 1967). Because of the Government's enforcement policy, conglomerate mergers have become the most frequent. The Attorney General recently reported that between 1948 and 1951, horizontal and vertical mergers accounted for 62% of all merger activity and conglomerates for only 38%. In contrast, horizontal and vertical mergers during 1968 comprised only 9%, while conglomerate mergers accounted for 91% of the total.
Clayton Act, as amended, cover all types of mergers, courts, finding established antitrust principles ineffective to combat conglomerate mergers, have resorted to more subtle and more sophisticated theories to find Clayton violations. One such theory is reciprocity, whereby a company by making purchases from a particular party is able to promote sales of its own products to that party. In *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, this theory was not only relied upon but was expanded, thus injecting new vitality into the Clayton Act as a vehicle for combating conglomerates.

Plaintiff, Allis-Chalmers Manufacturing Co. (Allis-Chalmers), alleged that an attempt by White Consolidated Industries (White Consolidated) to gain control of Allis-Chalmers violated section 7 of the Clayton Act. White Consolidated, a conglomerate exhibiting steady growth, had acquired 32 companies during the previous decade, all in diversified product lines. Its major subsidiary, Blaw-Knox Co., was...

Address by Attorney General John N. Mitchell to the Georgia State Bar Association, June 6, 1969, in *Trade Reg. Rep.*, ¶ 50,247. Unlike past administrations, however, the Department of Justice feels that § 7 of the Clayton Act is an adequate basis upon which to attack conglomerate mergers; indeed, the Nixon administration hopes to achieve comparable success in attacking conglomerates as was accomplished previously in the area of horizontal and vertical mergers. See Statement by Assistant Attorney General Richard W. McLaren, House Ways and Means Committee, Mar. 12, 1969, in *Trade Reg. Rep.*, ¶ 50,233.

3 The *House Report* on the Celler-Kefauver Amendment stated: “[I]t has been thought by some that this legislation applies only to the so-called horizontal mergers. . . . [T]he bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly.” *H.R. Rep. No. 1191*, 81st Cong., 1st Sess. 11 (1949).

4 For a general discussion of reciprocity as applied to conglomerate mergers, see *Turner, Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1386-93 (1965). In the leading case on reciprocity, *FTC v. Consolidated Foods Corp.*, the Supreme Court referred to reciprocity as a practice that “results in an irrelevant and alien factor . . . intruding into the choice among competing products, creating at least ‘a priority on the business at equal prices.’” 380 U.S. 592, 594 (1965). In addition, a spokesman for the Department of Justice has observed that “the vice of reciprocity . . . is that disadvantaged competitors . . . are deprived of sales they would otherwise be able to make on the basis of price, quality, and service.” Address by Roland W. Donnem, Director of Policy Planning for the Antitrust Division of the Department of Justice, before the Antitrust Law Section of the American Bar Association, in Dallas, Texas, Aug. 12, 1969.


6 White Consolidated had purchased 31.2% of Allis-Chalmers' outstanding stock from Gulf and Western Industries and was about to make a tender offer to Allis-Chalmers' shareholders. Allis-Chalmers, however, sought a preliminary injunction to restrain White Consolidated from obtaining any additional stock and from exercising its present voting power in any manner that would accomplish its takeover purpose. *Id.* at 508.
the third largest producer of foundries and rolling mills for which the steel industry is the primary purchaser. Significantly, Allis-Chalmers manufactured electrical drive and control equipment, integral components of rolling mills; indeed, at the time of the attempted acquisition, Allis-Chalmers was supplying Blaw-Knox Co. annually with $500,000 worth of this equipment, representing six percent of all such sales. In addition, Allis-Chalmers annually was purchasing from steel companies approximately $44 million worth of goods, while at the same time White was purchasing $42 million worth of similar steel industry products. The two companies' combined purchases of steel would be substantially greater than any of Blaw-Knox's competitors in the rolling mill production market.\textsuperscript{7} The federal district court in Delaware denied Allis-Chalmers' request for a preliminary injunction to stay White Consolidated's acquisition of its stock;\textsuperscript{8} on interlocutory appeal,\textsuperscript{9} however, the Third Circuit reversed and remanded because of an abuse of discretion by the district court.\textsuperscript{10} A majority of the panel—Judge Stahl speaking for the court and Judge Seitz concurring—could agree only that a takeover would result in a market structure conducive to reciprocal dealings between the proposed combination and the steel companies. Judge Stahl also argued that the acquisition would cause both entrenchment in the market and elimination of potential competition.\textsuperscript{11}

\textsuperscript{7} Id. at 518.


\textsuperscript{10} 414 F.2d at 522. Although the procedural setting of \textit{Allis-Chalmers} could discount its importance, in merger cases preliminary proceedings often determine the final outcome, since "the parties may abandon their plans rather than await the outcome of protracted and costly litigation." Id. at 510-11 n.8; see Note, Preliminary Relief for the Government Under Section 7 of the Clayton Act, 79 Harv. L. Rev. 391, 393 (1965); Note, Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act, 40 N.Y.U.L. Rev. 771, 772 (1965).

\textsuperscript{11} 414 F.2d at 514, 517. The third member of the panel, Judge Aldisert, dissented on each of the three proffered theories. He believed that the evidence showed merely a possibility, not a probability, that reciprocity would ensue. Id. at 533. In addition, basing his decision solely on objective evidence, he failed to find that Allis-Chalmers would enter the rolling mill market and thus did not find an elimination of potential competition. Id. at 534-35. Judge Aldisert also dismissed the entrenchment contention, finding no evidence in the record to indicate advantages to White Consolidated over its competitors inuring as the result of the acquisition, since neither Blaw-Knox nor Allis-Chalmers were significant factors in their markets. 414 F.2d at 535-37. In general, Judge Aldisert expressed his disfavor of the majority's adherence to "a 'Brandeisian bias in favor of human sized institutions,' a nostalgic at-
Entrenchment, which is ordinarily an outgrowth of product extension mergers, requires that one of the merging companies be a substantial factor in a concentrated market and that the acquisition result in further concentration of that market. In *Allis-Chalmers*, Judge Stahl noted that Blaw-Knox was the third largest company in the metal rolling mill market, a market heavily dominated by the top four manufacturers. Furthermore, companies in this market look to firms in other markets, such as Allis-Chalmers, for their electrical drive and control system requirements, which account for one-third of a fully-installed mill's cost. Judge Stahl concluded, therefore, that White Consolidated's acquisition of Allis-Chalmers would render the former's subsidiary, Blaw-Knox, the only fully integrated manufacturer of metal rolling mills, thereby deterring smaller, fragmented companies from entering the market. Although two commentators have suggested that entrenchment based upon full integration attaches illegality to what in essence would provide the consumer with better service, the Supreme Court has "recognize[d] Congress' desire to promote competition through the protection of visible, small, locally owned businesses . . . [notwithstanding the] occasional higher costs and prices [that] might result from the maintenance of fragmented industries and markets."  

[Id. at 538; see Davidow, *Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 Colum. L. Rev. 1231, 1285 (1968).]  

12 See Davidow, supra note 11, at 1252-64; Turner, supra note 4, at 1339-62.  

13 "[T]he emergence of a company offering such a complete product would raise higher the already significant barriers to entry of others into the various segments of the metal rolling mill market." 414 F.2d at 518. The Supreme Court has also noted the anticompetitive effects that follow from such a merger. "[T]he substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing . . . ." FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967). See also United States v. Ingersoll-Rand Co., 320 F.2d 509, 524 (3d Cir. 1963).  


15 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962). Another form of entrenchment—"deep pocket"—occurs when a wealthy parent corporation is able to undercut prices of its acquired subsidiary's competitors, thereby eliminating effective competition and augmenting its share of the market. See Reynolds Metals Co. v. FTC, 309 F.2d 223, 229-30 (D.C. Cir. 1962). Critics of this theory of entrenchment have argued that it should not be assumed a rational, well-counseled company would exercise its potential to cut prices, since such exercise could result in criminal and civil liability under the Robinson-Patman Act; rather, they urge that courts apply a "wait and see" test, relying solely on postacquisition evidence. See, e.g., Handler, *Emerging Antitrust Issues: Reciprocity, Diversification, and Joint Ventures*, 49 Va. L. Rev. 433, 439 (1963); Harsha, *The Conglomerate Merger and Reciprocity—Condemned by Conjecture?*, 9 Antitrust Bull. 201, 221 (1964). Such an approach, how-
The elimination of potential competition from a market also raises antitrust questions. If either of two merging companies would have entered the other’s market independent of the merger, then the merger eliminates potential competition. Moreover, if either company is considered to pose a continuing threat of entry into the other’s market, even though proof is offered later at trial that it would not have entered that market independently, the merger still eliminates this competitive influence on prices. An important element in potential competition cases, however, is “identification of particular potential competitors, [which] except in the most obvious cases, is fraught with difficulty.” In Allis-Chalmers, plaintiff contended that its entry into the metal rolling mill market was sufficiently probable to warrant an injunction of the proposed merger. In addition, it introduced uncontroverted affidavits disclosing that it had the necessary capabilities to manufacture rolling mill machinery. Although the Su-

ever, is not normal under § 7 of the Clayton Act; mergers are proscribed if the reasonable probability is that by the merged firm’s very presence and disproportionate size, it will substantially lessen competition. See Blair, The Conglomerate Merger in Economics and Law, 45 Geo. L.J. 672, 689-90 (1958).

A third form of entrenchment presents itself when the acquiring company is capable of using volume advertising discounts to the acquired company’s advantage. See, e.g., FTC v. Proctor & Gamble Co., 386 U.S. 568, 579 (1967); General Foods Corp. v. FTC, 386 F.2d 936, 938, 945 (3d Cir. 1967), cert. denied, 391 U.S. 919 (1968). The anticompetitive effect results from the psychological impact on potential entrants in the acquired company’s market; rather than compete with a giant advertiser, potential entrants may prefer simply to avoid the market. See FTC v. Proctor & Gamble, supra at 579; J. Bain, Barriers to New Competition 115 (1956). This theory, however, requires that the product to be advertised is subject to the cajolery of the market. In Butler Aviation Co. v. CAB, the court refused to apply this entrenchment theory, because a corporation purchasing business jets “is likely to make a rational and well-considered choice . . . rather than yield to a salesman’s blandishments.” 389 F.2d 517, 520 (2d Cir. 1968).

16 For a general discussion of the antitrust aspects of the elimination of potential competition, see Davidow, supra note 11, at 1241-49; Turner, supra note 4, at 1362-86.

17 See United States v. El Paso Natural Gas Co., 376 U.S. 651, 659 (1964); J. Bain, supra note 15, at 2-4, 203-04. See also C. Wilcox, Competition and Monopoly in American Industry 7-8 (TNEC Monograph No. 21, 1940). One commentator has stated that “[p]otential competition has become a key concept in the developing legal policy to control oligopoly power, for where a market is concentrated, the threat of new entry—or potential competition—is thought to be one of the few factors that can inhibit oligopoly behavior.” Brodley, Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy, 19 Stan. L. Rev. 285, 354-55 (1967).


19 414 F.2d at 514.

20 Id.
Supreme Court has noted the primacy of objective evidence, Judge Stahl, in finding a probable elimination of competition, relied upon plaintiff's own subjective contentions as well as objective evidence of its technological and financial capabilities and the capacity of the metal rolling mill market to support another competitor. In light of the Supreme Court's emphasis on objective evidence, and since subjective evidence has the obvious defect of being self-serving, it seems that Judge Stahl may have relied too heavily upon Allis-Chalmers' own contentions.

Besides basing his opinion on entrenchment and elimination of potential competition, Judge Stahl also held that by creating a market structure conducive to reciprocity, the proposed merger would substantially lessen competition. Since Judge Seitz concurred only on this ground, the precedential value of Allis-Chalmers is limited to its discussion of reciprocity. Both judges believed that competitors of White's subsidiary, Blaw-Knox, in the rolling mill machinery market would be at a disadvantage in conducting business with the steel industry, because steel companies would favor the White-Allis combination, which would purchase large quantities of steel from them. Moreover, the illegality of such a market structure was not remedied by the fact that the total amount of steel bought by the new combination would be less than one percent of the total output sold by steel companies; rather, the crucial consideration was White's position as a substantial buyer of steel relative to its competitors.

In the past, the key issue confronting courts in reciprocity cases has been whether plaintiff must demonstrate that one of the merging companies has been operating an organized program of reciprocal dealings with customers, generally under the euphemism of "Trade Relations," or whether he need merely show that the merger will create a market structure in which opportunities for reciprocal dealing would be present. According to prior case law, it probably was necessary to prove that either before or after the merger, a party had

22 Cf. Davidow, supra note 11, at 1245-46.
23 414 F.2d at 518; id. at 527 (Seitz, J., concurring).
24 id. at 527 (Seitz, J., concurring).
25 For a discussion of company trade relations divisions, see HinneGAN, Potential Reciprocity and the Conglomerate Merger: Consolidated Foods Revisited, 17 Buffalo L. Rev. 631, 633-34 (1968). A trade relations division keeps trade-balance records, which compare sale and purchase information, so that the company will favor suppliers who purchase from it. Policing the program is common, with "trade relations men" informing suppliers who do not also buy from the company that unless they modify their policy, the company no longer will buy from them. See id.
26 See Davidow, supra note 11, at 1266; Handler, supra note 15, at 434.
employed a formal reciprocity program. Postacquisition evidence of a program’s anticompetitive effect, however, was not required, because proof of an organized program of reciprocity in itself indicated that a company was reciprocity-conscious and in all probability would continue after the merger to build and strengthen the program. Nevertheless, requiring a plaintiff to make a specific showing of reciprocity significantly increased his burden of proof. Moreover, many companies have eliminated their trade relations divisions, thus making proof of actual reciprocity virtually impossible.

The major impact of Allis-Chalmers is that it eliminates this hurdle in conglomerate antitrust enforcement. When attacking a merger, the Government or a private litigant now must only show a potential market structure conducive to reciprocal dealings. Thus, the Allis-Chalmers court tacitly recognized that it would be a misconstruction of the morals of the market place to require proof that one of the merging companies actually has practiced reciprocity or to accept naively a defendant’s assertion that it will not abuse its position even though a market structure “opening the door” to reciprocity exists.

28 See FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965). In this case, Justice Douglas did concede that if post-acquisition evidence is advanced, some weight should be given to it:

The Court of Appeals was not in error in considering the post-acquisition evidence in this case. . . . But we think it gave too much weight to it . . . . If the post-acquisition evidence were given conclusive weight or allowed to override all probabilities, then acquisitions would go forward willy-nilly, the parties biding their time until reciprocity was allowed fully to bloom.

Id. at 598. This aspect of past reciprocity decisions, however, has evoked vigorous criticism. See, e.g., Harsha, supra note 15, at 204-19; Rill, Conglomerate Mergers: The Problem of “Superconcentration,” 14 U.C.L.A. L. Rev. 1029, 1048 (1967).
29 “[P]artly in response to the Consolidated Foods decision and the advice of counsel, many companies have abandoned organized reciprocity, abolished the office of ‘trade relations director,’ and flooded their employees with memoranda forbidding the practice.” Davidow, supra note 11, at 1266-67.
30 In addition, the Department of Justice has issued merger guidelines, which adopt the structural reciprocity theory to determine whether a conglomerate merger violates § 7. Department of Justice Merger Guidelines ¶ 19, 1 Trade Reg. Rep., ¶ 4430, at 6688 (May 30, 1968). One commentator has suggested that this approach will lead to “universal condemnation of all conglomerate mergers.” Handler, supra note 15, at 434. Professor Handler, however, seems to have overresponded, since structural reciprocity proscribes only those mergers that create a market situation in which the merged firm’s purchasing power is greater than that of those competitors who also sell to the same customer-suppliers.
31 In United States v. International Tel. & Tel. Corp., the court held that the Government’s allegation of a market structure leading to reciprocity created only a prima facie case, which could be defeated by defendant’s proof that the new combina-
Common business sense dictates that customer-suppliers make purchases from those companies that in return make purchases from them; such customers, therefore, do not make each decision to purchase on the basis of price, quality, and service. The anticompetitive effect of the structural reciprocity market thus becomes evident. As Justice Douglas aptly stated, "[r]eciprocal trading may ensue not from bludgeoning or coercion but from more subtle arrangements." 32

Paradoxically, the theory of "structural reciprocity" will be more effective when plaintiff seeks the extreme remedy of divestiture. Under prior law, if actual reciprocity had been found, relief short of divestiture, such as enjoining the operation of a trade relations division, 33 would have been feasible, since the specific illegality could be eliminated. According to the theory of structural reciprocity, however, defendant does not have to act affirmatively after the merger; he has created an illegal market structure, and relief must be directed

32 FTC v. Consolidated Foods Corp., 380 U.S. 592, 594 (1965). In United States v. Ingersoll-Rand Co., the court similarly reasoned that the mere existence of this purchasing power might make its conscious employment toward this end unnecessary; the possession of the power is frequently sufficient, as sophisticated businessmen are quick to see the advantages in securing the good will of the possessor. 320 F.2d 509, 524 (3d Cir. 1963), quoting United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 532 (W.D. Pa. 1963); see United States v. General Dynamics Corp., 258 F. Supp. 56, 60 (S.D.N.Y. 1966).

33 Cf. United States v. United States Steel Corp., 5 Trade Reg. Rep. (1969 Trade Cas.) ¶ 72,826, at 87,025 (W.D. Pa., Aug. 25, 1969). The Government charged U.S. Steel with violating § 2 of the Sherman Act by its reciprocity programs; by consent settlement, however, defendant agreed to discontinue its Trade Relations Divisions. Id. at 87,026.
at eliminating this structure. Thus, divestiture will be the only ade-
quate remedy unless the merger has not been effected, in which
case a preliminary injunction would be appropriate.

Another important issue in section 7 reciprocity cases is whether
there is a substantial lessening of competition. In previous decisions,
which involved companies with significant market shares, plaintiffs
were required to meet a qualitative test of substantiality by proving
that reciprocity would increase or maintain market concentration.
Such a test involved extensive analysis of market structure, because
subtle issues, such as whether defendant’s share of the market would
have been maintained absent reciprocity, had to be resolved.

This type of conjectural analysis greatly complicated a plaintiff’s burden
of proof. A quantitative test, however, would require a plaintiff to
show only that the combination’s sales have increased substantially,
thus imposing a significantly lighter burden of proof.

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34 "[I]nformal reciprocity . . . can be eliminated only by forestalling the creation
of the conglomerate structure that fosters it." Turner, supra note 4, at 1390.

35 In Brown Shoe Co. v. United States, Chief Justice Warren pointed out that
Congress consciously avoided espousing any single test of substantiality. 370 U.S.
294, 320-21 (1962). He did mention, however, that while Congress was debating
the Celler-Kefauver Amendment, the Supreme Court did apply a quantitative substantiality
test to § 3 of the Clayton Act and that the House Judiciary Committee’s Report, issued
two months after the Supreme Court’s decision, “remarked that the tests of illegality
of the new Act were intended to be ‘similar to those which the courts have applied
in interpreting the same language as used in other sections of the Clayton Act.’” Id. at
321 n.36 (1962); see H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949), citing Standard
Oil Co. v. United States, 237 U.S. 293 (1919). Nevertheless, a test of qualitative sub-
stantiality also is proper under § 3. See Tampa Elec. Co. v. Nashville Coal Co., 365

36 See FTC v. Consolidated Foods Corp., 380 U.S. 592, 599 (1965); United States v.

37 See United States v. General Dynamics Corp., 258 F. Supp. 36, 63-65 (S.D.N.Y.
1966). In Standard Oil Co. v. United States, plaintiff alleged that a requirements con-
tract that foreclosed $58 million of the wholesale gasoline market in the western
United States, amounting to 6.7% of that market, violated section 3 of the Clayton Act,
which like section 7, requires proof that defendant’s conduct substantially lessens
competition. 337 U.S. 293, 294-95 (1949). In holding that the quantitative test was
proper, the Court stressed the difficult burden of proof presented by a qualitative test:
[T]o demand that bare inference be supported by evidence as to what
would have happened but for the adoption of the practice that was in
fact adopted or to require firm prediction of an increase of competition
as a probable result of ordering the abandonment of the practice, would
be a standard of proof if not virtually impossible to meet, at least most
ill-suited for ascertainment by courts.

Id. at 309-10.

38 The test of quantitative substantiality has been applied in a variety of contexts.
See, e.g., Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949) (requirements
contracts); United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 595 (1957)
(vertical mergers); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495,
Since the test used in *Allis-Chalmers* to determine the anticompetitive effect of the proposed combination's reciprocal dealing was more quantitative than qualitative, the court took an important step in reducing plaintiff's burden. Under the *Allis-Chalmers* test, plaintiffs must show that a conglomerate's purchases from customers are quantitatively greater than those of its competitors who also sell to customers in the same line of commerce. This test differs from the purely quantitative one, which requires only a determination of sheer dollar volume, because it involves a comparison of the merged firm's purchases with like purchases by its competitors. The examination, therefore, does not ignore completely defendant's relative position in the market.

The *Allis-Chalmers* standard of substantiability comports with a proper analysis of reciprocity's anticompetitive effects. When the inquiry focuses on a company's economic importance to its customer-suppliers, the volume of that company's purchases is meaningless in the absence of figures reflecting the purchasing power of those competitors who also sell to the same customer-suppliers. Furthermore, an elaborate test requiring proof of defendant's market position and the impact of reciprocity on such position would raise insuperable burden of proof barriers to proper antitrust enforcement. Accordingly, only defendant's purchasing power relative to that of its competitors, which in turn indicates defendant's leverage on customers, is appropriate in determining the anticompetitive effect.

The accelerated merger movement in the United States has caused a vast increase in concentration of assets, according to former Chief Justice Warren, Congress' primary purpose in enacting the Celler-

501 (1969) (tying arrangements). Reciprocity frequently has been compared to a tying arrangement, because in both situations leverage from commerce in one product is wielded to promote the sales of another. See United States v. General Dynamics Corp., 258 F. Supp. 36, 65 (S.D.N.Y. 1966). See generally Ferguson, Tying Arrangements and Reciprocity: An Economic Analysis, 30 Law & Contemp. Proc. 552 (1965); Bittus, Tying Arrangements and Reciprocity: A Lawyer's Comment on Professor Ferguson's Analysis, 30 Law & Contemp. Proc. 581 (1965).

41 414 F.2d at 518; *id.* at 527 (Seitz, J., concurring).

40 See note 38 supra and accompanying text.

41 See Krash, The Legality of Reciprocity Under Section 7 of the Clayton Act, 9 Antitrust Bull. 93, 98 (1964).

42 Assistant Attorney General Richard W. McLaren has reported concentration figures as follows: (1) The number of corporate mergers has more than doubled in the last two years to over 4,000 in 1968; (2) acquisitions of firms with assets of $10 million increased from approximately 100 in 1966 to nearly 200 in 1968; (3) the total value of assets of acquired firms increased from $4 billion in 1966 to $12 billion in 1968; (4) of *Fortune* magazine's 500 largest industrials in 1962, 110 have disappeared by merger; and (5) in 1948, the 200 largest firms controlled 48% of corporate assets
Kefauver amendment was to check this trend. Nevertheless, in two recent cases, the Government's attempt to halt concentration simply by alleging that the Clayton Act proscribes large mergers was thwarted by the courts. Flatly rejecting such an argument, they held that absent a statutory provision to the contrary, antimerger law requires a specific demonstration of anticompetitive effect. The court while they now control 58% of those assets. Address by Assistant Attorney General Richard W. McLaren, Town Hall of California, May 27, 1969, in 5 TRADE REG. REP. ¶ 50,244. In addition, the Attorney General has stated that “[a]t the beginning of 1968, there were about 1,300 firms with assets over $25 million. Had it not been for acquisitions during the past decade, these firms would now number well over 1,900.” Address by Attorney General John N. Mitchell, supra note 2. Finally, W. T. Grimm Co., a Chicago-based merger and acquisition consultant firm, recently reported that in 1969 there was a 37% increase in merger activity, the total number of mergers being in excess of 6,000. Wall Street Journal, Jan. 6, 1970, at 9, col. 1.

43 "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy." Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962) (Warren, C. J.).

44 United States v. Northwest Indus., Inc., 301 F. Supp. 1066, 1092-94 (N.D. Ill. 1969); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766, 796 (D. Conn. 1969). See also United States v. Ling-Tempco-Vought, Civil No. 69-438 (W.D. Pa., filed Apr. 14, 1969). The Government's action was consistent with its announced policy that regardless of specific anticompetitive effect, "[t]he Department of Justice may very well oppose any merger among the top 200 manufacturing firms or firms of comparable size in other industries." Address by Attorney General John N. Mitchell, supra note 2. Aside from the argument that concentration of wealth in the hands of a few involves danger to the public welfare, the Government has presented several bases to support its contention that bigness is badness under the antitrust laws: (1) Since only very large firms have access to the capital necessary to enter concentrated markets, the merger of two such firms removes both as potential entrants into the market of the other. (2) When two large firms are allowed to merge, a community of interest is created among the newly-merged firm and other existing large firms. The firms in the oligopolistic markets, therefore, will "tread softly" to prevent aggressive pricing and consequent retaliation, thus blunting price competition. (3) Mergers involving large firms tend to trigger other such mergers. (4) Mergers of large companies reduce the number of firms with the capability and incentive for competitive innovation. See United States v. Northwest Indus., Inc., supra at 1093-94.

45 There may be very good reasons indeed to limit the growth of this country's largest corporations, particularly through mergers and acquisitions. The desirability of preserving the maximum number of competing units in any given line of commerce so long as they can compete effectively, the desirability of keeping entry barriers as low as possible, the increased potential for anti-competitive practices which may result from bigness, all are factors which may warrant a prohibition based on size alone. The law as it now stands, however, makes the adverse effect on competition the test of validity and until Congress broadens the criteria, the Court must judge proposed transactions on that standard.

in Allis-Chalmers, however, seems to have offered a workable solution for halting concentration within the existing framework of section 7 of the Clayton Act. As a company grows and diversifies by merger into more lines of business, the possibilities for reciprocal dealings increase proportionately. Most large conglomerate mergers, therefore, eventually should become subject to attack under the theory of structural reciprocity. Moreover, the Allis-Chalmers court realistically confronted and overcame burden of proof obstacles presented in previous reciprocity cases. Consequently, the Government no longer will have to resort to such spurious arguments as attacking bigness alone. Finally, not only will structural reciprocity provide a strong check on the trend toward concentration, but it also satisfies section 7's requirement of specificity, thus obviating any necessity for a new statute.

Size alone, however, is significant in at least one aspect: "Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effect may be dispensed with in view of § 7's design to prevent undue concentration." United States v. Continental Can Co., 378 U.S. 441, 458 (1964). In the presence of a trend toward concentration, therefore, courts need not concern themselves with a strict adherence to market structure or foreclosure, since "elaborate proof" is not necessary. Accordingly, a showing of oligopoly or concentration and its attendant evils greatly reduces plaintiff's burden; in fact, the burden shifts to the conglomerate defendant to show that the merger does not substantially lessen competition. See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963); Turner, supra note 4, at 1360; Note, Pure Conglomerate Mergers and Section 7 of the Clayton Act, 3 Ga. L. Rev. 579, 585-88 (1969). See also United States v. Von's Grocery Co., 384 U.S. 270 (1966); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

46 Although denying the Government's motion for a preliminary injunction, the court in United States v. Northwest Indus., Inc. stated that the "increasing aggregate concentration and mergers of large companies result in increased opportunities for reciprocity, encouraging the exchange of reciprocal favors and tending to discourage new enterprises from entering an industry. Indeed, opportunities for reciprocity increase geometrically as an enterprise becomes larger and more diversified." 301 F. Supp. 1066, 1088 (N.D. Ill. 1969); see G. Stocking, WORKABLE COMPETITION AND ANTITRUST POLICY 292 (1961); Statement by Assistant Attorney General Richard W. McLaren, House Ways and Means Committee, Mar. 12, 1969, in 5 TRADE REG. REP. ¶ 50,233, at 55,466.

47 After the Supreme Court announced its denial of certiorari, the Wall Street Journal reported that although the Government was not a party, the case "may have strengthened substantially the Justice Department's antitrust drive against large conglomerate mergers." Wall Street Journal, Jan. 13, 1970, at 4, col. 1.
DUE PROCESS CHALLENGE TO AN ACCOMPLICE’S COERCED CONFESSION


Based on the premise that unbridled governmental power is potentially destructive of liberties guaranteed by the Constitution, the exclusionary rule has experienced an ever-expanding role in protecting criminal defendants from official illegality. By depriving the prosecutor of any benefits from the use of evidence obtained by abridgment of constitutional rights, the exclusionary rule serves as an indirect remedy for the violation of privileges incapable of direct protection. Traditionally, however, exclusion has protected only those constitutional rights personal to an accused. Thus, as applied in cases involving violations of the fourth amendment freedom from unreasonable searches

1 "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (1961); see Elkins v. United States, 364 U.S. 206, 222-23 (1960); Weeks v. United States, 232 U.S. 383, 390-94 (1914). In Walder v. United States the Supreme Court stated that constitutional violations "are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men." 347 U.S. 62, 65 (1954). As early as 1776, Alexander Hamilton and James Madison observed that "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51, at 323 (H. Lodge ed. 1888).


3 Mapp v. Ohio, 367 U.S. 643, 651-53, 655-57 (1961). In Mapp, the Court expressly repudiated an earlier holding that although the fourth amendment right to privacy is applicable to the states, the exclusionary rule is not an essential ingredient of this right. Noting that state criminal sanctions prohibiting violations of fourth amendment rights are "worthless and futile," the Court held that the exclusionary rule is mandatory upon the states. 367 U.S. at 650-55; cf. Irvine v. California, 347 U.S. 128, 137 (1954). See generally Traynor, Mapp v. Ohio At Large in the Fifty States, 1962 Duke L.J. 319. The only direct remedy for police violations of constitutional rights is a private action in tort; however, the inadequacies of this remedy are well documented. See Mathes & Jones, Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions, 53 Geo. L.J. 889, 897-99, 907-08 (1965).

and seizures, the fifth amendment privilege against self-incrimination, and the sixth amendment right to counsel, exclusion is limited by the doctrine of standing, which precludes a defendant from objecting to the introduction of evidence obtained in violation of the constitutional rights of another.

In Stovall v. Denno, the Supreme Court enunciated another basis for application of the exclusionary remedy. Concerned with the due process standards of fundamental fairness governing criminal proceedings, the Court held that when the police stage a confrontation between an accused and witnesses to an alleged crime and when such confrontation is "unnecessarily suggestive and conducive to irreparable mistaken identification," any identification obtained must be suppressed, since it is potentially unreliable. Thus, the Supreme Court recognized for

9 388 U.S. 293 (1967).
12 Exclusion on the basis of due process does not require actual unreliability, but only potential unreliability, since the Stovall standard condemns procedures "unnecessarily suggestive and conducive to irreparable mistaken identification." 388 U.S. at 302 (emphasis added); see Simmons v. United States, 390 U.S. 377, 384 (1968) ("very substantial likelihood of irreparable misidentification"). If due process were to require exclusion only of evidence that can be shown actually unreliable, traditional trial safeguards, such as cross examination and jury instructions, perhaps would be sufficient. See generally Mishkin, supra note 10, at 83-84.
the first time that evidence must be suppressed not only when it is acquired in violation of specific guarantees of the Bill of Rights, but also whenever police procedures used to obtain it create a grave danger that it is unreliable. To date, evidentiary exclusion under the due process clause has been applied only to identification procedures.\textsuperscript{13} The recent decision by the Michigan court of appeals in \textit{People v. Bradford},\textsuperscript{14} however, which involved the conviction of an accused on the basis of testimony coerced from an alleged accomplice, illustrates the propriety of extending the exclusionary rule's application.

In \textit{Bradford}, two policemen, while investigating a burglary, were shot and seriously wounded by the occupants of an automobile. Shortly afterwards, Leroy Payne was arrested and taken to police headquarters.\textsuperscript{15} Following more than 24 hours of continuous interrogation, during which the police withheld food and water, physically tortured him,\textsuperscript{16} and threatened his family,\textsuperscript{17} Payne confessed to his own guilt and identified Bradford as his accomplice. On the strength of Payne's coerced admissions, Bradford was arrested, questioned at length, and ultimately charged with assault with intent to commit murder. Meanwhile, Payne entered a plea of guilty to the same charge and was held, unsentenced, in the county jail until he appeared at Bradford's trial as the State's chief witness, when he reiterated his confession implicating the accused. The circumstances surrounding Payne's earlier confession were elicited on cross-examination, and the State conceded the truth of his account.\textsuperscript{18}


\textsuperscript{15} Immediately after Payne's arrest and while enroute to the police station, the police initiated their efforts to extract a confession. Calling Payne a "dirty bastard" and a "nigger," they threatened to throw him from the police car and shoot him as an escapee. Petitioner's Brief for Certiorari at 4, app. A, at 3, Bradford v. Michigan, 394 U.S. 1022 (1969), \textit{denying cert. to} 10 Mich. App. 696, 160 N.W.2d 373 (1968).

\textsuperscript{16} Over the period of his detention Payne was beaten, kicked, and held down while police officers twisted his fingers and lifted him by his testicles. \textit{Id.} at 3, app. A, at 1-4, 6-9.

\textsuperscript{17} Taking advantage of Payne's ignorance of the law, the police threatened to prosecute his wife for perjury and to have his children taken away from him. \textit{Id.} at 3, app. A, at 8.

\textsuperscript{18} \textit{Id.} at 9, app. A, at 9 (addendum) The presiding trial judge concluded that "there isn't any question but what [Payne] can prove the abuse he suffered... There isn't any question but what he was beaten. There isn't any question but what he had a right to be scared." \textit{Id.} app. B, at 5-6.
At trial, Payne had stated that his testimony was not influenced by any fear of mistreatment on the part of the police or by any desire for personal gain.\(^\text{19}\) Two years after the trial, however, he attested that in fact he had been “in fear of [his] life [and the] safety of [his] family;” he further stated that because of his fear, he “gave false testimony at the preliminary hearing and trial” and that the only true testimony concerned “the treatment . . . received at the hands of the police.” \(^\text{20}\)

Despite this recantation, the trial court denied Bradford a new trial,\(^\text{21}\) and the Michigan court of appeals affirmed.\(^\text{22}\) While conceding that Payne’s testimony implicating Bradford was the product of coercion, the court of appeals ruled that it was not error to refuse to exclude such evidence as a matter of law, since Payne had been allowed to relate the circumstances surrounding his confession to the jury, which was instructed by the court regarding his credibility as a witness.\(^\text{23}\) Subse-

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Other evidence introduced was inconclusive, and the testimony of the two policemen was patently contradictory. Both officers testified that they could identify Bradford as one of their assailants. One, however, was able to identify only Payne from his hospital bed, and the other pointed out a third person as Payne’s accomplice. \textit{id.} at 4-6, app. A, at 17-24.

Furthermore, the investigator who discovered the gun used in the shooting testified at the preliminary hearing that it was found behind Payne’s home. At trial, however, he changed his account and said that the gun was found lying in back of Bradford’s home, which neighbored Payne’s house. The only fingerprints on the weapon were those of Payne. \textit{id.} at 6, app. A, at 24-27. Finally, the car in which the suspects had been riding when the original encounter with the policemen occurred was discovered about a block from the scene of the shooting, and it too lacked any evidence of Bradford’s involvement, despite, apparently, no opportunity to clean the car of fingerprints. \textit{id.} at 6, app. A, at 25-27.


\(^\text{20}\) Affidavit of Leroy Payne, submitted on behalf of Lionel Bradford to the Berrien County, Michigan, Circuit Court, Aug. 31, 1965.


\(^\text{23}\) \textit{id.} at 700-02; 160 N.W.2d at 375-76. The trial judge’s instructions did not mention that Payne’s testimony might have been unreliable because compelled. Instead, the judge focused only on the possibility that Payne’s expectation of favorable sentencing as a result of his testimony against Bradford might motivate him to testify untruthfully: [Payne’s] testimony should be received by you with the utmost caution and care, because the interest of such witness in the outcome of the trial and the desired result may color or shade his testimony.

The defense may prove the expectation of gain of any witness for the prosecution whether founded upon an agreement of the prosecution or not, under which the witness for the prosecution testified, and if the
quently, the Supreme Court denied certiorari, with Chief Justice Warren, joined by two other justices, authoring a dissent. 24

Although Payne could have suppressed his confession if it had been introduced against him, on the ground that it violated his privilege against self-incrimination, 25 the doctrine of standing prevented Bradford from vicariously asserting his accomplice's constitutional right. 26 Such standing problems, however, do not prevent exclusion on the grounds of untrustworthiness. 27 Potentially unreliable evidence is not objection-

defense has made a showing that there is such expectation of gain, the testimony of such witness for the prosecution must be received with great caution, and you alone are the sole judges of the credibility of the witnesses and the weight which is to be given to their testimony . . . .

Id. at 701 n.2, 160 N.W.2d at 375 n.2.


25 See Miranda v. Arizona, 384 U.S. 436 (1966). Although Payne would have to show only that his Miranda warnings were not given in order to suppress his confession at his own trial, the brutal method of interrogation to which he was subjected would invalidate his admissions under any standard for confession suppression. See, e.g., id.; Rogers v. Richmond, 365 U.S. 534 (1961); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936); notes 26-27 infra and accompanying text. Subsequent to Bradford's conviction, Payne's plea of guilty was overturned on grounds of duress. See Bradford v. Michigan, 394 U.S. 1022, 1023 (1969) (dissenting opinion), denying cert. to 10 Mich. App. 696, 160 N.W.2d 373 (1968).

26 See Malinski v. New York, 324 U.S. 401 (1945); Bruton v. United States, 416 F.2d 310 (8th Cir. 1969). The doctrine of standing serves to limit the class of persons to whom the exclusionary rule is available for infringement of constitutional rights. Since only those persons whose personal rights are violated may invoke the rule, a person may not object to the introduction of evidence obtained in violation of another's constitutional rights. This limitation on the exclusionary rule has been criticized by commentators. See Traynor, supra note 3, at 335-37; Note, Standing to Object to an Unlawful Search and Seizure, 1965 WASH. U.L.Q. 488; Comment, Judicial Control of Searches and Seizures, 58 YALE L.J. 144, 154-58 (1948).

The exclusionary rule is only effective to the extent the police are deprived of a benefit from their illegality. If one person's right to be free from unreasonable searches and seizures or his privilege against self-incrimination may be violated in order to obtain evidence for use against another, the exclusionary rule becomes an almost impotent deterrent. See People v. Portelli, 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965) (police torture of a witness to secure evidence against an accused—not excluded). The courts, however, balancing the need to protect the public from crime and the need to protect the constitutional rights of citizens, have found that the slight increase in protection afforded the latter does not warrant allowing parties whose rights have not been invaded to suppress such evidence. See Alderman v. United States, 394 U.S. 165, 174-76 (1969). California is the only jurisdiction in which the courts have determined that this weakening of the exclusionary deterrent is not justified by public policy. See People v. Martin, 45 Cal. 2d 755, 760-61, 290 P.2d 855, 857 (1955) (no standing requirement even for fourth amendment violations).

27 In Johnson v. New Jersey, the Supreme Court stated that "confessions are likely to be highly persuasive with a jury, and if coerced, may well be untrustworthy by their very nature." 384 U.S. 719, 729 (1966); see Rogers v. Richmond, 365 U.S. 534, 541 (1961). Dissenting to the denial of certiorari in Bradford, Chief Justice Warren analogized Payne's in-court testimony to a coerced confession, pointing out that it is
able because the objecting person's specific constitutional rights were violated by the manner in which it was obtained; rather, it is objectionable because it derogates from the fundamental fairness of the fact-finding process, and such fairness is required by due process. Thus, since by definition the person on trial has standing to challenge the due process fairness of his own trial, when such a challenge is made, the availability of the exclusionary remedy is not solely determined by whose rights have been violated directly by illegal police procedures.

It has been judicially well documented that coerced confessions are unreliable. Originally focusing on physical brutality, courts found that confessions coercively obtained lack any assurance of reliability and are "not premises from which a civilized forum will infer guilt." Because of "the tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain" and in order to guard against the risk of convictions based upon false confessions, judges have found it necessary to treat all statements made as the result of torture or threat of brutality as "too untrustworthy to be received as evidence of guilt." It has also been pointed out that because the now "'commonplace' that coerced confessions are inadmissible because untrustworthy." 394 U.S. 1023.

Palmer v. Peyton, the only case cited by the Stovall Court for its due process test in identification situations, stated that a state can not rest a criminal conviction on evidence "secured by a process in which the search for truth is made secondary to the quest for a conviction." 359 F.2d 199, 202 (4th Cir. 1966). See generally Note, Due Process Standard Extended to the Procurement of Evidence, 19 Stan. L. Rev. 479 (1967).

In the context of the exclusionary rule, the doctrine of standing originally developed in the area of fourth amendment violations, in which the reliability of evidence illegally obtained is unaffected. See, e.g., Jones v. United States, 362 U.S. 257 (1960); McAlister v. Henkel, 201 U.S. 90 (1906); Hale v. Henkel, 201 U.S. 43 (1906). Automatic application of the doctrine to fifth amendment violations, in which reliability is a consideration, has been judicially criticized. See Malinski v. New York, 324 U.S. 401, 430-31 (1945) (dissenting opinion); Hysler v. Florida, 315 U.S. 411, 426-27 (1942) (dissenting opinion); People v. Varnum, 66 Cal. 2d 808, 816-19, 427 P.2d 772, 778-80, 59 Cal. Rptr. 108, 115-118 (1967) (dissenting opinion); People v. Aranda, 63 Cal. 2d 519, 528, 407 P.2d 265, 271, 47 Cal. Rptr. 353, 359 (1965).


30 Stein v. New York, 346 U.S. 156, 182 (1953). In Stein, the Court reasoned that "reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any
reliability of a confession often is predicated upon an accused's free will
desire to absolve himself morally by admitting his criminal act, any
torture or brutality destroying free will likewise undermines reliability
and thus should render the confession inadmissible.31

The same reasoning has led to exclusion of confessions obtained by
the use of more sophisticated, nonphysical, interrogative techniques.32
Condemning the potential psychological coercion of modern custodial
procedures, the Supreme Court has applied the exclusionary rule to
in-custody confessions obtained in the absence of certain procedural
safeguards.33 The Court has concluded that such action is the only
method of assuring that the accused did not falsely incriminate himself
as a result of an overbearing atmosphere or a desire to please his cus-
todians.34

The potential unreliability of coerced confessions is magnified by the
disproportionate impact such evidence has on the jury. Similar to iden-
tification evidence, a confession is often decisive;85 since it goes to the
essence of the determination of guilt, "once a confession is accepted as
true the trial is over for all practical purposes."86 Because of this impact
of a confession, coupled with the absence of any standard by which to
measure the effect of coercive influences on reliability, as with an iden-
conviction." Id. at 192; see Rochin v. California, 342 U.S. 165, 173 (1952); Lyons v.
Oklahoma, 322 U.S. 596, 605 (1944); Lisenba v. California, 314 U.S. 219, 236-37 (1941);

31 Driver, Confessions and the Social Psychology of Coercion, 82 Harv. L. Rev. 42,
44-45 (1968); see Miranda v. Arizona, 384 U.S. 436, 507 n.4 (1966) (dissenting opinion);
U.S. 156, 182 (1953); Malinski v. New York, 324 U.S. 401, 422 (1945) (dissenting
opinion); Ward v. Texas, 316 U.S. 547, 555 (1942).

amendment privilege against self-incrimination entails freedom from all coercion, psy-
chological as well as physical. The Court interpreted the Constitution to require that
"a confession obtained by compulsion must be excluded whatever the character of
the compulsion." Id. at 462, quoting Wan v. United States, 266 U.S. 1, 14-15 (1924).
Noting that "the process of in-custody interrogation . . . contains inherently comp-
pelling pressures," the Court emphasized the potential for coercion rather than its
actual presence. Id. at 467.

33 See notes 49-51 infra and accompanying text.

34 "Even without employing brutality . . . the very fact of custodial interrogation
trades on the weaknesses of individuals." Miranda v. Arizona, 384 U.S. 436, 455 n.24
(1966). The extensive documentation in Miranda clearly establishes that "the blood of
the accused is not the only hallmark of an unconstitutional inquisition." Id. at 448;
see id. at 448-56 nn.8-24.

35 See United States v. Wade, 388 U.S. 218, 225-26 (1967) (identifications); Johnson

36 Driver, supra note 31, at 42; Note, Codefendants' Confessions, 3 Colum. J.L. & Soc.
tification it should be viewed in terms of admissibility rather than credibility.¶

Furthermore, no substantial, additional assurance of reliability was provided by the fact that Payne, the co-accused in Bradford, after initially having been subjected to coercion, took the stand to reiterate his confession at Bradford’s trial.¶ The Supreme Court has recognized many times that when an individual remains in the custody of the police, a confession made subsequent to a coerced statement suffers from the same danger of untrustworthiness as the original admission.¶ Dissenting to the denial of certiorari in Bradford, Chief Justice Warren characterized Payne’s in-court testimony as “cut from the same fabric that produced his original statement.”¶ Thus, the severity of prior abuse may well “forbid any other inference than that it dominated the mind of the accused to such an extent” that any later testimony is similarly too untrustworthy to be received as evidence of guilt.¶

Likewise, the opportunity to cross-examine does not obviate the need to view an accomplice’s coerced confession in terms of due process admissibility. To urge that the safeguard of cross-examination ade-
quately suffices to guarantee the reliability of such testimony is to ignore the Supreme Court's admonition that "even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability."42 Adopting this reasoning, the Supreme Court in Stovall v. Denno43 ruled that identification evidence may be so unreliable as to amount to a denial of due process of law, notwithstanding, apparently, the right to cross-examination.44 Moreover, admonitions to the jury cannot cure the inherently unreliable and prejudicial nature of a coerced confession. In analogous situations, the Supreme Court twice has rejected the adequacy of limiting instructions to insure that the jury considers evidence only for legitimate purposes and disregards it for all others.45 Although the Supreme Court has not explicitly condemned the sufficiency of jury instructions in the context of a due process challenge to untrustworthy evidence,46 in Stovall it implicitly rejected the notion that they are an adequate safeguard of identification reliability.47 Similarly, because of the great potential that a coerced confession is unreliable, cautionary instructions to the jury that do no more than impugn the motives of the witness48 would seem equally inadequate to protect the fairness and integrity of the fact-finding process.

In light of all factors, therefore, only by excluding coerced confessions

42 United States v. Wade, 388 U.S. 218, 235 (1967). In Gilbert v. California, a companion case to Wade, Justice Fortas expressed a similar reservation, observing that blind adherence to "the efficacy of cross-examination" in order to justify the assumption of testimonial accuracy "is much more of a comfort to an appellate court than a source of solace to the defendant and his counsel." 388 U.S. 263, 292 (1967) (dissenting in part); see Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 186, 188 (1948).

43 388 U.S. 293 (1967).

44 Id. at 301-02.

45 In Jackson v. Denno, the Supreme Court held that due process entitles a defendant to have the voluntariness of his confession not determined by the jury deliberating his guilt or innocence; limiting instructions would not insure that if the jury found defendant's confession coerced and thus inadmissible, it would be able to completely disregard it when determining his guilt. 378 U.S. 368, 381-87 (1964). In Bruton v. United States, the Court held that even in a joint trial in which the extra-judicial statement of one co-defendant is admitted solely against such defendant, the other co-defendant's sixth amendment right to confrontation is violated. 391 U.S. 123 (1968), overruling Delli Paoli v. United States, 352 U.S. 232 (1957). The Court found that limiting instructions would not assure that the jury would consider the extra-judicial statement only in regard to the guilt of the party who made it. Id. at 128.

46 The two cases in which the Supreme Court repudiated the sufficiency of limiting instructions concerned the jury's ability to restrict its consideration of evidence to permissible purposes. See Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964).

47 388 U.S. at 301-02.

48 See note 23 supra.
of accomplices can a court be assured that guilt or innocence rests solely upon reliable evidence. As conceded by the State in Bradford, Payne's statements incriminating Bradford were the product of intensive physical torture, applied by custodial authorities over an extended period of time. Although Payne testified against Bradford at trial, he had never been free from the constant observation, influence, custody, and control of the police who had beaten him, since throughout the course of the trial, he remained incarcerated awaiting sentencing on his own plea of guilty. Despite the potentially coercive nature of the threat of renewed police brutality and the hope of favorable sentencing, the court permitted Payne to testify against Bradford. The inexorable conclusion is that the court's failure to exclude Payne's testimony denied Bradford his right to due process.

The remaining question is under what circumstances a coercively obtained confession, which would be challengable by the confessor as violative of his privilege against self-incrimination, should be inadmissible against another party as violative of due process. The present standard for excluding confessions is found in *Miranda v. Arizona.* By holding that the fifth amendment privilege against self-incrimination is adequately safeguarded only if four prophylactic warnings are given an accused prior to in-custody interrogation, the Supreme Court in

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50 An accused must be told "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona,* 384 U.S. 436, 479 (1966). These warnings must be given when the defendant is "in custody," a phrase that comprehends both detention at a police station and situations in which an accused is "deprived of his freedom of action by the authorities in any significant way and is subject to questioning." *Id.* at 478; see *Orozco v. Texas,* 394 U.S. 324, 326-27 (1969); *Mathis v. United States,* 391 U.S. 1, 4-5 (1968). *See generally Medalie, Zeitz & Alexander, Custodial Police Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda,* 66 MICH. L. REV. 1347 (1968); *Note, Waiver of Rights in Police Interrogations: Miranda in the Lower Courts,* 36 U. CHI. L. REV. 413 (1968).
Miranda rendered threshold inquiry into the presence of compulsion unnecessary. Thus, an accused who makes a confession may have it suppressed upon a mere showing that the police failed to warn him of his constitutional rights.\(^{51}\) In contrast, an accomplice who invokes due process in an attempt to suppress must show potential unreliability in order to gain exclusion, and although failure to give the Miranda warnings does not necessarily imply such unreliability, physical brutality is not its only indicium.\(^{52}\) As was recognized in Miranda, compulsion is inherent in modern custodial interrogation, which is designed to place the accused in such an emotional state that his ability to exercise rational judgment is impaired.\(^{53}\) Thus, the due process standard of potential unreliability should be deemed satisfied whenever the statements of the confessor are accompanied by police conduct more serious than a technical failure to give the prescribed Miranda warnings.

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\(^{51}\) See, e.g., Frazier v. United States, 419 F.2d 1161 (D.C. Cir. 1969); Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969). In Frazier, the court held that even a recitation of the Miranda warnings is not an adequate safeguard if the accused indicates in some manner that he does not understand his constitutional rights. Frazier v. United States, supra; see Note, The United States Court of Appeals for the District of Columbia Circuit: 1968-1969 Term, 58 Geo. L.J. 83, 98-100 (1969).

\(^{52}\) See notes 30-32 supra and accompanying text.

\(^{53}\) 384 U.S. 436, 445-58 (1966). The Miranda Court catalogues at length the techniques and strategies of modern interrogation. Id. at 445-54 (1966); see Driver, supra note 31; notes 32-34 supra and accompanying text.
DISMISSAL OF HOMOSEXUALS FROM GOVERNMENT EMPLOYMENT: THE DEVELOPING ROLE OF DUE PROCESS IN ADMINISTRATIVE ADJUDICATIONS

Norton v. Macy (D.C. Cir. 1969)

In Norton v. Macy, the United States Court of Appeals for the District of Columbia Circuit recently illustrated its increased interest in the precise scope of the Civil Service Commission's discretion in dismissals involving homosexuals. Clifford L. Norton, a National Aeronautics and Space Administration (NASA) budget analyst, was arrested with another man, Proctor, for an alleged traffic violation. Both were taken to the police station where, pending issuance of the summons, Norton was questioned by the police and later by NASA's security chief regarding both a homosexual advance on Proctor and his prior sexual activities. Although Norton specifically denied being a homosexual in a subsequent, formal reply, the security chief maintained that during the interrogation he had admitted engaging in unorthodox sexual activities. At all times, however, Norton denied any homosexual interest in Proctor.

1 417 F.2d 1161 (D.C. Cir. 1969).
2 Because one of the arresting officers was a member of the morals squad, Norton argued that he was the victim of a sham arrest founded upon the mere suspicion of sexual misconduct and not on the necessary requirement of probable cause. He further asserted that as a result, the evidence obtained was tainted. Brief for Appellant at 7, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). See generally Hill v. United States, 418 F.2d 449 (D.C. Cir. 1969) (evidence seized pursuant to "sham" arrest inadmissible); Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961). The court in Norton noted that the record was unclear on the issue of whether Proctor's allegation of a homosexual advance came before or after the arrest. 417 F.2d at 1162 n.2.

Norton also argued that his detention and the police interrogation were illegal since he had never been brought before a committing magistrate and no Miranda warnings had been given. Brief for Appellant at 12, supra. Although the court noted that the police investigative tactics were of "questionable" legality, it failed to resolve whether the same exclusionary rules that apply in criminal trials should apply in administrative proceedings. 417 F.2d at 1166, 1168 nn.27 & 34; see Powell v. Zuckert, 125 U.S. App. D.C. 55, 61, 366 F.2d 634, 640 (1966) (illegally seized evidence inadmissible in discharge proceedings).

3 Apparently, Norton conceded that he had engaged in mutual masturbation while in high school and college, had experienced homosexual desires, and on two occasions might have participated in other homosexual relations. These activities usually were associated with consumption of alcohol and at times were accompanied by temporary blackouts. 417 F.2d at 1163.
As a result of these events, NASA dismissed Norton, concluding that
he did in fact make the alleged advance on Proctor, that this act
amounted to "immoral, indecent, and disgraceful conduct," and that
he possessed personality traits rendering him "unfit for further Govern-
ment employment." Chief Judge Bazelon, speaking for the D.C. Cir-
cuit, found that although the evidence was sufficient to sustain the
charge of homosexual conduct, Norton was unlawfully dismissed. Re-
lying upon a mixture of constitutional and statutory considerations,
the court held that there must be a reasonable nexus between the off-
fending conduct and the statutory requirement that a dismissal be for
"such cause as will promote the efficiency of the service." Furthermore,
in so ruling, the court expanded the traditional scope of judicial re-
view of governmental dismissals that involve possible violations of
constitutional rights.

Traditionally, judicial review of dismissals was practically nonex-
istent. In deference to the constitutional framework creating the sepa-
ration of powers, courts hastily dismissed petitions for review, asserting
that in the absence of statutory or constitutional violations, "the power
to remove [is] incident to the power to appoint." Although courts
refused to delineate clearly the nature of the "constitutional violations"
that would justify review, bare assertions of due process violations spe-

4 Norton was dismissed pursuant to a Civil Service regulation authorizing removal of
"an appointee for . . . [c]riminal, infamous, dishonest, immoral or notoriously dis-
graceful conduct . . . or [a]ny legal or other disqualification which makes the indi-
vidual unfit for the service." 5 C.F.R. §§ 731.201(b), (g) (1968). Dismissal had been
upheld by the Civil Service Appeals Examiner, the Board of Appeals and Review, and
the district court, which granted appellee's motion for summary judgment. See 417
F.2d at 1163.

IV, 1969).

6 The Executive was considered responsible for the efficient functioning of the govern-
ment, and judicial review was seen as an interference with his constitutional authority.
In addition, the judiciary regarded itself ill-equipped to investigate the comparative
quality of an employee's performance. See, e.g., Burnap v. United States, 252 U.S.
512, 515 (1920); Keim v. United States, 177 U.S. 290, 296 (1900); Decatur v. Paulding,
39 U.S. (14 Pet.) 496, 515 (1840); Bailey v. Richardson, 86 U.S. App. D.C. 248, 264,
182 F.2d 46, 62 (1950); Carr v. Gorden, 82 F. 373, 374 (C.C.N.D. Ill. 1897). For a
general discussion of the policy reasons underlying denial of review, see Chaturvedi,
Legal Protections Available to Federal Employees Against Wrongful Dismissal, 63
Nw. U.L. Rev. 287 (1968); Note, Dismissal of Federal Employees—The Emerging

7 E.g., Eberlein v. United States, 257 U.S. 82, 84 (1921); Burnap v. United States,
252 U.S. 512, 515 (1920); Shurtleff v. United States, 189 U.S. 311, 318 (1903); Keim v.
United States, 177 U.S. 290, 293 (1900); Eckloff v. District of Columbia, 135 U.S.
240, 241 (1890); In re Hennen, 38 U.S. (13 Pet.) 230, 260 (1839); United States ex rel.
Palmer v. Lapp, 244 F. 377, 382 (6th Cir. 1917).
cifically were rejected. Since government employment was considered merely a “privilege” and not a property or contract “right,” dismissal did not amount to a deprivation of life, liberty, or property within the fifth amendment.

Even with the passage of the Civil Service Act, which requires that dismissal be “for cause” and subject to procedural safeguards, most courts adhered to the prior policy of nonprocedural safeguards, review of pro forma compliance with statutory procedures, refused


9 The right-privilege distinction was originally formulated by Justice Holmes in McAuliffe v. Mayor of New Bradford, 155 Mass. 216, 29 N.E. 517 (1892). In McAuliffe, petitioner had been dismissed from the police department pursuant to a police regulation prohibiting certain political activities. The court held that petitioner had a “constitutional right to talk politics, but . . . no constitutional right to be a policeman.” Id. at 220, 29 N.E. at 517. Relying on this language, courts have inferred that government employment is an unprotected “privilege” offered by the State without any obligation on its part. See Van Alystyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

10 The proposition that there is no constitutionally protected property right to hold a government position was generally asserted in adjudications involving removal of public officers, not mere employees. See, e.g., Taylor v. Beckham, 178 U.S. 548 (1900); Gray v. McLendon, 134 Ga. 224, 246, 67 S.E. 859, 869 (1910); Lynch v. Chase, 55 Kan. 367, 372, 40 P. 666, 667 (1895); Johnson v. Laffon, 257 Ky. 156, 168, 77 S.W.2d 345, 350 (1935). In Taylor the Court ruled that neither a public office nor its “salary and emoluments” are property or contract rights. Taylor v. Beckham, supra at 577. Justice Harlan, however, dissented, declaring that due process is intended to protect the individual from the arbitrary exercise of governmental power and to prevent the deprivation of any legal right. He believed that a public office, as well as the receipt and enjoyment of salary, is as much a property right as tangible property. Moreover, he continued, “liberty” comprehends not only physical freedom, but the individual’s right to be free “in the enjoyment of all his faculties; . . . to use them in all lawful ways; to live and work where he will; [and] to earn his livelihood by any lawful calling . . . .” Id. at 585, 592-609.

Much of the language denying a right to hold office arose out of the reaction to the early English view that public office was a hereditary to which a property right attached. See, e.g., Trimble v. People, 19 Colo. 187, 196, 34 P. 981, 985 (1893); Edge v. Holcomb, 135 Ga. 765, 768, 70 S.E. 644, 645 (1911); Annot., 99 A.L.R. 336, 342 (1935). For an interesting argument expanding the interpretation of the due process-property requirement, see Reich, The New Property, 73 Yale L.J. 733 (1964).

11 Assertions that there is no constitutionally protected contractual right to public employment have involved situations in which the legislature has altered existing legislation regarding terms and tenures of public employ. Arguments that legislative benefits are terms of a contract between a sovereign and its citizens were rejected. See, e.g., Dodge v. Board of Educ., 302 U.S. 74 (1937); Crenshaw v. United States, 134 U.S. 99 (1890); Butler v. Pennsylvania, 51 U.S. (10 How.) 402 (1850).

to consider allegations based upon the employer's bad faith, or insufficiency of evidence, or the fundamental fairness of administrative fact-finding procedures. Eventually, however, the courts began to expand their inquiry beyond formal paper compliance. In its landmark decision in *Gadsden v. United States*, the Court of Claims held that government employees are entitled to judicial review not only of agency compliance with statutory procedural guarantees, but also of substantial compliance with the requirement that dismissal be “for cause.” The court then ruled that “for cause” requires a dismissal to be based upon an honest evaluation rendered in good faith, free from a superior's malice, arbitrariness, or capriciousness. Thus arose the standard used by many courts today in granting review for statutory compliance with administrative procedures and for violations of a vaguely-defined right to be free from arbitrary dismissal. Many courts have followed *Gadsden* in equating arbitrariness with bad faith, thereby necessitating an examination of evidence supporting the dismissal; others, however, have re-

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13 In *Golding v. United States*, plaintiff claimed that his dismissal was the result of a conspiracy to remove him; the court, however, decided that since on its face the petition indicated compliance with statutory procedures, his dismissal was “conclusive.” 78 Ct. Cl. 682, cert. denied, 292 U.S. 643 (1934).


15 In *Levy v. Woods*, the claim that the investigation supporting the dismissal was “biased, prejudiced or unfair,” was found “immaterial.” 84 U.S. App. D.C. 138, 139, 171 F.2d 145, 146 (1948).


17 Id. at 127.

18 Id. As examples of malicious dismissals, the court cited those resulting from a superior's mere dislike of an employee or from a desire to procure the employee's job for a friend.


20 In *Gadsden*, the court permitted review of the evidence to determine if it was “so grossly erroneous as to imply bad faith.” 78 F. Supp. at 128; accord, Love v. United
fused to consider the merits and simply have equated administrative arbitrariness with violations of statutory procedures. Nevertheless, despite the existence of good faith, the question still remains to define the extent of an agency’s discretion in determining the reasonableness of the relationship between the grounds for dismissal and its effect on the “efficiency of the service.”

Courts usually defer to an agency’s decision on the reasonableness of grounds for dismissal; therefore, they have been reluctant to interfere with administrative dispositions of homosexuals. Recently, however, terminations for homosexuality have been exposed to increasingly skeptical judicial scrutiny. Thus, in *Dew v. Hallaby,* although upholding a dismissal, the D.C. Circuit intensively analyzed the relationship between pre-employment homosexual acts and governmental efficiency. In a subsequent case, *Scott v. Macy,* the same court over-

States, 98 F. Supp. 770, 774 (Ct. Cl.), cert. denied, 342 U.S. 866 (1951). Although the court in *Knotts v. United States* established a presumption in favor of the official’s “good faith,” it still found that the superior’s decision was based upon “personal animus” and a desire to obtain the position for a friend. 121 F. Supp. 630, 631-36 (Ct. Cl. 1964); cf. McTiernan v. Gronouski, 337 F.2d 31, 38 (2d Cir. 1964).

21 Brown v. Zuckert, 349 F.2d 461, 463 (7th Cir. 1963); accord, Cohn v. Ryder, 258 F. Supp. 693, 694 (E.D. Pa. 1966), aff’d, 373 F.2d 530 (1967) (refusal to review sufficiency of evidence); cf. Seebach v. Cullen, 338 F.2d 663, 664 (9th Cir.), cert. denied, 380 U.S. 972 (1964) (refusal to review “findings of fact”). In *Vigil v. Post Office Dep’t,* the court found that the officials had not acted “arbitrarily or capriciously” because they had complied carefully with statutory requirements pertaining to investigations, hearings, and appeals; the court, however, also examined the record and determined that the officials’ conclusion was supported by “substantial evidence.” 406 F.2d 921, 924 (10th Cir. 1969).


23 See, e.g., Vigil v. Post Office Dep’t, 406 F.2d 921, 925 (10th Cir. 1969); Anonymous v. Macy, 398 F.2d 317, 318 (5th Cir. 1968), cert. denied, 393 U.S. 1041 (1969); Taylor v. Civil Service Comm’n, 374 F.2d 466, 470 (9th Cir. 1967).


25 In *Dew,* appellant was dismissed for engaging in homosexual acts at least four years prior to his appointment. The court eventually deferred to the Civil Aeronautics Board’s decision, stating that it lacked “the background and experience to say, contrary to the agency’s judgment, that efficiency will not be promoted by removing [Dew].” *Id.* at 177, 317 F.2d at 588. The court’s emphasis, however, differed significantly from that of the Civil Service Appeals Examiner, who stressed the fact that homosexuality is repugnant to “established and accepted standards of decency” and would have a “dis-
turned the disqualification of a civil service applicant who had previously qualified for a position, because other than to label his conduct "homosexual," the agency neither specified the charges against him, nor demonstrated a reasonable relationship between his alleged homosexuality and the efficiency of the agency.\textsuperscript{27} Although \textit{Scott} could have been decided solely on statutory grounds,\textsuperscript{28} Judge Bazelon's opinion, later expanded in \textit{Norton}, was cast in terms of the constitutional right to due process.\textsuperscript{29}

Constitutional theories have been utilized infrequently in government employment cases because statutes delimiting agency conduct ordinarily provide sufficient protection for employees.\textsuperscript{30} Case law on the licensing of professionals, however, has expanded the application of due process concepts to private employment by disregarding the traditional and formalistic requirement of a "liberty or property" deprivation\textsuperscript{31} and the

rupting effect upon the morals and efficiency" of the agency. \textit{Id.} at 176 n.10, 317 F.2d at 587 n.10. The court stressed an air traffic controller's exacting duties, which require "skill, alertness and above all responsibility;" thus, Dew's prior conduct was relevant to his dismissal only in so far as it evidenced a lack of the "character, stability and responsibility" necessary to the position. \textit{Id.} at 176-77, 317 F.2d at 587-88.

\textsuperscript{26}121 U.S. App. D.C. 205, 349 F.2d 182 (1965).

\textsuperscript{27}Appellant was notified in February 1962, that pending further investigation, he had qualified for Civil Service "personnel positions;" in May, he was "disqualified" because of "immoral conduct." Following appellant's request that the charges be specified in order that he be able to rebut them, he was informed only that evidence established he had engaged in "homosexual conduct," which the agency considered to be "contrary to generally-recognized and accepted standards of morality." \textit{Id.} at 205-06, 349 F.2d at 182-83.

\textsuperscript{28}At the conclusion of his opinion, Judge McGowan's concurring opinion, which stressed that the "broad letter" of 5 U.S.C. § 631 indicates a congressional purpose of assuring that charges be specified in order that a applicant have adequate opportunity to assert his "fitness." \textit{Id.} at 208-09, 349 F.2d at 185-86. This decision was based in part on a regulation guaranteeing to federal employees against whom adverse action is contemplated, the right to 30-day notice, specification of charges, and opportunity to answer. 5 C.F.R. § 752.202(a) (1969). Dissenting in \textit{Scott}, the now Chief Justice strictly construed the word "employees" in the regulations to exclude mere applicants, thus concluding that applicants have no rights under 5 U.S.C. § 631 without further specific authorization by Executive action. 121 U.S. App. D.C. at 211-12, 349 F.2d at 188-89 (Burger, J., dissenting).

\textsuperscript{29}The court noted but did not elaborate on the issue of whether both applicants and employees are entitled to the same protection against arbitrary or discriminatory treatment by the Government. 121 U.S. App. D.C. at 207, 349 F.2d at 184.


\textsuperscript{31}In \textit{Dent v. West Virginia}, the Supreme Court recognized the right to engage in "any lawful calling, business, or profession," and to be protected by due process from any arbitrary denial of this right, to the same extent as if the interest in the job were "real or personal property." 129 U.S. 114, 121-22 (1889).
technical distinction between "rights" and "privileges." Thus, adopting standard formulations, courts have ruled that substantive due process requires not only a reasonable relationship between the statutory licensing provision and the legitimate governmental purpose of assuring "occupational fitness or capacity," but also reasonable application of a constitutionally permissible statute.

Courts faced with government-dismissal and job-exclusion cases have borrowed from the licensing decisions, but realization of meaningful due process rights has been slow. The notion that due process is a flexible standard and depends upon a balancing of competing interests has resulted in employees' rights becoming a matter of some speculation. Moreover, courts faced with challenges to governmental job

32 Schwar v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957); Wieman v. UpdGRAFF, 344 U.S. 183, 192 (1952); Garner v. Board of Pub. Works, 341 U.S. 716, 725 (1951) (Frankfurter, J., concurring in part, dissenting in part). In Wieman, the Court found no reason to decide whether a right to public employment exists, ruling that the Constitution clearly protects a public servant whose exclusion pursuant to statute is "patently arbitrary or discriminatory." Wieman v. UpdGRAFF, supra at 192. See generally Van Alstyne, supra note 9.

33 In Schwar v. Board of Bar Examiners, the New Mexico Board of Bar Examiners found the petitioner lacked "good moral character," since he had used aliases, had an arrest record, and was formerly a member of the Communist party. The Court ruled that the State has a legitimate interest in requiring strict standards for qualification, but insisted that any qualification must be reasonably related to the applicant's fitness to practice law. 353 U.S. 232, 234, 239 (1957).

34 In Schwar, the Court held that the evidence did not establish a lack of good moral character; thus, application of a permissible standard was inconsistent with due process. Id. at 246-47; see Wieman v. UpdGRAFF, 344 U.S. 183, 192 (1952).

35 In Stolbauer v. Board of Higher Educ., a summary dismissal of a teacher following the invocation of the privilege against self-incrimination was found unreasonable. 350 U.S. 551, 555 (1956). The Court held that attaching a presumption of guilt to use of the fifth amendment constitutes an arbitrary application of the state's power and therefore violates due process. Id. at 555-59.


In Hannah v. Larch, the Supreme Court distinguished between those situations in which administrative agencies "adjudicate and make binding determinations which directly affect the legal rights of individuals" and those in which agencies merely conduct a "general fact-finding investigation;" in "adjudications," individuals must be provided all due process rights associated with the judicial process. 363 U.S. 420, 442 (1960). But cf. Vitarelli v. Seaton, 355 U.S. 535 (1959). The Court in Vitarelli upheld an Executive order that allowed the Secretary of the Interior to dismiss summarily an employee from a sensitive position without providing a reason.
exclusions or dismissals on due process grounds often have refused to investigate the validity of the government's reasons, reversing only when the decisions are "patently arbitrary." Thus, if a court were faced with an obviously unjustifiable basis for decision, such as race or religion, it would not hesitate to invalidate the action of the agency. Such an unfair dismissal, however, may be camouflaged by a misleading label. To protect against such an occurrence, therefore, courts must look behind the label and examine the factual basis for the agency's action; in Scott and Norton, the court demonstrated its inclination to make such an examination.

The court's decision in Scott, which merely noted that an agency must show a reasonable relationship between homosexuality and the efficiency of the agency, takes on real significance only in the context of the court's statement that procedural due process demands a specification of charges. In Norton, however, the activities considered detrimental by the agency had been particularized; therefore, the court concerned itself with elucidating the due process requirement that an agency show a reasonable relationship between the acts labeled homosexual and the agency's efficiency. As in Scott, the court in Norton appears to have imposed due process-reasonableness concepts in a case that might have been decided on statutory grounds with the same result.

In justifying its refusal to accede to agency interpretations of reason-

40 The agency apparently complied with § 863, which provides that a preference eligible employee may be discharged only if reasons are given in writing and the person whose discharge . . . is sought shall have at least thirty days' advance written notice . . . stating any and all reasons, specifically and in detail, . . . shall be allowed a reasonable time for answering the same personally or in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision . . .
41 417 F.2d at 1164-65. In Carter v. United States, an FBI agent was dismissed pursuant to § 9(c) of the Universal Military Training and Service Act, which requires that any discharge be for cause. 50 U.S.C. App. § 459(c) (1964). The court held that since any discharge amounting to a violation of due process would also violate the statute, there was no need to reach the constitutional questions. 132 U.S. App. D.C. 303, 307 n.4, 407 F.2d 1238, 1242 n.4 (1968).
ablleness, the court in Norton first pointed out that the Government has an obligation to accord employees minimal due process rights in order to protect against "arbitrary and capricious" dismissals. The court then implied that an employee is entitled to greater due process protection when the dismissal imposes a "badge of infamy" or intrudes upon his right to privacy. The court, however, did not explain how Norton's right to privacy had been infringed, although the NASA security chief's extensive interrogation and investigation may have resulted in a violation. Nevertheless, language in Norton indicates that the scope of

 Courts now would appear to have a choice in deciding cases involving the exercise of administrative discretion. They can find a violation of a statutory right by determining that an arbitrary application of a statutory grant of authority resulted in an abuse of power; on the other hand, a finding of equal protection and due process violations resulting from an unconstitutional application of a constitutionally permissible statute seems equally possible. Compare Kent v. Dulles, 357 U.S. 116 (1958), with Shachtman v. Dulles, 96 U.S. App. D.C. 287, 225 F.2d 938 (1955).


43 417 F.2d at 1164.

44 The constitutional right to privacy is still in the developmental stage; however, an examination of principles developed in tort law concerning active intrusions upon a person's privacy may be useful. Courts have recognized the right to be free from intrusive conduct, the purpose of which is to obtain information about one's private life. See W. Prosser, Torts § 112, at 833 (3d ed. 1963). Most successful cases have involved use of wiretapping devices, but damages have also been allowed when constant surveillance and extensive investigation have resulted in mental suffering. See Pinkerton Nat'l Detective Agency v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963) (constant surveillance); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964) (wiretapping); LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 201 N.E.2d 533 (1963). But see Shorter v. Retail Credit Co., 251 F. Supp. 329 (D.S.C. 1966) (mild interrogation insufficient).

In Norton, a "working" arrangement was alleged to exist between the deputy chief of the morals squad and the NASA security chief; whenever a NASA employee was arrested, the security chief was notified by the morals squad and allowed to monitor the interrogation. Brief for Appellant at 2, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). Since both the police and the security chief conducted an extensive investigation that lasted for many hours and covered every detail of Norton's sexual history, it could be argued that the resultant harassment and humiliation amounted to intrusive conduct violating Norton's right to privacy.

In a recent case involving revocation of a teaching license for homosexual conduct, the court interpreted Norton to mean that the right to privacy prohibits sweeping inquiries into an employee's private life. The court concluded that such investigations are permissible only to the extent that they are related to the person's ability to teach. Morrison v. State Bd. of Educ., — Cal. 2d —, 461 P.2d 375, 390, 82 Cal. Rptr. 175, 190 (1969). In Jarvella v. Willoughby-Eastlake City School Dist., the court held that private letters containing vulgar language and published by third parties are protected
private activity contemplated by the court may be broader than that previously envisaged, encompassing activities that are conducted in the home and that do not directly affect any public interest or infringe upon the rights of others. 46 Thus, Norton's dismissal, which was based upon the application of traditional modes of morality to a government employee's private life, 46 may have constituted an improper intrusion upon the sanctity of his home and personal life. 47 Another possible violation of Norton's right to privacy may have resulted from the "badge of infamy" placed upon him by the dismissal. The reasons for the dismissal, if made part of public record, 48 might adversely affect his reputation and

by the first, fourth, ninth, and fourteenth amendments and cannot be the basis for terminating a teaching contract on grounds of "immorality." The "intrusion" upon the teacher's privacy resulting from use of these letters as a basis for dismissal became "unwarranted" when it appeared that the letters did not adversely affect the welfare of the school community. 12 Ohio Misc. 288, 291, 233 N.E.2d 143, 146 (Lake County Ct. C.P. 1967).


46 "[T]he notion that it can be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with the elementary concepts of liberty, privacy, and diversity." 417 F.2d at 1165.

46 Id. Other cases have indicated that except when related to work efficiency, there is no public interest in insuring that an employee's private activities are "moral." See Morrison v. State Bd. of Educ., — Cal. 2d —, 461 P.2d 375, 390-94, 82 Cal. Rptr. 175, 190-94 (1969); Jarvela v. Willoughby-Eastlake City School Dist., 12 Ohio Misc. 288, 291, 233 N.E.2d 143, 146 (Lake County Ct. C.P. 1967). See also note 53 infra.


48 It is not evident whether the reasons for the dismissal in Norton were made part of the public record. "Preference eligibles" may elect to have copies of the charges, the order of removal, and the reasons therefor "made part of the records of the employing agency." 5 U.S.C. §§ 7501(b), (c) (Supp. IV, 1969). It is clear, therefore, that a prospective employer of a person falling within these provisions would then have access to the reasons for the dismissal. See 5 C.F.R. § 294.702(b)(4) (1969).

If the preference eligible elects not to apply the provisions of § 7501, his dismissal will be subject to § 7512, which makes no provision as to the content of the records of the employing agency. 5 U.S.C. § 7512 (Supp. IV, 1969). Nevertheless, this provision does
limit future employment opportunities.40 Such a theory of the constitutional right to privacy fits within the framework of traditional tort concepts of the right to anonymity.50

not forbid the agency from keeping records on the cause for dismissal, and if records are kept, employers will have access to such information. Whether an employer can secure information as to a dismissal when records are not kept would seem to depend upon the availability of other sources of information within the agency. See 5 C.F.R. § 294.702(b)(4) (1969).

If a dismissed employee challenges the action of the employer, the case comes within the provisions of Freedom of Information Act, which provides that each agency must make available to the public "final opinions . . . as well as orders made in the adjudication of cases," although the agency is permitted to delete identifying details "to the extent required to prevent a clearly unwarranted invasion of personal privacy." 5 U.S.C. §§ 552(a)(2) (A)-(C), (b)(6) (Supp. IV, 1969). In addition, the agency having custody of an employee's appeal or complaint file may disclose to the public the names of the parties, the decision in the case, and the nature of the action, unless disclosure would constitute "a clearly unwarranted invasion of privacy." 5 C.F.R. §§ 294.801(b)(1), (3)-(4) (1969). There is no further elucidation in either the statute or the regulations as to what constitutes a clearly unwarranted invasion of privacy. See generally Note, Freedom of Information: The Statute and the Regulations, 56 Geo. L.J. 18 (1967).


50 Originally, the right to anonymity was given expression in suits claiming recovery for publication of an individual's name, reputation, or personal characteristics when such information was unrelated to the public interest. See Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N.D. Cal. 1939) (radio broadcast of hold-up victim's name without consent); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (publication of plaintiff's name and past); Cason v. Baskin, 159 Fla. 531, 30 So. 2d 635 (1947) (neutral publication of plaintiff's name and idiosyncracies). See generally Prosser, Privacy, 48 Cal. L. Rev. 383, 392 (1960); Warren & Brandeis, The Right of Privacy, 4 HARV. L. REV. 193 (1890).

Although at common law matters of public record were excluded from this right to anonymity, several recent decisions have found violations of the right to privacy in preservation or dissemination of arrest records when convictions have not been obtained. See Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969) (dissemination to public of arrest record); United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967) (preservation of arrest records and attack upon character). See generally COMMITTEE TO INVESTIGATE THE EFFECT OF POLICE ARREST RECORDS ON EMPLOYMENT OPPORTUNITIES IN THE DISTRICT OF COLUMBIA, REPORT (1967). In Love v. Snyder, however, the Seventh Circuit held that if made in the performance of authorized duties, defamatory statements published by officials during an investigation before the Civil Service Commission could not be the subject of a civil suit. 184 F.2d 840, 841 (7th Cir. 1950).
In discussing the relationship between a government employee’s conduct and the efficiency of an agency, the court explained that it is improper to assume that once conduct has been labeled “immoral,” the duty of the agency ends. While acknowledging that when measured by conventional mores, homosexuality may fall within that category of activity defined as “indecent,” “immoral,” or “notoriously disgraceful,” the court insisted that these terms are overly broad and encompass conduct having no appreciable effect upon the efficiency of an agency. Thus, conduct as grounds for dismissal must be judged in terms of the effect that specific acts have on the efficiency of the service and not according to a general characterization of types of conduct.

Nevertheless, the court did not hold that homosexuality can never

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51 417 F.2d at 1165. The court did not treat the question of whether the terms “immoral” and “unprofessional” are so broad as to lack the definiteness required by due process. Traditionally, statutory or regulatory provisions are found unconstitutionally vague if they are so ambiguous as to lead men of common intelligence to guess their meaning and application. See, e.g., United States v. Harris, 347 U.S. 612 (1954); United States v. Petrillo, 332 U.S. 1 (1947); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Construction Co., 269 U.S. 385 (1926); Fleuti v. Rosenberg, 203 F.2d 652 (9th Cir. 1962).

In Morrison v. State Bd. of Educ., the Supreme Court of California suggested that a statutory provision permitting the revocation of a teacher’s certificate for “immoral” or “unprofessional” conduct might be unconstitutionally vague, but instead, without really defining “immorality,” narrowed the scope of its application to include only conduct related to occupational fitness. — Cal. 2d —, —, 461 P.2d 375, 379-89, 82 Cal. Rptr. 175, 179-90 (1969). In Norton, the court construed the regulatory provision on morality as commensurate with “the majority’s conventional codes of conduct.” 417 F.2d at 1165. Compare Czarra v. Board of Medical Supervisors, 25 App. D.C. 443 (1905), State v. Vallery, 212 La. 1095, 34 So. 2d 329 (1948), and State v. Musser, 118 Utah 537, 223 P.2d 193 (1950), with Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P.2d 449 (1951) and Sage-Allen Co. v. Wheeler, 119 Conn. 667, 179 A. 195 (1935).

For general discussions of statutes involving morality that have been attacked for vagueness, see Shapiro, Morals and the Courts: The Reluctant Crusaders, 45 MINN. L. REV. 897 (1961); Note, Dismissal of Federal Employees, supra note 6, at 722 (1966); Note, Entrance and Disciplinary Requirements for Occupational Licenses in California, 14 STAN. L. REV. 533, 540-50 (1962).

52 417 F.2d at 1165.

53 Id. The California Supreme Court in Morrison v. State Bd. of Educ. also found that private homosexual conduct in itself could not justify removal of an employee on the grounds of immorality. — Cal. 2d —, —, 461 P.2d 375, 391, 82 Cal. Rptr. 175, 191 (1969). Revocation of the employee’s teaching license was found improper in the absence of a showing that the conduct adversely affected his performance in the classroom or his impact on students. In determining the relationship between an employee’s conduct and his teaching competence, the court directed the board of education to consider such factors as the likelihood and the extent to which the conduct adversely affected students or fellow teachers, the proximity or remoteness in time of the acts in question, reasons and possible extenuating circumstances surrounding such conduct, the type of teaching certificates involved, and the extent to which disciplinary action would have a “chilling” effect upon the exercise of constitutional rights by both the teacher involved
affect an agency's efficiency. An employing agency legitimately might dismiss a person for homosexual conduct if as a potential blackmail victim, the employee could jeopardize the security of classified information. Homosexuality also might evidence an unstable personality, inappropriate for certain positions of responsibility. In addition, notorious and offensive conduct might cause reactions by other employees in the agency, thus adversely affecting the agency's operations.

and other teachers. Id. at —, 461 P.2d at 379-89, 82 Cal. Rptr. at 179-89. The court in Morrison also cited other cases in which courts have overturned exclusions or license revocations upon finding an insufficient relationship between the individual's conduct and his job performance. E.g., Fort v. City of Brinkley, 87 Ark. 400, 112 S.W. 1084 (1908) (illegal sale of intoxicants not a crime of "moral turpitude" allowing revocation of physician's license); H.D. Wallace & Assoc. v. Department of Alcoholic Control, — Cal. App. 2d —, 76 Cal. Rptr. 749 (1969) (conviction for drunken driving and public drunkenness does not justify revocation of liquor license); Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 435 P.2d 553, 64 Cal. Rptr. 785 (1968) (illegal sale of amphetamine without evil motivation found not a crime of "moral turpitude" allowing revocation of physician's license); Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966) (participation in fistfights and convictions for nonviolent civil disobedience found not to justify exclusion from the bar).

54 Homosexuals have long been considered vulnerable to blackmail attempts. M. Ploscowe, Sex and the Law 195-96 (1951); P. & B. Wyden, Growing Up Straight 213-14 (1968). Nevertheless, the exact nature of the relationship between homosexuality and the likelihood of disclosure of classified information has not been documented. See Note, Government-Created Employment Disabilities of the Homosexual, 82 Harv. L. Rev. 1738, 1749 (1969). Furthermore, regulations providing for automatic dismissal of homosexuals probably increase an employee's vulnerability to blackmail attempts, since the loss of a job might be of more concern than the embarrassment of public exposure or even the possibility of a criminal prosecution. Id. at 1749; Task Force on Homosexuality, Final Report 20 (1969). A number of homosexuals have made public admissions of their sexual inclinations in an attempt to deprive the Department of Defense of the blackmail rationale. See generally Wall Street Journal, July 17, 1968, at 1, col. 1. In a recent case, it was argued in dissent that the necessary showing of a connection between homosexuality and inability to protect classified information had not been made, because the exposure given appellant by virtue of the trial dissipated any basis for blackmail. Adams v. Laird, — F.2d —, — (D.C. Cir. 1969) (Wright, J., dissenting).


56 See Norton v. Macy, 417 F.2d 1161, 1166 (D.C. Cir. 1969). There are no reliable statistics on the reactions of the public to homosexuality. One of the specific recommendations of the Task Force on Homosexuality, appointed by the Director of the National Institute of Mental Health, was to study the "attitudinal patterns" of the public on homosexuality and its effects upon working relationships with fellow employees. Task Force on Homosexuality, Final Report 9 (1969). See generally E. Schur, Crimes Without Victims 109-10 (1965). Recent studies have indicated that employee job satisfaction and harmonious relationships with fellow employees have no positive correlation with productivity. See W. Whyte, Men at Work 554 (1961). Moreover, it has been suggested that potential adverse reactions of employees, often based on working conditions and personality conflicts, might be diminished substantially by intelligent
however, who was a competent employee and whose sexual activities were infrequent and generally unknown,\(^57\) was not dismissed for any of these reasons; rather, he was dismissed because of the agency's custom to do so in such cases and because of the possibility of embarrassment, which the court found "unparticularized and unsubstantiated." \(^58\)

Perhaps the most important aspect of *Norton* is that the court's analysis should stimulate government employers to reexamine traditional certitudes as to the nature of homosexuality. An inflexible policy, resulting in the exclusion of all homosexuals, fails to take into account the wide variations in homosexual behavior,\(^59\) as well as the deleterious effects such a policy can have on both the homosexual segment of the population\(^60\) and government service.\(^61\) Thus, by imposing needed restrictions on the power of agencies to dismiss or exclude them from employment, the *Norton* court demonstrated an enlightened concern for the problem of homosexuals in government employment.


\(^{57}\) The official who dismissed Norton admitted that he was a "competent" employee, that the risk of a security breach was minimal, and that his work did not bring him into contact with the public. 417 F.2d at 1166-67.

\(^{58}\) *Id.* at 1167. The court saw a danger that the claim of possible embarrassment might serve as a "smokescreen" behind which individual dislikes could determine personnel policies. A reasonably foreseeable and specific correlation must be shown between embarrassment and the efficiency of the service. In *Eustace v. Day*, the court upheld the agency's decision that petitioner's conduct would bring the Department "into disrepute and was unbecoming to a postal employee." Even though the agency did not specify the unbecoming conduct, the decision was found to be "rational" and not "arbitrary, capricious or unwarranted." 114 U.S. App. D.C. 242, 314 F.2d 247 (1962).


\(^{60}\) In *Norton*, Chief Judge Bazelon cited Dr. Kinsey's study as the most widely accepted study of American sexual practices. 417 F.2d at 1167 n.28, *citing* A. Kinsey, W. Pomeroy & C. Martin, *Sexual Behavior in the Human Male* 623 (1948). Kinsey estimated that 4% of the male population of America is exclusively homosexual, that 8% have had continued homosexual experience over at least a three-year period between the ages of 16 and 55, and that at least 37% of all American males have had at least one homosexual experience. Statistics, however, are in conflict. See M. Ploscowe, *Sex and the Law* 206-07 (1951).

\(^{61}\) Aware of these problems, the Task Force on Homosexuality recently proposed creation of a center for the study of sexual behavior, the main purpose of which would be to study all aspects of homosexuality and its relationship to community attitudes. Such a facility could disseminate information to policymakers and administrators for use in framing rational social policy. *Task Force on Homosexuality, Final Report 7* (1969). The Task Force specifically recommended revisions in governmental regulations that make homosexuality a cause for dismissal. Judge Bazelon, author of the *Scott* and *Norton* opinions, was a member of the Task Force.
PROFESSIONAL ASSOCIATIONS AND THE RIGHT TO FREE EXPRESSION: CONSTITUTIONAL LIMITATIONS ON CONTROL OF MEMBERS

Firestone v. First Dist. Dental Soc'y (N.Y. 1969)

The economic power and public influence of private professional associations,\(^1\) when coupled with the presence of a high degree of internal control over association members,\(^2\) militates in favor of some form of judicial review of disputes between associations and their members. Nevertheless, because of the difficulty in balancing members' interests against the societal values of free association, group autonomy, and private ordering of society, courts traditionally have been hesitant to intervene.\(^3\) On occasion, however, the exercise of such power has stirred courts to review the actions of a private association. Judicial examination of the legality of an association's conduct has been based upon several approaches. Some courts have reasoned that judicial action is necessary in order to prevent the taking of a member's proprietary interest in the association;\(^4\) others have enforced a contractual waiver of rights between

\(^1\) See generally Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930); Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983 (1963) [hereinafter cited as Developments—Private Associations]. One study has concentrated on a particular professional association. See Note, The American Medical Association: Power, Purpose, and Politics in Organized Medicine, 63 Yale L.J. 938 (1954).

\(^2\) Generally, an association exerts such disciplinary powers over its members as censure, suspension, and expulsion. Whenever a member has a strong economic or social interest in maintaining an unblemished standing in his association, such sanctions become powerfully effective. See, e.g., Smith v. Kern County Medical Ass'n, 19 Cal. 2d 263, 120 P.2d 874 (1942); Paccaud v. Waite, 218 Ill. 138, 75 N.E. 779 (1905).

\(^3\) "Courts have been understandably reluctant to interfere with the internal affairs of membership associations and their reluctance has ordinarily promoted the health of society." Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 590, 170 A.2d 791, 796 (1961); see Chafee, supra note 1, at 1027. This reluctance is more pronounced in cases of exclusion than in those of expulsion. See Trautwein v. Harbourt, 40 N.J. Super. 247, 250, 123 A.2d 30, 37 (App. Div. 1956). Compare Medical Soc'y of Mobile County v. Walker, 245 Ala. 135, 16 So. 2d 321 (1944) and McKane v. Democratic General Commn., 123 N.Y. 609, 25 N.E. 1037 (1890), with State ex rel. Waring v. Georgia Medical Soc'y, 38 Ga. 608 (1869) and Ryan v. Cudahy, 157 Ill. 108, 41 N.E. 760 (1895). See also Comment, Exclusion from Private Associations, 74 Yale L.J. 1313, 1314-15 (1965).

\(^4\) E.g., Lawson v. Hewel, 118 Cal. 613, 50 P. 763 (1897); Fussell v. Hail, 233 Ill. 73, 84 N.E. 42 (1908). Various proprietary interests have been recognized. See, e.g., Davis v. Scher, 356 Mich. 291, 97 N.W.2d 137 (1959) (right to use association's physical
the member and the association or have simply applied state or federal antitrust laws. Less frequently, courts have found an association's action contrary to public policy or tantamount to a tort because it has injured the individual's membership status. Still other courts have used a state constitutional or statutory guarantee to measure the legality of an association's action. A recently advocated and even more recently invoked ground for judicial intervention is the federal constitution, which provides a jurisdictional basis when the association has engaged in state action.


8 "The petitioner, having agreed to be bound by the laws adopted by the membership, is therefore precluded from any relief in this proceeding." Smith v. Kern County Medical Ass'n, 19 Cal. 2d 263, 273, 120 P.2d 874, 879 (1942); see, e.g., Lawson v. Hewel, 118 Cal. 613, 50 P. 763 (1897); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928).


10 E.g., Schneider v. Local 60, Journeymen Plumbers, 116 La. 270, 40 So. 700 (1905) (public policy against contracts that infringe upon discretion of a public officer); Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958) (public policy favoring free expression and political opposition within unions).


York supreme court became the first court to find an association's conduct in violation of the first amendment on the basis of state action. Suing for declaratory and injunctive relief, a member of the First District Dental Society alleged that a provision in the society's code of ethics requiring approval of its members' professionally related publications and broadcasts was an unconstitutional prior restraint on his freedom of speech, as guaranteed by the first amendment and applied to the states through the fourteenth amendment. The disputed provision declared it "unethical for any . . . member to publish or broadcast any manuscripts or talks to the lay public dealing with scientific, dental matters without first securing . . . approval" from the society's committee on ethics; furthermore, the society's constitution and bylaws authorized suspension or expulsion for a violation of this regulation.  

Plaintiff had prepared a manuscript on dental care for radio broadcast and submitted it to the committee on ethics for approval. Approval was refused because the manuscript "contained numerous statements that were not in good taste and not designed to uphold the dignity of the profession" and thus it would not be "in the best interests of dentistry" to read the manuscript "over the radio."  

Since the fourteenth amendment protects individuals only from wrongful acts by a State and not from those by individuals, state action was basic to plaintiff's case. In finding such action, the Firestone court first observed that appointees to the official state board charged with preparing and conducting examinations for licenses to practice dentistry are nominated by the state dental society, whose members come exclusively from the various district societies, including defendant. The court concluded, therefore, that defendant society was engaged in state action, since the district societies clearly function as agents of the State in selecting members to the official state board of examiners.

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14 Id. at 363, 299 N.Y.S.2d at 554.
15 Id. at 363, 299 N.Y.S.2d at 555.
16 Civil Rights Cases, 109 U.S. 3 (1883); see United States v. Guest, 383 U.S. 745, 755 (1968). Courts, however, have recognized a variety of state involvement that constitutes state action: formal operation of a state agency, indirect state control over a nominally private party, and exercise of an essentially governmental function by private parties. According to another test, all the indicia of state involvement should be considered, and if sufficient private entwinement with the state exists, state action is involved. See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (entwinement theory); Marsh v. Alabama, 326 U.S. 501 (1946) (governmental function); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945) (indirect state control by financial aid).
Having ruled state action present, the court then found the censorship provision in defendant’s code of ethics an invalid prior restraint on plaintiff’s constitutionally protected freedom of expression.\(^{18}\)

In the past, courts have employed indirect methods to protect a member’s rights from the rule making power of a private association.\(^{19}\) Thus, it has been held that a union cannot expel a member for testifying against it at a public hearing,\(^{20}\) for advocating passage of legislation to which it is opposed,\(^{21}\) or for publicly criticizing union officials.\(^{22}\) Similarly, a trade or professional association cannot expel one who testifies against it;\(^{23}\) nor may a social club expel a member for openly espousing legislation disapproved by the club;\(^{24}\) for publicly criticizing a majority of the club;\(^{25}\) for refusing to adhere to suddenly required political loyalties;\(^{26}\) or for participating in proscribed religious activities.\(^{27}\)

Notwithstanding the laudable results of the indirect methods of protecting first amendment freedoms, the *Firestone* court, unequivocally invoking the Constitution to protect freedom of expression, avoided several disadvantages of the indirect rationales. For example, the *Firestone* approach probably would not be as hindered by the doctrine of waiver, which is a serious obstacle to relief under the simplistic contract theory for defining the relationship between an association and its members.\(^{28}\) In applying the contractual theory, courts have recognized the association’s rules and bylaws as enforceable contracts by emphasizing the consensual basis of a member’s relationship to the group; thus, courts could find that a member had waived certain rights when he voluntarily

\(^{18}\) *Id.* at 365-66, 299 N.Y.S. 2d at 557.

\(^{19}\) See notes 4-10 *supra* and accompanying text.


\(^{26}\) Stein v. Marks, 44 Misc. 140, 89 N.Y.S. 921 (Sup. Ct. 1904).


\(^{28}\) See note 5 *supra* and accompanying text. *See also Developments—Private Associations, supra* note 1, at 1001-02.
joined the group.\textsuperscript{29} By contrast, under \textit{Firestone}, even an explicit waiver of first amendment rights as a precondition to membership may not be legally recognized because of the high dignity of these privileges.\textsuperscript{30} Furthermore, at least when the restriction established by the association is void on its face, \textit{Firestone} modifies the traditional doctrine of exhaustion of internal remedies,\textsuperscript{31} since judicial relief may be sought immediately.\textsuperscript{32} Finally, it may offer the further advantage of allowing judicial relief without an allegation of economic detriment\textsuperscript{33}—traditionally an almost universal requirement.\textsuperscript{34}

Most significantly, however, if state action is present, the \textit{Firestone} approach allows incorporation of well-defined constitutional principles into the law governing professional associations.\textsuperscript{35} Applying to associations the law surrounding the first amendment would aid the courts in formulating more definite guidelines for determining the legality of an association's action. This alternative to the nebulous public policy stand-

\textsuperscript{29} See North Dakota v. North Cent. Ass’n, 23 F. Supp. 694, 699-700 (E.D. Ill.), aff’d, 99 F.2d 697 (7th Cir. 1938); Manning v. San Antonio Club, 63 Tex. 166 (1884).


\textsuperscript{31} This doctrine prevents a court from adjudicating a dispute when remedial procedures made available by the association itself have not been resorted to by the complainant. See generally Developments—Private Associations, supra note 1, at 1069-80; Comment, Exhaustion of Remedies in Private, Voluntary Associations, 65 Yale L.J. 369 (1956).

\textsuperscript{32} The right to immediate judicial relief has been recognized because of the possible chilling effect on freedom of speech that an invalid restraint might otherwise have. Cf. Freedman v. Maryland, 380 U.S. 51, 56 (1965); Thornhill v. Alabama, 310 U.S. 88, 97 (1940); Lovell v. City of Griffin, 303 U.S. 444, 452-53 (1938). But see Poulos v. New Hampshire, 345 U.S. 395 (1953).

\textsuperscript{33} “[T]here would seem to be no need for plaintiff to establish that his suspension or expulsion from the defendant society would cause him economic loss.” 59 Misc. 2d at 367, 299 N.Y.S.2d at 558 (dictum).

\textsuperscript{34} See Developments—Private Associations, supra note 1, at 998.

\textsuperscript{35} The eventual effect of \textit{Firestone} on the law governing associations depends upon other jurisdictions accepting its method of finding state action. If accepted, the effect will be pervasive, since many states have delegated to professional associations the power to nominate, and in some instances actually to appoint, persons to the state boards that license new professionals and administer legislative standards for all practitioners. E.g., N.C. Gen. Stat. § 90-3 (1965); N.J. Stat. Ann. § 45:9-1 (Supp. 1963); see Council of State Governments, Occupational Licensing Legislation in the States 37-38, 88-90 (1952). Arguably, other quasi-public functions could serve as bases for finding state action, such as accreditation of professional schools and administration of licensing examinations. See Comment, Exclusion from Private Associations, supra note 3, at 1316. But see Salter v. New York State Psychological Ass’n, 14 N.Y.2d 100, 198 N.E.2d 250, 248 N.Y.S.2d 867 (1964).
ard previously employed would protect more effectively the individual member's rights, since courts will have clearly developed tests and principles to apply. Two particularly relevant constitutional tests which would be applicable concern vagueness and overbreadth. Basing their reasoning upon the fragile nature of the first amendment freedoms and the possible chilling effect of any ambiguous restrictions upon them, courts have required that, to avoid overbreadth, such restrictions be drawn as narrowly as possible and, to prevent vagueness, they be couched in such explicit terms that one can be aware what speech or conduct is prohibited.

Another constitutional principle that would be incorporated under the Firestone approach is that of balancing of interests, whereby a restriction on first amendment freedoms is justified only when the individual interest is outweighed by a more compelling state interest. In applying this principle, the courts have carefully examined, defined, and weighed opposing interests, requiring that a substantial state interest be found in order to justify carving out exceptions to the freedom of expression. Similarly, in applying the first amendment to private associations, a court should first define the salient interest of the association deserving protection; second, determine whether there is a logical nexus between these interests and the disputed restriction; and, third, balance these associational interests against society's interest in protecting members' freedom of expression. Traditionally, courts have applied the balancing test in the context of the relationship between the citizen and the State. The interests involved in a member-association relationship, however, may differ greatly from those surrounding a citizen-sovereign relationship, since in order to achieve its legitimate

36 See cases cited note 8 supra.
39 "Where First Amendment rights are asserted . . . the issue always involves a balancing by the courts of the competing private and public interest at stake in the particular circumstances shown." Barenblatt v. United States, 360 U.S. 109, 126 (1959).
and socially desirable goals, a professional association requires a certain degree of regulatory control over the activities and character of its membership. When applying the balancing test to private associations, therefore, a court should be hesitant to automatically apply the results of prior first amendment cases, which involve the exercise of state regulatory control over the general populace.

The *Firestone* court did not indulge in a detailed analysis or balancing of the relevant interests involved because the evil attacked—censorship—traditionally has been abhorred by courts. Nevertheless, it is possible that when disciplinary proceedings for actual violations of professional ethics are in issue, such an analysis under the balancing test should be employed. Although most professions are also regulated by state law, a professional association may discipline its members merely for violating its code of ethics, which is not law but only a guide to proper professional conduct. In general terms and often in excessively broad

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41 These goals include raising the quality of professional education and improving the standards of professional practice. For evidence of the undeniable success of the AMA in these areas, see Note, *The AMA*, supra note 1, at 959-96.

42 For example, in cases involving state bar associations and state boards of education, the courts have refined traditional modes of analysis. In *Pickering v. Board of Educ.*, in which an employer-employee relationship was also present, the Supreme Court held that the state school board's dismissal of plaintiff as a public school teacher for publicly criticizing past allocations of public school funds in connection with a proposal to raise new revenues was violative of plaintiff's first amendment rights. 391 U.S. 563 (1968). Although the school board argued that plaintiff's continued employment was detrimental to the efficient operation and administration of the school system, the Court found that dismissal was not essential to protect this valid state interest, since plaintiff's continued employment created neither discipline problems for his immediate superiors nor disrespect among his co-workers. Furthermore, there was no proof that plaintiff knowingly or recklessly made false statements. In an earlier case, however, the Supreme Court upheld rejection of the petitioner's application for admission to the California state bar because of repeated refusals to answer questions concerning his past or present membership in the Communist Party. In its opinion, the Court found the substantial state interest "in having lawyers who are devoted to the law ... [as well as] its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association." *Konigsberg v. State Bar*, 366 U.S. 36, 52 (1961). See also *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).


44 59 Misc. 2d at 365-66, 299 N.Y.S.2d at 557.


46 In *re Moore*, 8 Ill. 2d 373, 378, 134 N.E.2d 324, 326 (1956). See also *Preamble to AMA Principles of Medical Ethics*. There have been cases of blatant abuse of such disciplinary power. In *Bernstein v. Alameda-Contra Costa Medical Ass'n*, a physician was expelled from a county medical association in part, because in a report prepared solely for use in court, he had made disparaging remarks about a pathologist. 139 Cal.
language, professional ethics regulate a wide range of activities involving both other professionals and the public.\textsuperscript{47} and sanctions imposed may be as severe as suspension of membership or expulsion from the association.\textsuperscript{48} Furthermore, because of the near monopolistic position of many professional associations,\textsuperscript{49} the feared loss of collateral membership benefits also operates as a sanction,\textsuperscript{50} and in some instances, as a forceful deterrent to publicly expressed dissent by member professionals. Similarly, in its characteristic failure to provide a public forum for dissenting views,\textsuperscript{51} a professional association may effectively stifle intra-disciplinary debate. The confluence of these factors, coupled with general lay ignorance in professional matters, may allow a professional association to channel or stultify future development of the profession, sometimes to the detriment of the public interest.\textsuperscript{52} Thus, there is a strong societal interest in protecting the freedom of professionals to express their views to both other professionals and the public, which can be best accomplished by applying constitutional safeguards to association activities.

Any constitutionally posited assault on the authority of professional associations also must consider the associations' equally important interest in promulgating professional ethics: to establish and promote uniform professional standards that will engender and maintain strong public confidence in the profession.\textsuperscript{53} Moreover, all regulation of members'

App. 2d 241, 293 P.2d 862 (1956). The association's council thought it immaterial that the remarks might have been true; the court, however, held the expulsion void as against public policy.

\textsuperscript{47} "A dentist may properly participate in a program of health education of the public involving such media as the press, radio, television and lecture, provided that such programs are in keeping with the dignity of the profession and the custom of the dental profession of the community." ADA PRINCIPLES OF ETHICS § 20.

\textsuperscript{48} See note 2 supra and accompanying text.

\textsuperscript{49} For a discussion of the monopoly position of the AMA, see Note, The AMA, supra note 1, at 948.

\textsuperscript{50} For example, membership in the AMA may be a prerequisite for appointment to a hospital staff, teaching position, or specialty rating. In addition, local societies may provide such valuable services as group malpractice insurance and legal advisors. Ostracism from the profession provides further subtle sanctions, including loss of consultations and patient referrals. See id. at 940, 949.

\textsuperscript{51} The official publication of the AMA, the Journal of the American Medical Ass'n, rarely prints articles in disagreement with positions taken by the Association. M. DAVIS, AMERICA ORGANIZES MEDICINE 175-76 (1941); Note, The AMA, supra note 1, at 946.


\textsuperscript{53} E.g., Preamble to ABA, CODE OF PROFESSIONAL RESPONSIBILITY; Preamble to AMA, PRINCIPLES OF MEDICAL ETHICS.
activities of course must be related to achieving this general purpose.\textsuperscript{54} A review of several prominent professional codes of ethics\textsuperscript{55} reveals certain broad professional interests which when translated into regulations, must be balanced against the first amendment freedoms of expression and association.

It is commonly recognized that some restriction upon advertising professional skills and soliciting business is necessary.\textsuperscript{56} The public policy rationale for this restriction focuses on the prevention of deception and the fear that if advertising were not restricted, the concomitant commercial atmosphere would lower the dignity of the profession and hence lower public confidence in the profession.\textsuperscript{57} The interest in maintaining public confidence also is reflected in the proscription of disparaging and disrespectful comments about the services rendered by professional colleagues.\textsuperscript{58} In addition, the interest in insuring that the public receives entirely professional service requires that some limitation be imposed upon a member's right to associate with nonprofessionals in rendering service to the public;\textsuperscript{59} similarly, creation of a privileged relationship with the patient or client in order to encourage complete and honest disclosure is justified by the interest in rendering complete professional service to the public.\textsuperscript{60} Finally, the interest in preventing the public from being misled by professionally unsound views is used to justify official approval of members' publications and broadcasts.\textsuperscript{61} Besides being reflected in the various professions' national codes, these


\textsuperscript{55} ABA Code of Professional Responsibility [hereinafter cited as ABA Code]; ADA Principles of Ethics [hereinafter cited as ADA Principles]; AMA Principles of Medical Ethics [hereinafter cited as AMA Principles].

\textsuperscript{56} See ABA Code Canon 2, Ethical Considerations ¶¶ 2-10; ADA Principles § 12; AMA Principles § 5.

\textsuperscript{57} Letter from Harrison Hewitt, to the American Bar Association Journal, in 15 A.B.A.J. 116 (1929); see State v. Nichols, 151 So. 2d 257, 259 (Fla. 1963); Jacksonville Bar Ass'n v. Wilson, 102 So. 2d 292, 294-95 (Fla. 1958).

\textsuperscript{58} ADA Principles § 8; AMA Principles § 1.

\textsuperscript{59} ABA Code Canon 3; ADA Principles § 6; AMA Principles § 3.

\textsuperscript{60} ABA Code Canon 5; AMA Principles § 9.

\textsuperscript{61} AMA Principles § 10.

In the ever-expanding field of medical public relations, no single phase has developed more than that which leads to the publication in national lay magazines and newspapers of stories of research or surgery. Such articles, where authoritatively prepared, usually tend to add to public confidence in the procedure described. The members of the Judicial Council believe that public confidence would be greatly enhanced, if a footnote printed with the article set forth the information that the article as written had the approval of the county or state, or both, medical societies.

ethical canons generally are both adopted by local associations and expanded upon to include more exacting standards. In reviewing regulatory proceedings by state licensing boards and disciplinary proceedings by professional societies, the courts have found most of these regulations reasonable and necessary.

Notwithstanding the importance of professional considerations, such regulations may present serious first amendment issues. For example, official approval of publications and broadcasts in order to insure public confidence that the expressed view is professionally sound may be justified to the extent that the association distinguishes between the profession’s approved and nonapproved views; as was held in Firestone, however, this interest is not so compelling as to justify censorship of nonapproved publications. Other first amendment issues also exist, such as whether Christmas cards, newsletters, and product endorsements are advertisements in violation of professional ethics. Because of the variety of specific regulations promulgated by local associations and because local approaches may differ widely, a general analysis of applicable and relevant first amendment principles cannot be made. It is significant to note, however, that many of these regulations have been limited judicially on bases other than the first amendment. Under the Firestone rationale, if state action is found, these regulations can be attacked anew and thus subjected to closer scrutiny and more exacting standards.

If the state action theory of Firestone gains wide acceptance, professional associations will need to re-evaluate the underlying justification for many of their restrictions on members’ activities, in which case

62 E.g., TEX. MED. ASS’N BY-LAWS ch. 10, § 21 (1962); VA. MED. SOC’Y BY-LAWS art. II (1952).


64 See note 61 supra.


68 Bernstein v. Alameda-Contra Costa Medical Ass’n, 139 Cal. App. 2d 241, 293 P.2d 862 (1956) (expulsion based in part upon court testimony criticizing fellow professional against public policy); State v. Nichols, 151 So. 2d 257 (Fla. 1963) (newspaper article prepared from answers by attorney not in violation of canon prohibiting advertising); In re Kanter, 194 Kan. 362, 399 P.2d 865 (1965) (newsletters to clients not advertisements).
focus first should be on whether there is a substantial professional interest to be protected and whether there is a sufficient nexus between such interest and the restriction imposed. Furthermore, assuming a valid association interest, the promulgated ethics themselves will need to be re-examined in light of the doctrine of vagueness and overbreadth\textsuperscript{69} in order to insure that all restrictions are well-defined and narrowly drawn. Perhaps then a person will be able to manage his professional affairs without fear that his conduct may be challenged at a later time as “conduct which leads to a lowering of esteem of the profession.”\textsuperscript{70}

\textsuperscript{69} See notes 37-38 supra and accompanying text.

\textsuperscript{70} ADA Principles § 2.
BOOK REVIEWS


The introduction to Mason Willrich's book states that it "is intended in part as a useful reference book on the Non-Proliferation Treaty." This part of the author's purpose is met in a wholly satisfactory manner. His book supplies an excellent technological base, in terms easily comprehended by laymen, for understanding the problems involved in assessing the merits of the Non-Proliferation Treaty. In this connection, he cogently points out the importance of the chemical separation plant as a key point in the cycle of nuclear materials.

As a reference book alone, it is well worth having; it is a useful and convenient tool and of invaluable assistance in understanding an issue of major international significance. Unfortunately, this success is not without its costs. The last 85 pages of the text consist of public documents, which may seem a relatively high proportion of appendix to a textual discussion of 186 pages. Nevertheless, while such documents as the body of the treaty itself, the Security Council Resolution, the related United States declaration on Security Assurance, and the International Atomic Energy Agency's Safeguards System are available to the public, it is often a nuisance to obtain copies of them, particularly the I.A.E.A. Safeguards System; thus, it is worthwhile to have them all in one book.

In one respect, however, the book did not live up to my expectation. The author is not only a skilled lawyer, but has served, to the reviewer's personal knowledge, as a wise and effective member of the United States delegation to the disarmament negotiations in Geneva. It would be safe to assume, therefore, that he wanted to give the reader more than a legal analysis. Furthermore, it also would be fair to assume that he hoped to put the reader in a position both to evaluate the Non-Proliferation Treaty from the point of view of the realities of the international negotiations and to analyze it in light of the real dangers the Treaty was designed to prevent.

This purpose is satisfied, but not completely. Some parts of the author's analysis place more emphasis on theoretical legal problems than on the practical problems likely to arise. Chapter II on Policy Evaluation, for example, is a routine evaluation of theoretical alternative
policies, some of which may have little practical significance. Had the author applied a common sense "threshold," he could have dispensed with at the outset the unreal alternative policies, such as the general policy of encouraging non-nuclear weapons states to acquire nuclear weapons. Also in this regard, I make particular mention of the portion of chapter IV dealing with the impact of the Non-Proliferation Treaty in time of war. Moreover, in chapter VII the author suggests that the clause permitting withdrawal from the Treaty based on jeopardy of a party's "supreme interest" may have had its origin in similar language in the quite dissimilar Nassau agreement, which concerns the targeting of certain United Kingdom Polaris submarines. Such a suggestion is not merely legalistic; it is inaccurate.

This theoretical emphasis, however, is not found throughout the book. The chapter on Safeguards is written with insight, and in the later chapter dealing with the wider political implications of the Treaty the author regains his form as an experienced international negotiator. On an overall basis, therefore, Mr. Willrich's book fulfills its purpose and is both worth reading for its political insight and worth having as a reference work.

The Non-Proliferation Treaty went into effect as to almost 50 parties on March 5, 1970. This event will increase, rather than decrease, the importance of the book. As the author points out, the coming into force of the Treaty will initiate creation of a world wide safeguards system, to be worked out through the International Atomic Energy Agency. Mr. Willrich's book will be useful in checking on how this important work is proceeding.

Adrian S. Fisher*


The author of this volume, John P. Frank—lawyer, law teacher, author, and former law clerk to Justice Hugo Black—is a pessimist. The reviewer is an optimist. Mr. Frank expects the bench and bar to undertake a large part of the herculean labor of remaking human beings. The reviewer thinks that the bench and bar have the more modest task of acting as peacemakers, so that litigants, with the aid of counsel and without violence, in large measure can resolve their own disputes

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and with or without the aid of outside help, remake themselves. As Aesop remarked in his *Hercules and the Waggoner*: "The gods help them that help themselves."

Thus, Mr. Frank is a prophet of doom. On the first page of his introduction he writes: "[W]e are approaching the total bankruptcy of our remedy system. . . . Moreover, but for a handful of persons, we are making no effort to escape a legal doomsday . . . ." The reviewer, on the contrary, is of the opinion that lawyers as peacemakers are doing a better job than ever before; lawyers as peacemakers are settling more controversies than they ever did.

Mr. Frank complains about the law's delays and illustrates his complaint with the automobile accident case of *John* and *Mary*: "At the corner of Vine and Elm, they stop for a red light. As they are stopped, the light itself goes completely out and a moment later, before they can decide what to do, they are rear-ended by a truck whose driver, seeing no light, failed to stop in time." The facts of this case, however, show why it was not settled expeditiously. The defendant felt that he had available to him the defense of contributory negligence. Lawyers settle most negligence cases when liability is clear, as well as many when it is not so clear. The majority of those that remain pending in court involve doubtful liability, disputed facts, controversy as to the amount of liability, or unsettled legal issues. Rather than grieve over the length of time it takes to resolve such differences of opinion, it should be a source of gratification not only that ultimately they are resolved peacefully, but also that lawyers settle most negligence cases in which liability is clear.

In the words of part of a 1965 proposal of the Arden House Session of the American Assembly, Mr. Frank suggests for automobile accident cases "establishment of machinery for administrative compensation, as in industrial accidents." This suggestion is not a new one. Negligence cases do cumber our courts; however, there is one thing to be said for the present system—jury verdicts do provide the measure that lawyers as peacemakers use to settle most negligence cases.

Mr. Frank next complains about the complexity of the law under rule 23 of the *Federal Rules of Civil Procedure* relating to class actions, but the case employed as an example should not have been a class action to begin with. The reviewer, who has represented defendants in class actions against corporations, their officers, and directors, takes an entirely different approach. He regards a class action by a corporate stockholder on behalf of himself and other stockholders as a device largely for the benefit of the plaintiff's lawyers, a practice the courts and administrative agencies sanction as a way to help keep corpo-
rate officers and directors in line. Thus, the reviewer takes pleasure in causing plaintiffs' lawyers all the legal difficulties he can, especially when he feels that he represents innocent directors.

Mr. Frank complains that our divorce laws are antiquated. He is correct, but the fault does not lie with the bench and bar. New York State recently spent a great deal of time and effort to change its obsolete divorce law, which recognized adultery as the only ground. New York lawyers, however, still find it easier and better to work out separation agreements and then send one of the spouses on a freedom ride to Mexico. Mr. Frank suggests "that alimony be taken out of the system of enforcement by contempt, leaving the wife to the normal creditor's remedies of the jurisdiction." Again he is right, but again the fact that this is not so, cannot be blamed on the bench and bar.

Mr. Frank complains that "the legal system gives to the adversary proceedings an overblown value." There is, however, another point of view. Our proceedings are adversary because our clients are adversaries, although we have come a long way from the blood feud and trial by battle. Today's lawyers as peacemakers are resolving more controversies peacefully than ever before.

Mr. Frank also takes the position that summary judgment procedure "is applied in stingy fashion." There is another side to this coin, as the Second Circuit explained in the often cited case of Arnstein v. Porter:¹

[W]here . . . credibility, including that of the defendant, is crucial, summary judgment becomes improper and a trial indispensable. It will not do, in such a case, to say that, since the plaintiff, in the matter presented by affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true. We think that Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at a trial, especially as to matters peculiarly within defendant's knowledge . . .

We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing summary judgments, intended to permit a "trial by affidavits," if either party objects.²

Mr. Frank complains of dilatory lawyers. There are some dilatory lawyers, just as there are some dilatory individuals in other walks of life, but the bench and bar cannot cure them. Their patterns were

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¹ 154 F.2d 464 (2d Cir. 1946).
² Id. at 471.
set in the first few years of their lives; only psychoanalysis will help them remake themselves.

Mr. Frank concludes his book by proposing a Warren Commission for American Law, to be headed by Chief Justice Earl Warren, whose function would be “to suggest proposals for the complete overhaul of the American legal system.” Such a proposal is not at the top of the reviewer’s list of priorities. As he contemplates the world’s sorry condition, he finds the work of the American bench and bar one of the bright spots in the picture. Some of the bench’s accomplishments, such as the rulings of the Supreme Court, as well as other courts in its lead, outlawing segregation and improving the rights of accused persons, are nothing short of magnificent. Furthermore, the Court’s rulings against segregation have been the same whether it was the Vinson Court, the Warren Court or the Burger Court. Recently, in Alexander v. Holmes County Board of Education, the Burger Court held that the Fifth Circuit “should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing ‘all deliberate speed’ for desegregation is no longer constitutionally permissible.”

The reviewer realizes that in response to Mr. Frank’s jeremiad he has begun to sound like Dr. Pangloss in Voltaire’s Candide—in the American legal system all is for the best in the best of all possible legal systems. The reviewer is not a Dr. Pangloss. He is not writing a panegyric to the American bench and bar. Moreover, he agrees with many of Mr. Frank’s points. He agrees with Mr. Frank’s complaint about calendar calls by judges. Something should be done about it. Mr. Frank suggests that such calls be handled by clerks, who would make use of postcards.

The reviewer also subscribes to Mr. Frank’s Recommendation 33: “A widespread pretrial system should be adopted in criminal cases covering discovery, Jencks problems, admission of documents, and anticipated legal issues. Defendants should not be required to participate, but the mutual advantages to both sides should be sufficiently great so that, in most cases, each will wish to do so.” One must observe, however, that courts, state as well as federal, have been moving in this direction. The reviewer endorses Mr. Frank’s Recommendation 35 that “[t]he defense of insanity should be abolished, and become relevant not to guilt or innocence, but rather to the sentence to be

5 Id.
imposed or the treatment to be prescribed." This is perhaps the best suggestion in the entire volume. In addition, he agrees with Mr. Frank's Recommendation 36 that "both the federal system and the separate states must utilize all available electronic devices to manage the flow of their work." It should be noted, however, that the author himself concedes that he does "not pretend to understand how modern electronic devices can improve judicial administration."

Mr. Frank's book is the result of the opening three lectures he gave at the dedication of the Earl Warren Legal Center, University of California. The book has an eloquent preface by Justice Tom C. Clark and is dedicated "To Chief Justice Earl Warren, A Great Judicial Administrator." Anyone who wants proposals to espouse for the improvement of the administration of justice in this country will find them in Mr. Frank's book.

O. John Rogge*

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