Chapter 10: Constitutional Law

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§10.1. Modification of constitutional standards in libel law. In May of the Survey year, the Supreme Judicial Court decided Stone v. Essex County Newspapers, Inc., a case involving the then quite unsettled impact of the First Amendment on libel law. Less than two months later, the Supreme Court of the United States, in Gertz v. Robert Welch, Inc., clarified some of the ambiguities of earlier opinions in this area. This section will assess some of the problems presented by Stone in light of the later Gertz decision.

In Stone the plaintiff’s son had been prosecuted for certain narcotics offenses. Through a mix-up, defendant newspaper reported that plaintiff, rather than his son, was the owner of the “harmful drug.” The trial judge charged the jury that plaintiff could recover simply by showing publication of a defamatory falsehood. The jury returned a verdict for the plaintiff.

On appeal, the principal issue before the Supreme Judicial Court was that of what the applicable constitutional standards are in cases involving libel by the news media. In 1964 in New York Times Co. v. Sullivan, the United States Supreme Court had established that the basis of recovery in a libel suit instituted by a public official is a showing of knowing or reckless falsity. The New York Times standard has been interpreted to require only “knowing or reckless falsity” and not personal spite or ill will. Therefore, the phrase “actual malice” used in New York Times itself is perhaps misleading. In 1971, in Rosenbloom v. Met-
romedia, Inc., the Court appeared to extend the "knowing or reckless falsity" standard to cases in which, although the plaintiff is a private individual, the matters reported are of public or general interest. The state of the law was unclear, however, since no opinion in *Rosenbloom* commanded the assent of more than three justices, Justice Douglas did not participate, and two changes in the membership of the Court had occurred since the date of decision.

Despite this lack of clarity, the Supreme Judicial Court reversed and remanded for a new trial the lower court judgments in *Stone* on the basis of the standard announced in *Rosenbloom*. Moreover, the Court noted that the evidence presented at the first trial indicated that a jury could properly find satisfaction of the "knowing or reckless falsity" standard. On the question of damages, the Court reaffirmed that under the law of the Commonwealth only compensatory damages may be recovered in a defamation action. The risk to First Amendment values posed by the possibility that a jury would impose punitive damages under the guise of compensatory damages could, in the Court's view, be obviated by the trial court's power to reduce verdicts regarded as excessive.

Less than two months after the decision in *Stone*, the Supreme Court decided *Gertz v. Robert Welch, Inc.* The Court held that a publisher of a defamatory falsehood about a private individual who is neither a public official nor a public figure may not claim the protection of the "knowing or reckless falsity" standard of the *New York Times* line of cases. If the "defamatory statement makes substantial danger to reputation apparent," that is, if the content of the statement warns "a reasonably prudent editor of its defamatory potential," then the states may select, short of liability without fault, "

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8 403 U.S. 29 (1971).
9 Id. at 43.
11 The Court based its conclusion on the fact that the editor acknowledged being "surprised" by the story; that the editor knew the plaintiff personally and knew him to be an "excellent citizen;" and that the editor knew that the writer of the story had minimal training and experience. Id. at 701, 311 N.E.2d at 58.
12 Id. at 702-04, 311 N.E.2d at 58-59.
13 Id. Justice Quirico, with whom Chief Justice Tauro joined, dissented because the trial court had not determined that the subject of the action had been an event of public or general concern and because, even if the event were of general concern, the plaintiff himself had not been involved in it. Id. at 705-11, 311 N.E.2d at 59-63.
15 Id. at 347. This approach involves a retreat from the stance adopted in *Rosenbloom*. In another respect, however, it goes beyond *Rosenbloom*. Under *Gertz*, the states are forbidden to impose liability without fault even in a case involving a private person's activities that are not of public interest. 418 U.S. at 347. This question had been reserved in *Rosenbloom*. 403 U.S. at 44 n.12, 48-49 n.17.
16 418 U.S. at 348.
17 Id.
whatever standard of liability they think appropriate.\textsuperscript{18}

On the issue of damages, the Court stated that only proven actual injury is compensable.\textsuperscript{19} Unless the "knowing or reckless falsity" standard is satisfied, neither presumed nor punitive damages will be permitted.\textsuperscript{20} "Actual injury" was not defined but will be given a liberal interpretation so as to include not only out-of-pocket loss but also personal humiliation and mental suffering.\textsuperscript{21}

There were four dissenting opinions, reflecting the diversity of opinion that has prevailed on the Court in this area. These minority views ranged from Justice Douglas' long espoused view that the First Amendment totally invalidates state libel laws\textsuperscript{22} to Justice White's position that the First Amendment in no way restricts the power of states to redress libelous publications about private individuals who are not involved in public matters.\textsuperscript{23} More notable was Justice Blackmun's concurrence, in which he reaffirmed his belief that \textit{Rosenbloom} had been a logical extension of earlier cases.\textsuperscript{24} Nevertheless, Justice Blackmun provided a fifth vote for Justice Powell's majority opinion chiefly because of a belief that a majority of the Court should speak with a more or less definitive voice on this subject.\textsuperscript{25}

The \textit{Gertz} decision significantly alters the constitutional aspects of libel law. A majority of the Court now agrees that even if the content of a publication is a matter of general or public interest, a private individual does not bear the burden of proving that a defamatory statement was published with a knowing or reckless disregard of the truth. This rejection of \textit{Rosenbloom}'s plurality analysis correlatively

\begin{footnotes}
\item[18] Id. at 347.
\item[19] Id. at 349.
\item[20] Id.
\item[21] Id. at 350.
\item[22] Id. at 356 (Douglas, J., dissenting).
\item[23] Id. at 399 (White, J., dissenting).
\item[24] Id. at 353 (Blackmun, J., concurring).
\item[25] Id. at 354 (Blackmun, J., concurring). While it may seem peculiar that a Justice would vote contrary to his beliefs in order to provide clearer precedent, grateful recognition should be accorded to Justice Blackmun for his efforts. The area is one where able persons of good will obviously disagree and no moral imperatives that do not admit of compromise appear to be at stake. There have been other occasions when members of the Court have submerged their views in the interest of allowing the Court to give a clear answer to a problem and other occasions when they did not but perhaps should have. Compare \textit{Screws} v. United States, 325 U.S. 91, 134 (1945) (concurring opinion), where if Justice Rutledge had voted his real views the case could not have been decided at all, with both \textit{Coolidge} v. New Hampshire, 403 U.S. 443, 492 (concurring opinion), where Justice Harlan missed a chance to clarify the impact of a major case, and \textit{Cardwell} v. Lewis, 417 U.S. 583, 596 (1974) (concurring opinion) where Justice Powell, with the Court otherwise divided 4-4 in regard to the "automobile exception" to the search warrant requirement, discussed only his belief that the Fourth Amendment exclusionary rule generally should not apply to collateral attack on convictions.
\end{footnotes}
casts doubt upon the precedential value of the *Stone* decision. In this regard, it must be emphasized that *Gertz* does not mandate the application of any particular standard of liability in a libel action instituted by a private individual; rather, "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood . . . ."26 It would seem, however, that the Supreme Judicial Court will retreat from the actual malice test, *i.e.*, knowing or reckless disregard of the truth, which has been applied in the Commonwealth since the *Rosenbloom* decision.27 Inasmuch as this test is no longer constitutionally required, the Massachusetts courts are free to provide a greater degree of protection from the damaging effects of defamatory statements. Adherence to a standard that is less demanding than the *Rosenbloom/Stone* test would merely be, as Justice Powell stated for the majority in *Gertz*, "recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation."28

Another aspect of the *Stone* decision is not entirely consistent with Supreme Court precedent in the area of libel law. In *New York Times*, the Court described the burden of proof allocated to the plaintiff in terms of "convincing clarity,"29 and in *Rosenbloom* as "clear and convincing proof."30 Surprisingly, however, in the face of this language, the Supreme Judicial Court in *Stone* took the position that these phrases refer not to the quantum of evidence required but only to the fact that recklessness must be proved:

We think it advisable to comment that, in our view, these expressions are not intended to vary the usual measure of the plaintiff's burden of proof. Proof by a fair preponderance of the evidence is still the requirement. The "convincing clarity" and "clear and convincing" concepts are not a necessary or appropriate part of the instructions to the jury in a case such as the instant one. It seems evident that these phrases were used by the Supreme Court with reference to the necessity for proof of at least recklessness, and not mere negligence, in publication. As such they relate only to the judge's consideration of the issues raised by a motion for a directed verdict.31

With all respect, it is hard to support this interpretation. First, an unnatural reading of language is necessary in order to interpret phrases such as "clear and convincing evidence" as referring to what is to be proved rather than to the quantum of evidence. Secondly,

26 418 U.S. at 347.
28 418 U.S. at 348-49.
29 376 U.S. at 285-86.
30 403 U.S. at 52.
such an interpretation does not in fact seem to have been adopted in other cases.\textsuperscript{32}

On the other hand, regardless of the original meaning of the “clear and convincing” standard, it is possible that the Supreme Court, if squarely faced with the question, would not require any specially severe standard of proof. In \textit{Lego v. Twomey},\textsuperscript{33} the Court held that the voluntariness of a confession may be determined by a preponderance of the evidence.\textsuperscript{34} The Court indicated that the preponderance test would also be appropriate in challenging the admissibility of evidence on other constitutional grounds.\textsuperscript{35} Problems of the type arising under the Court’s decision in \textit{Miranda v. Arizona}\textsuperscript{36} were specifically mentioned\textsuperscript{37} even though in \textit{Miranda} itself the Court had said that the government would have a “heavy burden” to demonstrate waiver.\textsuperscript{38} It may be supposed that if the Court is willing in cases involving the constitutional rights of criminal defendants to regard error in favor of one party as no more serious than error in favor of the other, which, as the dissenters in \textit{Lego} suggested, is the inference drawn from application of the civil standard,\textsuperscript{39} then a special quantum of evidence in mere libel cases should certainly not be required. If this result is achieved, it ought to be frankly acknowledged that the “clear and convincing evidence” language has been abandoned and not merely interpreted.

Another aspect of \textit{Gertz} worthy of attention is that of the meaning given to the knowing falsity standard. In \textit{St. Amant v. Thompson},\textsuperscript{40} Just-
tice White, speaking for the Court, observed:

[Re]ckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.41

In Gertz, the Court defined this standard in more explicit terms, stating that reckless disregard involves "subjective awareness of probable falsity."42 On the other hand, a showing of "personal spite, ill will or a desire to injure plaintiff" is not required.43 Thus, subjective awareness but not malice in the traditional sense is required. It is for this reason that the Court now avoids use of the phrase "actual malice" to describe the New York Times standard.44

The Court in Gertz also amplified its definitions of "public figure" and "public official." The plaintiff in Gertz was an attorney who, in a civil suit, represented the family of a man who had been murdered by a police officer. The defamatory publication, consisting of an accusation that the plaintiff was a "communist-fronter" who had participated in a Communist conspiracy to "frame" the police officer, occurred in connection with this litigation. After dismissing the defendant's contention that plaintiff's brief service on local housing committees several years prior to the events in question made him a "public official,"45 the Court discussed the "public figure" concept. One may become a public figure for all purposes if he has a pervasive fame or notoriety; one can also become a public figure with respect to a particular area of public concern.46 The Court concluded that the plaintiff was not a public figure in the general sense, and that since his involvement in the instant controversy had been restricted to the collateral civil litigation and he had not given press interviews, he was not a public figure in the more limited sense either.47

A final noteworthy problem in the libel area still unresolved is that of whether courts, in view of the fact that defamed private individuals must show at least negligence to receive damages, can compel a defendant publisher to publish either a retraction or a court's determination of falsity. In Miami Herald Publishing Co. v. Tornillo,48 decided

41 Id. at 731 (emphasis added).
44 See note 7 supra.
45 418 U.S. at 351.
46 Id.
47 Id. at 351-52.
the same day as *Gertz*, the Court held unconstitutional a Florida statute granting a “right to reply” to any political candidate “assailed” in the columns of a newspaper.\(^49\) Although *Tornillo* was a unanimous decision, Justice White noted in a concurring opinion that the combination of *Gertz* and *Tornillo* subjects the interest in a person’s reputation to the mercy of the press.\(^50\) Justice Brennan, joined in his concurring opinion by Justice Rehnquist, explicitly reserved the retraction issue.\(^51\) Similarly, in his dissenting opinion in *Gertz*, Justice Brennan suggested that a plaintiff who is the subject of a false publication but is unable to satisfy the constitutional standards of fault could be vindicated short of damages by either: (1) enactment of statutes requiring a publisher of a defamatory falsehood to publish either a retraction or a statement of a court’s determination of falsity; or (2) at the least, extension of the right to the plaintiff to “secure a judgment upon the truth or falsity of statements published about him.”\(^52\)

Allowing such remedies would not imperil First Amendment values as did the *Tornillo* statute because relief would be predicated on proof of a defamatory falsehood, as opposed to merely any criticism. A judicial declaration of the falsity of the defamatory statement, without provision for coercive relief, would not impinge on First Amendment values in any significant way at all. It must be borne in mind that in *New York Times* the Court had expressed concern that awards of damages might be so vast that even powerful newspapers would be faced with going under upon satisfaction of the judgment.\(^53\) Needless to say, if faced with such possibilities, all but the most intrepid publisher would be inclined to approach controversial areas with diffidence. On the other hand, if “faultless” error by publishers resulted in no worse sanction than either a judicial declaration of the erroneous nature of the publication or, at most, the requiring of a retraction, the inhibiting influence on publishing would be minimal.

§10.2. *State action and equal protection in collegiate athletics.* Dean Prosser once observed that the *Palsgraf* case was “a law professor’s dream of an examination question.”\(^1\) If so, *Buckton v. National Collegiate Athletic Association*,\(^2\) decided by the federal District Court for the District of Massachusetts, is perhaps a model problem

\(^{49}\) Id. at 254-58.
\(^{50}\) Id. at 262-63 (White, J., concurring).
\(^{51}\) Id. at 258 (Brennan, J., concurring).
\(^{53}\) 376 U.S. at 278.

for a seminar in constitutional litigation.

The plaintiffs, two Canadian nationals residing in Boston, were skilled hockey players for Boston University. The defendants were the Eastern College Athletic Conference (ECAC), the National Collegiate Athletic Association (NCAA), both unincorporated associations of colleges, and, at least nominally, Boston University (B.U.) itself. Boston University, under compulsion by the ECAC and NCAA, had declared the plaintiffs ineligible to play hockey because of violations of their amateur status. The conclusion of ineligibility was premised upon the finding that the plaintiffs, while playing Major Junior A hockey in Canada, had received funds for room, board and expenses from the sponsor of the hockey team. This policy is open and legitimate in Canada but differs from the American practice in that the support for Canadian Junior hockey comes not from schools but from certain civic groups. The plaintiffs argued that the defendants could not deprive them of eligibility to play hockey under these circumstances despite the explicit provisions of the constitution and bylaws of the defendant organizations. After an assessment of the application of equitable principles and a discussion of the constitutional problems of "state action" and "equal protection," the district court granted a preliminary injunction against the declaration of ineligibility.

Although the complaint set forth three causes of action, Count II, a civil rights claim alleging a denial of equal protection, is of principal interest. Section 1981 of Title 42 of the United States Code guarantees equal rights to all persons within the jurisdiction of the United States, and section 1983 provides a remedy for state deprivation of rights secured by the United States Constitution. Thus, the viability

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3 Id. at 1157-59.
4 Id. The defendant organizations' constitution and bylaws provide: "Any student-athlete who has participated as a member of the Canadian Amateur Hockey Association major junior A hockey classification shall not be eligible for intercollegiate athletics." Id. at 1155, quoting N.C.A.A. Const. art. 3, § 1 (1973-74); E.C.A.C. Bylaws art. 3, § 1 (1972).
5 366 F. Supp. at 1160.
7 42 U.S.C. § 1981 (1970), which provides: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
8 42 U.S.C. § 1983 (1970), which provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of
of the plaintiff’s claim was dependent upon a demonstration of state involvement in the denial of equal protection. This comment will first address the issue of state action and will then examine the validity of the plaintiff’s equal protection claim.

To succeed on their section 1983 claim, plaintiffs had to show that the defendants were acting under color of state law and not merely as private organizations. This state action problem involves two sub-theories that are analytically distinct. In order to sustain a finding of state action, the plaintiff must prove either that: (1) private action has been so entangled with governmental policies that the private activity is attributed to the state; or (2) organizations have performed activities so governmental in nature that they will be treated as if they were the government. In *Buckton* the court treated the facts as encompassing both sub-theories and concluded that the requisite state action existed as to B.U. and the NCAA. The factors emphasized were:

1. B.U. performs a governmental function by providing higher education and exercising substantial dominion over its students.
2. The NCAA, by supervising intercollegiate athletics, performs a public function.
3. State universities comprise one half of the membership of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress.

9 See id. There is little if any distinction between “state action” under the Fourteenth Amendment and “under color of” state law in § 1983. See *Fletcher v. Rhode Island Hosp. Trust Nat'l Bank*, 496 F.2d 927, 929 n.4 (1st Cir. 1974).


12 366 F. Supp. at 1156-57. Although a logical case could be made for insisting that the “public function” aspect of a case should not be mixed with the “governmental involvement” aspect, courts have treated them together and ruled that state action could be found based on the combination of the two. See *Jackson v. Statler Foundation*, 496 F.2d 623, 629 (2d Cir. 1974); *McQueen v. Druker*, 438 F.2d 781, 784 (1st Cir. 1971).

13 366 F. Supp. at 1157. The ECAC was not made subject to the preliminary injunction because it stipulated that it would take no action against B.U. for obeying a court order, even if the order were to be vacated after a hearing on the merits. Id. at 1155.
and pay dues to the NCAA; state facilities are provided for NCAA contests.

4. B.U. is incorporated by the Commonwealth of Massachusetts;\textsuperscript{14} during 1973 B.U. received approximately $55,000 from the Commonwealth; B.U. utilizes state-owned facilities for athletic events.\textsuperscript{15}

In deciding cases involving the issue of state action, it is particularly necessary for courts to make judgments based on the facts of the particular case. Thus one cannot really say that the court was “right” or “wrong” on the state action issue. There are, however, some factors not discussed by the court that point away from the conclusion that state action was present in \textit{Buckton}. First, although there was significant state involvement with the defendant private institutions, the state was neither involved in nor tended to promote the activity which caused plaintiff’s injury.\textsuperscript{16} This is a far different situation than where, for example, scholarship money derived from governmental sources was being allocated in a discriminatory way. Second, although the defendant organizations perform what is in a certain sense a “public function,” such function is not traditionally performed exclusively, or even principally, by the state,\textsuperscript{17} in contrast to \textit{Marsh v. Alabama}\textsuperscript{18} and \textit{Evans v. Newton},\textsuperscript{19} the leading public function cases. Indeed, there is the countervailing consideration of the desirability in the educational field of preserving a private sector free of the restraints that apply to

\textsuperscript{14} This factor is almost certainly make-weight. “The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever.” \textit{Moose Lodge v. Irvis}, 407 U.S. 163, 173 (1974).

\textsuperscript{15} 366 F. Supp. at 1156-57. Since the decision of the court in \textit{Buckton}, the Supreme Court handed down its decision in \textit{Gilmore v. Montgomery}, 417 U.S. 556 (1974). This case involved a challenge to the use of public recreation facilities by all-white private groups in the context of pending court orders to desegregate the public parks and school systems. The Court held that allocation of exclusive possession of public facilities to all-white private groups implicated the state in the groups’ private discrimination, but that the record provided an insufficient basis for any conclusion when use by private groups was non-exclusive. Id. at 569-74.


\textsuperscript{17} In \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954), the Court found the intent of the framers of the Fourteenth Amendment unclear on the issue of public school segregation because education was largely in private hands at the time of the adoption of the amendment. Id. at 489-90.

\textsuperscript{18} 326 U.S. 501 (1946).

\textsuperscript{19} 382 U.S. 296 (1966).
The Equal Protection Clause of the Fourteenth Amendment has been an especially turbulent area of constitutional law during the past decade. Traditionally the Court had been very reluctant to entertain equal protection claims, sustaining legislative classification as long as a rational basis existed for the statutory treatment. More recently the Court has required that classifications that are "suspect" or curtail "fundamental rights" be justified by a "compelling state interest." While no fundamental right in this technical sense seems to be involved in *Buckton,* "alienage" is one of the classifications that has triggered the stricter scrutiny of the new equal protection. As the court noted, the plaintiffs are, in effect, classified differently because they are resident aliens; therefore, the classification must fall unless supported by some compelling state interest. The court concluded that while the interest in preserving amateurism is entirely legitimate, the interest in such preservation by means of the discrimination involved in this case was not, to say the least, compelling. Realistically, Canadian boys are no more professionalized by receiving money from civic groups than American boys are by receiving money from schools. Moreover, Canadian boys of high school age wishing to play hockey on an organized level have no alternative but to do so on the basis of opportunities made available to them in their native land. Thus, the state interest, given the suspicion with which classifications affecting aliens is currently regarded, was found wanting.

The court's application in *Buckton* of a strict standard of scrutiny is appealing on the facts and perhaps serves as a good illustration of

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20 See Wahba v. New York Univ., 492 F.2d 96, 102 (2d Cir. 1974). For a discussion of the state action problem as applied to private colleges, see generally Schubert, State Action and the Private University, 24 Rutgers L. Rev. 323 (1970), in which the author concludes that courts have generally not found activities of private universities to involve state action.

21 In *Buck v. Bell,* 274 U.S. 200 (1927), a case involving the involuntary sterilization of a feeble-minded person, Justice Holmes described an equal protection challenge as "the usual last resort of constitutional arguments ...." Id. at 208.


27 366 F. Supp. at 1157.

28 Id. at 1158-60.
why some problems require a judicial rather than political response. The plaintiffs in this case are, personally at least, politically powerless. Discrimination against aliens is an age-old problem that resists satisfactory political resolution. Thus, perhaps it is justifiable for the courts to stretch a point in their favor. Indeed, one suspects that the court's view of the state action problem in such a case is influenced by the type of equal protection violation that is alleged. 29

This special solicitude for aliens should be assessed, however, in light of the dissatisfaction that has been expressed both on and off the Supreme Court in the recent past with the use of certain "suspect classifications" and "fundamental rights" as trip-wires for severe judicial scrutiny, while other classifications receive virtually no scrutiny at all. 30 The two standards may be enough to handle cases at the ends of the spectrum, e.g., racial classifications closely scrutinized and ordinary economic legislation treated with profound deference to the legislative judgment. The problem cases, of course, fall between these extremes. Increasingly, the Supreme Court is tending toward the position that the amount of justification required for a classification must be sensitively proportioned to the potential invidiousness of the classification and the importance of the rights affected by it. 31 The risk of subjectivity in making assessments such as these is obvious, but assumption of such a risk is necessary if the courts are to avoid either deciding cases on the basis of superficial labels, or, on the other hand, effectively withdrawing from the equal protection field altogether.

Even judged by this more refined standard, the result reached in Buckton seems entirely defensible. The controlling factor ultimately is that the interest in protecting amateurism is so little advanced by the regulation under attack, at least on the facts before the court at the injunction stage, that the classification must fall. Alienage is in some


31 See James v. Strange, 407 U.S. 128, 140-42 (1972). This is especially true in the area of sex discrimination where the majority of the Court has declined to regard classification based on sex as suspect, but where the degree of scrutiny is clearly somewhat exacting. See Kahn v. Shevin, 416 U.S. 351, 355 (1974);Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973); Reed v. Reed, 404 U.S. 71, 76-77 (1971). It is unclear whether there is now a "substantial relationship" test, i.e., an intermediate standard between the "mere rationality" test and the "compelling interest test," or whether there is now a whole spectrum of equal protection tests, depending on an assessment of all the variables involved. See Kahn, 416 U.S. at 355; Note, Irrebuttable Presumptions, 87 Harv. L. Rev. 1534, 1535 n.9 (1974).
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degree suspect. In addition, the deprivation of plaintiffs' right to engage in sports free from discrimination could have adversely affected their potential for a subsequent professional career. Thus, a showing of a substantial state interest in the classification would be required to justify it. No such showing was forthcoming.

§10.3. Justiciability of challenges to delays in the courts. The delays in the justice system, civil and criminal, have increasingly become a source of frustration and dissatisfaction. Although defendants can win the dismissal of charges in the criminal sphere because of the denial of a speedy trial, this remedy results in satisfaction only to the defendants themselves and is, in any event, hardly a solution. In Ad Hoc Committee on Judicial Administration v. Massachusetts, the plaintiffs, an association of attorneys and a litigant in a pending civil action, brought suit in federal District Court for the District of Massachusetts, claiming that the failure of the Commonwealth to provide sufficient judges, support facilities and personnel to enable the courts to keep abreast of their dockets was a violation of the plaintiffs' rights under the Sixth and Fourteenth Amendments.

The district court dismissed the action on the grounds that the complaint failed to state a justiciable cause of action and that the Eleventh Amendment barred the action. The Court of Appeals for the First Circuit, after a brief and inconclusive assessment of the effect of the Eleventh Amendment on the case, affirmed the trial court's alternate holding that no justiciable controversy was presented.

32 Buckton is really not a typical alien case since it is in the interest of many persons influential in the preparation of the regulations in question to see that the interests of these "aliens" are not unduly neglected. In any event, arguably, alienage should be less suspect than race as a classification because it is a status not necessarily beyond the power of the individual to change. See Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974).

33 On June 19, 1974, before the completion of the taking of testimony on the merits, the court issued a decree consented to by the plaintiffs as well as by B.U. and the ECAC. The ECAC agreed to restore the eligibility of the plaintiffs by granting exceptions and to recommend a similar course of action to the NCAA. In addition, the ECAC adopted a revised affidavit form to be completed by each student-athlete who intends to participate in intercollegiate ice hockey in order to facilitate the colleges' enforcing of the ECAC eligibility rules.

§10.3. 1 See Barker v. Wingo, 407 U.S. 514 (1972).
4 Id. at 956-59.
5 Id. at 960. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.
7 488 F.2d at 1244-46.
A non-justiciable question is one that is not suitable for judicial resolution:

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . ." 8

Thus, the political question doctrine, which apparently was involved in Ad Hoc Committee, concerns only one area of cases that are non-justiciable. Political questions are non-justiciable not because of a concern for political rights, 9 but because such matters are properly committed for final decision to the political departments of the government, i.e., the legislative and executive. 10 Thus, questions concerning the discipline of the national guard are non-justiciable because the Constitution textually commits this matter to the legislative branch; 11 likewise, questions concerning the reasonable time for pendency of a proposed constitutional amendment are non-justiciable because of the lack of standards that could be applied by courts. 12

The First Circuit regarded this case as non-justiciable for several reasons:

1. The degree of delay that is constitutionally intolerable cannot be quantified apart from particular cases and thus no generally applicable timetable could be formulated; 13
2. No suitable remedy could be molded. More manpower and physical resources may not be the answer. The courthouses may have to be closed to certain types of litigation; 14 and
3. Federal courts should be most reluctant to reorder state priorities by compelling additional funding for a service, where the state does not realistically have the alternative of discontinuing the service altogether. 15

11 Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
13 488 F.2d at 1244.
14 Id. at 1245.
15 Id. at 1245-46.
Upon first reflection, the court’s refusal to become, in effect, a receiver for the state court system seems mandated by common sense, for which there is still something to be said in constitutional law. “It is the cardinal principle at least of American constitutional interpretation that the Constitution is to be interpreted so as to be workable and reasonable. This principle does not collide with respect for the intent of the Framers because their transcendent intent was to build just such a Constitution.”\(^{16}\) Moreover, the criteria of *Baker v. Carr*,\(^ {17}\) the leading political question case, seem to be satisfied because *Ad Hoc Committee* would require the application of standards and the exercise of discretion usually associated with the political branches of government.\(^ {18}\)

Nevertheless, there is one respect in which *Ad Hoc Committee* is an anomaly as a political question case. *Baker v. Carr* teaches that “it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the political question.”\(^ {19}\) In *Ad Hoc Committee* no such conflict of competence with a coordinate branch of the federal government is presented. If the First Circuit had addressed this problem in its opinion, a discussion of the Supreme Court’s opinion in *O'Brien v. Brown*\(^ {20}\) would have been pertinent. In *O'Brien*, the Supreme Court was asked to review a decision by the United States Court of Appeals for the District of Columbia that had ruled on the merits of disputes concerning the seating of delegates at the 1972 Democratic National Convention.\(^ {21}\) Technically, the Supreme Court in its per curiam opinion merely granted a stay of the judgment of the Court of Appeals and did not even rule on the petitions for certiorari. As a practical matter, however, the Court, as it acknowledged, was simply allowing the cases to become moot.\(^ {22}\) It acted in this manner largely because of doubts concerning the justiciability of the case:

No case is cited to us in which any federal court has undertaken to inject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy that are essentially political in nature.\(^ {23}\)

\(^{17}\) 369 U.S. 186 (1962).
\(^{18}\) See id. at 217.
\(^{20}\) 409 U.S. 1 (1972).
\(^{22}\) 409 U.S. at 5.
\(^{23}\) Id. at 4.
Yet, as Justice Marshall pointed out in dissent, the Democratic National Convention is not a coordinate branch of government.\textsuperscript{24} Although one might suppose that judicial intervention in the deliberations of the convention would collide with any ultimate power of Congress to control federal elections,\textsuperscript{25} the majority in \textit{O'Brien} did not even urge this rationale as its reason for doubts as to justiciability. Perhaps the gloss that \textit{O'Brien} provides on \textit{Baker v. Carr} is that a conflict with a coordinate branch of the federal government is a presupposition of the political question doctrine only in those cases where the reason for non-justiciability is rooted in the Constitution itself, \textit{i.e.}, a textually demonstrable constitutional commitment of a problem to another department, and not where the reason for non-justiciability is rooted in discretion, \textit{e.g.}, lack of judicially manageable standards.\textsuperscript{26}

While the implications of \textit{O'Brien} have not all been spun out, the case does lend support to the decision of the First Circuit in \textit{Ad Hoc Committee}. The problem of delays in the justice system seems to be one that must be left to the political departments. Such a result should not be disturbing simply because state political departments seem to be left with unreviewable power to control federally guaranteed rights. For those who would be uncomfortable with the notion that there could be no recourse from a state legislative decision on a federal constitutional issue, it may be suggested that Congress has authority under section 5 of the Fourteenth Amendment to remedy any perceived state violations of due process and equal protection.\textsuperscript{27}

\textbf{§10.4. Legislation: Criminal law: Scope of search incident to arrest.} Chapter 508 of the Acts of 1974 provides:

A search conducted incident to an arrest may be made only for the purpose of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evi-

\textsuperscript{24} Id. at 11-12 (Marshall, J., dissenting). Justice Douglas joined in the dissent.  
\textsuperscript{25} Art. II, § 1 of the Constitution appears to leave the appointment of presidential electors up to the states entirely. For the view, however, that Congress has ultimate authority to insure that officers selected in presidential elections represent their national constituency, see \textit{Oregon v. Mitchell}, 400 U.S. 112, 124 n.7 (1970).  
\textsuperscript{26} This question merges with the broader issue of whether the political question doctrine is entirely constitutional in scope or whether there is an element of judicial discretion as well. Compare Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 9 (1959) with Bickel, The Supreme Court 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 46 (1961). See also Commonwealth v. Laird, 451 F.2d 26, 31 (1st Cir. 1971).  
The enactment of this statute is a reaction to recent Fourth Amendment decisions by the Supreme Court. In 1969 in *Chimel v. California*, the Court, in discussing the bounds of a legitimate search incident to arrest, held that an arresting officer has the right, without a warrant, to search the person arrested and to seize weapons or destructible evidence either on the arrestee’s person or in areas within his immediate control. The Court further held in 1971 in *Coolidge v. New Hampshire* that “an object which comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant.”

Certain questions that remained open were subsequently treated in the related cases of *United States v. Robinson* and *Gustafson v. Florida* in 1973. There the Court distinguished between two different branches of the search incident to arrest: (1) the search of the person of the arrestee; and (2) the search of the area within the control of the arrestee. The Court held that, even in the context of a routine motor vehicle violation, the police may effect a search of the person as long as there is an actual in-custody arrest and not merely a citation or summons. Such a search is permissible even though the offense is one for which there could be no evidence or fruits and the circumstances do not suggest the presence of a weapon. Moreover, the search may be a complete one rather than merely a “frisk,” i.e., apparently anything short of an exploration of body cavities. Thus, if

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§ 10.4. 1 Acts of 1974, c. 508.
3 Id. at 762-63.
4 403 U.S. 433 (1971) (plurality opinion).
5 Id. at 465. *Coolidge* suggests that there is a difference between the “plain view” exception to the search warrant requirement and the “plain view” aspect of the search-incident-to-arrest exception to the warrant requirement. It is a general principle that as long as the police are in a place they have a right to be, they may seize evidence with probable cause but without a warrant, provided they come upon it inadvertently. Id. at 469-71. The inadvertence requirement is dispensed with if the seized items are contraband, stolen or dangerous in themselves. Id. at 471. If, however, during the course of and within the scope of a search incident to arrest the police find other evidence which there is probable cause to seize, the inadvertence requirement is disregarded. Id. at 465 & n.24.

A further complication comes from the fact that it is controverted whether the “inadver-
tence” analysis of *Coolidge* commanded the assent of as many as five justices even in *Coolidge* itself. See North v. Superior Court, 8 Cal. 3d 301, 307-08, 502 P.2d 1305, 1308-09, 104 Cal. Rptr. 833, 836-37 (1972).
8 414 U.S. at 236.
9 Id. at 234-35.
10 Id. at 227-29.
heroin is discovered in a search of a cigarette package, the arrestee may then be prosecuted for possession.

A dissent by Justice Marshall raises several criticisms. First, contrary to earlier cases, the reasonableness of the search was judged in the abstract rather than with reference to the facts of the particular case. Thus while the need to prevent the destruction of evidence is one of the justifications for a search incident to arrest, after Robinson the police, in order to justify a complete search of the person, will not have to consider whether the search will yield evidence of an ordinary motor vehicle violation. Further, cases such as Robinson and Gustafson have often been thought to occur as a result of "pretext" arrests. For example, the police may observe particular conduct, such as motor vehicle violations or vagrancy, for which an arrest would not ordinarily be effected. If, however, they suspect, but do not have reasonable cause to believe, that an individual is guilty of certain unrelated conduct, the police may be tempted to arrest for the minor violation in order to have the opportunity to search. Thus, as a practical matter, the arrest is incident to the search. Although the Court in Robinson purported to reserve the "pretext" question, in the normal case a pretext arrest would be a difficult matter to prove unless the police were candid enough to admit to it. Courts generally eschew inquiry into the analogous area of the unconstitutional legislative motive, which, if anything, presents fewer problems.

Justice Marshall also expressed doubt about the willingness of the Court to apply its own principles even-handedly to "white collar" persons who find themselves taken into custody for minor traffic offenses:

One wonders if the result in this case would have been the same

12 414 U.S. at 238 (dissenting opinion).
13 Id. at 239 (dissenting opinion). Justice Marshall's opinion notwithstanding, it does not appear that judging Fourth Amendment reasonableness by the generality of cases is unprecedented. Thus, with the possible exception of arrests that require an entry into a dwelling, it is generally agreed that felony arrests may be made without a warrant because exigent circumstances are so often present. See Coolidge v. New Hampshire, 403 U.S. 465, 477-81 (1971). This rule is applied even though no exigent circumstances appear in the particular case. Arguably this situation is different from that of Robinson because while there is always some danger a felony suspect may suddenly flee, there are some crimes, of which Robinson is an example, for which there is no destructible evidence.
14 414 U.S. at 225-26, 235.
15 Id. at 235.
16 Id. at 221 n.1.
were respondent a businessman who was lawfully taken into custody for driving without a license and whose wallet was taken from him by the police. Would it be reasonable for the police officer, because of the possibility that a razor blade was hidden somewhere in the wallet, to open it, remove all the contents, and examine each item carefully? Or suppose a lawyer lawfully arrested for a traffic offense is found to have a sealed envelope on his person. Would it be permissible for the arresting officer to tear open the envelope in order to make sure that it did not contain a clandestine weapon—perhaps a pin or a razor blade? 18

The practical answer, one supposes, is that such offenders would not be taken into custody in the first place.

It was in the context of these cases that the Massachusetts legislature passed chapter 508 of the Acts of 1974. This Act seems to provide substantially more protection to the individual than does the Fourth Amendment as currently interpreted by the Supreme Court. Of course, this comparison in no way suggests that the Act is unconstitutional; the state may provide greater though not lesser protections than those required by the federal constitution.

Chapter 508, although somewhat ambiguous, seems to limit the seizure of evidence in a search incident to arrest to evidence connected with the crime for which the arrest was made. 19 Thus, in the example discussed earlier, if one is arrested for a motor vehicle violation and a search yields illegally possessed narcotics, the narcotics may not be seized; and, if seizure is effected, the contraband will not be admissible as evidence. Equally, if one is arrested for armed robbery and searched, evidence connecting him with an unrelated murder should not be seized and, if seized, will be suppressed at trial.

In interpreting the chapter, attention must be directed to the question of whether or not the legislature intended to supplement the statutory language with the "plain view" doctrine. The Supreme Court in Coolidge v. New Hampshire held that an object which comes into plain view during a search incident to arrest may be seized without a warrant. 20 Massachusetts decisions have recognized the legitimacy of such seizures. 21 Since this view prevailed in the Commonwealth when chapter 508 was enacted and the legislature did not express an intention to overrule this case law, it should be presumed that the plain view doctrine does apply to searches incident to arrest. Thus, if someone arrested for robbery were searched for the fruits of the robbery and narcotics were found in plain view during a search tailored realis-

18 414 U.S. at 257 (dissenting opinion).
19 See text at note 1 supra.
20 See note 5 supra and accompanying text.
ically to the robbery, the narcotics would be seizable. It is essential to the plain view doctrine that the police confine their search to the area where they have a right to be looking when the object comes into their plain view.\textsuperscript{22} Thus, the statute as interpreted would not permit the type of search that took place in Robinson because such a search goes beyond the permissible scope dictated by the specific statutory purposes.

Under this interpretation the primary difference between the scope of the search permitted by Robinson and that which would be permitted by the statute is that Robinson permits a thorough search of the person without regard to whether evidence of the crime is likely to be found. The statute would require a search more precisely tailored to the statutory purposes based on the facts of the particular case.

Chapter 508 also provides that weapons may be "removed" rather than "seized."\textsuperscript{23} Presumably, the proper interpretation of this provision is that weapons may be "seized" insofar as they happen to come within the earlier part of the statute as fruits, instrumentalities, contraband or evidence, but that in any event they may be "removed" from any person for the protection of the police and the prevention of escape. It should also be noted that other items which there is probable cause to seize might come into plain view during the course of such removal of weapons. If the search is properly tailored to the discovery of weapons, this evidence would be seizable.

The enactment of this statute gave rise to demands for repeal even before the effective date.\textsuperscript{24} In response, Professor Lloyd Weinreb of Harvard Law School, who collaborated in the drafting of the Act, wrote a short commentary seeking to clarify and defend the statute.\textsuperscript{25} The key portion of his analysis is as follows:

The second sentence [of chapter 508] states that if property is seized as the result of an unlawful search, made for a purpose not mentioned in the statute, it is inadmissible as evidence in criminal proceedings. The plain meaning of the statute is that if a search is lawful, and property is lawfully seized, the property is admissible as evidence even if it is not within the category that prompted the search. For example, if a police officer makes a reasonable search for weapons following an arrest and unexpectedly finds contraband narcotics, the seized narcotics are admissible in evidence. That conclusion is consistent with a great many decisions allowing the seizure (and subsequent evidentiary use) of items unexpectedly discovered in plain view during a lawful search. For example:

\textsuperscript{23} See text at note 1 supra.
\textsuperscript{24} Mass. Lawyers Weekly, Sept. 30, 1974, at 35.
\textsuperscript{25} Id.
Coolidge v. New Hampshire, 403 U.S. 443, 464-473 (1971); Marron v. United States, 275 U.S. 192 (1927); see Commonwealth v. Hawkins, 280 N.E.2d 665 (Mass. 1972). Of course an officer could not search a man's wallet and claim that the purpose of the search was to seize stolen automobile tires. Nor could he claim that a search was for weapons or means of escape unless he reasonably believed that the arrested person was armed or might try to escape.26

This commentary on the statute presents several problems. First, it cites earlier cases such as Coolidge. The difficulty with this authority is that the statute was intended to forbid certain searches that had been permitted under prior law.27 The statutory language does not in any way indicate that Coolidge is to be left undisturbed. Furthermore, if Coolidge does have precedential value in interpreting the statute, Professor Weinreb has overlooked distinctions articulated in that Supreme Court decision. He makes it plain that the police may exceed the statutory bounds of a permissible search if contraband is unexpectedly discovered in plain view. Yet "inadvertence" is not a requirement of the Coolidge case in regard to the plain view doctrine for the seizure of contraband or weapons.28 In addition, he interprets the statute to forbid even searches for weapons unless there is reason to believe in the particular case that the arrested person was armed or might try to escape. There is no support for this position either in prior case law or the statute itself, which makes no mention of probable cause or reasonable belief, other than the implicit probable cause which provides the basis for the arrest.29

It is obvious then that discussion about the wisdom of this statute will be clouded by disagreement as to its meaning. To the extent that the statute prevents the police from conducting searches of arrested persons of such a nature that there is no realistic possibility of turning up weapons or evidence of the crime for which the arrest is made, there should be no objection. Why, for example, if a person is arrested for a motor vehicle violation, should police inspect cigarette packages or a wallet? The police, however, should not be forced to blind themselves to evidence that comes into their plain sight within the scope of the ordinary discharge of their responsibilities in making an arrest, whether the discovery was inadvertent or not. Further, when making an in-custody arrest, the police should be able in all cases to make a thorough search of the person for weapons. In light of the grave potential danger to the police in making any arrest, the

26 Id.
27 Id.
28 See note 5 supra.
29 See text at note 1 supra.
view of the Court in *Robinson* that the police should not have to speculate in a particular case whether the arrested person has weapons\(^{30}\) seems eminently sound.

**§10.5. Right to appear pro se.** In *Commonwealth v. Mott*,\(^{1}\) the Appeals Court ruled that a defendant has the right under Article XII of the Declaration of Rights of the Massachusetts Constitution to appear pro se in a criminal case. Chief Justice Hale, speaking for the court, thought the question easy to decide because of the explicit language of the constitutional provision: "And every subject shall have a right . . . to be fully heard in his defense by himself, or his counsel, at his election."\(^{2}\)

The right to appear pro se, however, is not unqualified. Three limitations are imposed on its exercise: (1) the request to appear pro se must be unequivocal; (2) the right must be asserted before trial; (3) the trial judge must be satisfied that the right to counsel is waived knowingly, and for a proper purpose, *e.g.*, not for purposes of delay.\(^{3}\)

If these conditions are satisfied, the failure to honor a request to appear pro se calls for automatic reversal, with no room for application of the "harmless error" doctrine. This rule prevails even though there is no claim of ineffective assistance of counsel.\(^{4}\)

In addition to its substantive importance, this case serves as a reminder that provisions of state constitutions often do not get the attention they deserve, partly because of their almost total neglect in law schools. Such provisions are especially important where, as here, there is no clear counterpart in the federal constitution. Furthermore, even when the state provision seems substantially the same as a parallel federal provision, it may be subject to quite a different interpretation by state judges\(^{5}\). Such an interpretation would be beyond review by the Supreme Court of the United States as long as the construction of the state provision was bona fide and not merely an attempt to evade a binding interpretation of the federal constitution.\(^{6}\) Thus, for example, Justice Kaplan in his concurring opinion in *Commonwealth v. Horton*\(^{7}\) suggested that the Massachusetts Declaration of Rights might

\(^{30}\) 414 U.S. at 234-35.


\(^{2}\) Mass. Const. pt. I, art. XII.


\(^{4}\) Id. at 237-38, 308 N.E.2d at 561.


\(^{7}\) 1974 Mass. Adv. Sh. 599, 613, 310 N.E.2d 316, 325 (concurring opinion). In this case the then current Massachusetts obscenity statute was found unconstitutional on vagueness grounds.

Justice Kaplan did not refer to any specific state constitutional provision, but presumably was referring to Article XVI of the Declaration of Rights. "The liberty of the press
warrant the conclusion that any state statute intruding "on the choice of an adult who knowingly and willingly seeks out a pornographic work" is unconstitutional.\footnote{1974 Mass. Adv. Sh. at 613, 310 N.E.2d at 325 (concurring opinion).} Nevertheless, he acknowledged that this view is not now the prevailing interpretation of the federal constitution by the Supreme Court of the United States.\footnote{Id.}

In Mott, the Appeals Court also referred briefly to the Sixth Amendment as a source of the right to appear pro se.\footnote{1974 Mass. App. Ct. Adv. Sh. at 236, 308 N.E.2d at 560.} Although the court merely referred to the lack of controlling authority on this subject, an argument based on the existence of such a right deserves examination. The Sixth Amendment right to counsel is fully binding on the states;\footnote{Gideon v. Wainwright, 372 U.S. 335, 342 (1963). By statute, a party has the right to appear pro se in federal courts. 28 U.S.C. § 1654 (1970).} however, textually it is hard to find support in the Amendment for a right to appear on one's own behalf.\footnote{Mott v. Commonwealth, 366 Mass. 236, 308 N.E.2d at 560.} While a defendant may constitutionally waive his right to counsel,\footnote{Id.} the proposition that a right of waiver implies the right to appear pro se is unsound. The fallaciousness of such an argument is demonstrated by the rejection of analogous ones in other areas of constitutional law. Thus, even if a defendant waives his right to a jury, he ordinarily cannot insist on a bench trial if the prosecution by rule also has a right to a jury and does not so waive.\footnote{Singer v. United States, 380 U.S. 24, 36 (1965).} Similarly, the right to a public trial does not imply the right to insist on a private trial.\footnote{Id. at 35.}

The question then becomes whether there is some overwhelming policy supporting a right to appear pro se, such that the right should be deemed implicit in the Sixth Amendment or, perhaps more generally, in the Due Process Clauses of the Fifth and Fourteenth

\footnote{Mass. Const. pt. I, art. XVI.}
Amendments. The most persuasive argument is that any defendant, at least any defendant who has the willingness and ability to conduct a trial without disrupting orderly court procedures, should be free to present his case directly to the fact finder without an attorney as intermediary. A defendant might desire to represent himself for any one of several reasons: the case may be one that the defendant perceives as political, with the trial affording a vehicle for dissemination of his beliefs, or the defendant may have no technical defense but may think he is right in a moral sense and at least wants his own “say.” Conversely, he may have a strong technical defense but may not want to put on such a defense. He may prefer to win or lose based on a straightforward presentation of the facts.

An accused has a fundamental right to confront his accusers and his “country,” to present himself and his position to the jury not merely as a witness or through a “mouthpiece,” but as a man on trial who elects to plead his own cause. He is not obliged to seek what counsel would record as a victory but what he sees as tantamount to condemnation or doubt rather than vindication. A defendant has the moral right to stand alone in his hour of trial. The denial of that right is not to be redeemed through the prior estimate of someone else that the practical position of the defendant will be enhanced through representation by another, or the subsequent conclusion that defendant’s practical position has not been disadvantaged.

Whether such considerations rise to the level of a constitutional argument depends on one’s thoughts regarding these matters and one’s perceptions of proper constitutional interpretation. In any event, the court in Mott was saved the difficulty of wrestling with this problem by the explicit provision in Article XII of the Declaration of Rights.

§10.6. Constitutionality of repossession statutes. In Mitchell v. W.T. Grant Co., the Supreme Court upheld the constitutionality of a Louisiana sequestration statute which provided that a vendor-creditor could seize personal property without giving the purchaser-debtor an

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17 In such a case, the question of the right to appear pro se is closely related to the dispute over the jury’s right to find a defendant not guilty in the face of satisfactory proof of guilt. Of course, as a matter of power a jury can disregard the instructions of the court with impunity. If it finds the defendant not guilty, the case is ended. But does a jury have the right to acquit in the face of proof of guilt for any reason? The Supreme Court has held that a jury has no right to ignore instructions. Sparf v. United States, 156 U.S. 51, 64-107 (1895). Accord, Commonwealth v. Porter, 51 Mass. (10 Met.) 263, 276 (1846).


opportunity for a hearing. Justice Powell, concurring with the opinion of the 5-4 majority, viewed the decision as a marked departure from recent pronouncements of the Court relating to repossession:

In sweeping language, Fuentes v. Shevin . . . enunciated the principle that the constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest in the property. The Court's decision today withdraws significantly from the full reach of that principle, and to this extent I think it fair to say that the Fuentes opinion is overruled.²

This comment will consider (1) the extent that this decision represents a departure from Fuentes v. Shevin³ and a repudiation of the lower court cases that have followed in the wake of Fuentes, and (2) the extent to which such a departure comports with the doctrine of stare decisis.

Fuentes had its roots in Sniadach v. Family Finance Corp.,⁴ which held that prejudgment garnishment of wages without a hearing is violative of due process.⁵ It is apparent that Sniadach survives Mitchell. First, Sniadach involved wages, "a specialized type of property presenting distinct problems in our economic system."⁶ This point was emphasized in Sniadach, deemphasized in Fuentes when the Court refused to distinguish Sniadach on that basis,⁷ but revitalized in Mitchell.⁸ In addition, the suing creditor in Sniadach had no prior interest in the attached property. There is a world of difference between allowing the seizure of personal property in which admittedly both the creditor and debtor have an interest and, on the other hand, allowing garnishment or attachment of wages, bank accounts or real estate. In a case such as Sniadach, a potential plaintiff is merely interested in tying up property as security for a future judgment and does not claim to have a present interest in the property itself.⁹

² Id. at 623 (concurring opinion) (citation omitted).
⁵ Id. at 340-42.
⁶ Id.
⁷ 407 U.S. at 88-90.
⁸ 416 U.S. at 616-18.
⁹ As the Court noted in Mitchell:

Plainly enough this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must
The extent to which *Mitchell* modifies the law with respect to the precise type of problem presented in *Fuentes* is less certain.\textsuperscript{10} Both *Fuentes* and *Mitchell* involved ex parte authorization for repossession of consumer goods. The *Fuentes* Court found that such repossession was violative of due process;\textsuperscript{11} the *Mitchell* Court found that it was not a violation of due process, but purported to save *Fuentes* on its own facts.\textsuperscript{12}

In distinguishing the two cases, the Court pointed to the following factors: in *Mitchell*, but not *Fuentes*, (1) state law required a clear showing of specific facts and not merely a generalized claim of right to possession; (2) state law required that the showing be made to a judge and not merely a clerk;\textsuperscript{13} and (3) the debtor was entitled to a prompt hearing on the merits after repossession.\textsuperscript{14}

This analysis so depends on a comparison of the details of the statutes involved in *Fuentes* and *Mitchell* that the teaching of the latter case for other jurisdictions is unclear, at least on the face of the opinion. It is perhaps a fair inference from the tone of the prevailing opinion in *Mitchell* that the Court would uphold the validity of any repossession statute that (a) required application to a judge rather than a clerk; (b) had the bond provisions of the *Mitchell* statute;\textsuperscript{15} and (c) permitted debtor a prompt hearing on the merits. It is clear, however, that the Court has now adopted the viewpoint expressed in Justice White's dissent in *Fuentes* that an inflexible constitutional rule is undesirable in

take account not only of the interests of the buyer of the property but those of the seller as well.

416 U.S. at 604.\textsuperscript{10}

The Court made it plain that it did not in any event intend to repudiate the line of cases decided by lower courts on the authority of *Fuentes*:

Our decision will not affect recent cases dealing with garnishment or summary self-help remedies of secured creditors or landlords. Nor is it at all clear, with an exception or two, that the reported cases invalidating replevin or similar statutes dealt with situations where there was judicial supervision of seizure or foreclosure from the outset.


416 U.S. at 605-06.\textsuperscript{11}

11 407 U.S. at 96.

12 416 U.S. at 615-18.

13 Even in *Mitchell* this requirement did not exist for the whole state of Louisiana, although it did for the particular parish in which the writ of sequestration was obtained.

416 U.S. 605-06.\textsuperscript{12}

14 Id. at 616-18.

15 Under the statute challenged in *Mitchell*, the creditor was obligated to post a bond pending a determination of the merits; and the debtor could, although he did not in *Mitchell*, regain possession pendente lite by posting his own bond. Id. at 608.
this area; \(^{16}\) rather, there must be an assessment of the impact of pro-
cedural requirements on the cost of credit. \(^{17}\) This approach necessarily 
demands resolution of empirical questions which are peculiarly 
within the legislative province. Therefore, it would seem that a statute 
of the “Uniform Act” variety, adopted after a determination that 
greater procedural protections would hurt rather than help consum-
ers because of the adverse effect on the cost of credit, would be 
constitutional. \(^{18}\)

The dissenters in *Mitchell* did not merely indicate their dissatisfac-
tion with the substance of the Court's discussion, but also expressed 
dismay over the majority's refusal to apply the doctrine of stare de-
cisis. It seems to me that unless we respect the constitutional decisions 
of this Court, we can hardly expect others to do so. . . . A substan-
tial departure from precedent can only be justified, I had 
thought, in the light of experience with the application of the rule 
to be abandoned or in the light of an altered historic environ-
ment. Yet the Court today has unmistakably overruled a consid-
ered decision of this Court that is barely two years old, without 
pointing to any change in either societal perceptions or basic con-

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\(^{16}\) 407 U.S. 67, 101-02 (White, J., dissenting).

\(^{17}\) 416 U.S. at 618 n.13. One unspoken premise of the *Mitchell* majority may well be 
that as a practical matter these cases involve large corporate sellers and buyers of moderate 
means or less. In these circumstances the seller is merely interested in receiving its 
payments promptly and has nothing to gain from frivolous repossessions. Garnish-
ments, however, particularly wage garnishments, would be subject to abuse by vindictive 
litigants who might not even have a substantial claim. See id. at 614.

If this is so perhaps some distinctions need to be made within *Fuentes.* *Fuentes* actually 
involved five different cases, four of which concerned the usual default on payments of 
consumer goods. The other individual, Rosa Washington, “had been divorced from a 
local deputy sheriff and was engaged in a dispute with him over the custody of their 
son. Her former husband, being familiar with the routine forms used in the replevin 
process, had obtained a writ, that ordered the seizure of the boy's clothes, furniture and 
toys.” 407 U.S. at 72. Whatever might be thought of the assumption that creditor-lien 
holders have benign intentions, such an assumption would certainly have no counter-
part in a case such as Rosa Washington's.

\(^{18}\) The post-*Mitchell* cases have already begun and are hard to reconcile. In *Woods v. 
Tennessee*, 378 F. Supp. 1364 (W.D. Tenn. 1974), a summary repossession statute sur-
vived constitutional attack despite the fact that the debtor could not regain possession 
by putting up a bond and could not obtain an immediate hearing on an application to 
dissolve the writ, both of which are features of the *Mitchell* statute.

procedure was declared unconstitutional on the authority of *Mitchell*. The Court read 
*Mitchell* as emphasizing: (1) a clear showing by creditor of fear that debtor would con-
cel, dispose of, or waste the property; (2) the requirement that the writ be issued by a 
judge; (3) that the debtor was entitled to a full hearing on the merits immediately. The 
Court, placing particular emphasis on the second factor, found the Texas statute defi-
cient in all three respects and thus unconstitutional. Id. at 1258-60.
institutional understandings that might justify this total disregard of stare decisis.\(^19\)

This problem arose because of a change in membership of the Court between \textit{Fuentes} and \textit{Mitchell}. Justices Powell and Rehnquist did not participate in \textit{Fuentes} because they had not been members of the Court at the time of the argument. Justice White, with whom Chief Justice Burger and Justice Blackmun joined, wrote in dissent. Thus, Justice Stewart's opinion of the Court represented the view of only four justices. In \textit{Mitchell}, Justice White, joined by the other dissenters in \textit{Fuentes} as well as by Justices Powell and Rehnquist, wrote the majority opinion. The four justices who comprised the working majority in \textit{Fuentes} dissented in \textit{Mitchell}, with Justice Stewart writing the principal dissent.

Thus the explanation in \textit{Mitchell} of \textit{Fuentes}' "real" meaning was articulated by those who had not been part of the \textit{Fuentes} majority. This is not the first time, however, that limitations have been placed on a case solely or principally because of changes in membership on the Court.\(^20\) In any event, \textit{Mitchell} was not the most suitable case for the dissenters to decry a departure from stare decisis. First, as Justice Powell noted in his concurring opinion in \textit{Mitchell}, \textit{Fuentes} itself can be regarded as a break with precedent.\(^21\) Moreover, the Court has generally taken the position that broad rules should not be announced when unnecessary to dispose of the case, especially where constitut

\(^19\) 416 U.S. at 634-35 (Stewart, J., dissenting) (footnote omitted). Even the dissenters, however, would not claim that due process inflexibly requires notice and hearing before seizure of property in all circumstances. See Calero-Toledo \textit{v.} Pearson Yacht Leasing Co., 416 U.S. 663 (1974).


\[\text{[C]ertain crucial rules relating to the right to counsel as established in United States \textit{v.} Wade ... and Gilbert \textit{v.} California ... were all but vacated by the severe limitations of Kirby \textit{v.} Illinois ... just five years later. Likewise, the relative certainty concerning search and seizures related to automobiles, as established by Chambers \textit{v.} Maroney ... was cast into confusion by Coolidge \textit{v.} New Hampshire the very next year ... . Certainly constitutional interpretation must respond to social change, but this duty does not explain speedy overruling of new doctrines. These turn-arounds are followed by serious consequences to many people in every community. Especially in the area of constitutional-criminal law all concerned are entitled to a substantial measure of stability and predictability.}\]

\[^{21}\] 416 U.S. at 624 (Powell, J., concurring).

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tional matters are in issue. While this rule is perhaps one of prudence only, and there have been cases where the Court has ignored it altogether, Fuentes was a case in which the Court should have taken special pains to restrict discussion to the statutes before it rather than to announce a rule of unnecessary generality. It was, after all, a 4-3 decision, where there was reason to believe that in these matters the two new justices would agree with the minority rather than the majority. Thus, it may be said that the spectacle of the Court's undercutting a broad principle recently announced and widely applied was not caused by the Mitchell majority's disrespect for precedent, but rather by the attempt in Fuentes to preempt an entire area of due process litigation before the voting make-up of the Court altered.

STUDENT COMMENTS

§10.7. Newsman privilege: Dow Jones & Co. v. Superior Court. Petitioner Liz Roman Gallese was a staff reporter for the Wall Street Journal (hereinafter the Journal), which is published by petitioner Dow Jones & Co., Inc. On October 17, 1972, the Journal carried a front page article written by Gallese discussing the problems of implementing Massachusetts' anti-snob zoning law, which was designed to facilitate the construction of low income housing in suburban communities where such construction is hindered by local zoning ordinances. A smaller, boxed-in article was included on the bottom of the same page and focused on the possibility that some developers might use the controversial law to “blackmail” town officials throughout the state; if local approval for conventional development programs was not forthcoming, the developers could threaten to secure state approval to build low-income housing. This smaller article then quoted an accusation by an unnamed Stoneham, Massachusetts official that one developer, William D'Annolfo, was blackmailing Stoneham officials in this manner because they had refused his prior request for a permit to build luxury apartments. The official was also quoted as stating that D'Annolfo was a “bad word” in Stoneham. The article concluded with a paraphrase of a statement made by an unnamed

22 See Ashwander v. TVA, 297 U.S. 288 (1936), in which Justice Brandeis stated:

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:...

3. The Court will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”
Id. at 346 (concurring opinion).


2 G.L. c. 40B, §§ 20-23.
lawyer representing D'Annolfo which denied the charges made by the town official. On December 22, 1972, the Journal published a “correction” of its article, explaining that D'Annolfo had in fact applied for a permit to build a nursing and convalescent home and not for a zoning change to build luxury apartments. The Journal concluded that the inference of blackmail raised by the October article was incorrect and stated that it regretted the error. ³ However, D'Annolfo complained that the correction was inadequate because it did not correct the town official’s statement that D'Annolfo was a “bad word” in town. ⁴

D'Annolfo subsequently initiated a libel action in superior court against Gallese and Dow Jones early in 1973. On May 30, 1973, D'Annolfo's counsel took an oral deposition of Gallese, during which she refused to reveal the identity of the Stoneham official quoted in her story, claiming the information had been obtained under a pledge of confidentiality. ⁵ No other method of discovery had as yet been undertaken by either party. D'Annolfo filed a motion in superior court for an order compelling Gallese to reveal her source. ⁶ The court granted the motion; the defendants then moved to quash the order. The motion to quash was continued without action while an interlocutory appeal was taken to the Supreme Judicial Court. ⁷

On appeal the petitioners contended, in the words of the Court, that “the free press guaranty of the First Amendment to the Constitution of the United States, while not creating an absolute privilege, at least creates a partial shield behind which journalists may conceal their confidential sources even from the fact-finding procedures

⁵ The oral deposition was taken pursuant to Mass. Sup. Jud. Ct. R. 3:15. Section 1(a) of the rule states that a party may take the testimony of any person, including a party, “for the purpose of discovery or for use as evidence or for both purposes.” Section 1(b) provides that “the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding . . . .” Section 8(a) allows the person taking the deposition to request the court to grant a motion for an order compelling an answer. Section 8(b)(1) provides that “[i]f any party . . . refuses to answer any question after being directed to do so by the court, the refusal may be considered a contempt of court.”

In proceedings in superior court, before a single justice of the Supreme Judicial Court, in Boston Housing Court and in certain proceedings in probate court and land court, this rule has been superseded by Mass. R. Civ. P. 26, effective July 1, 1974. See note 106 infra.
⁷ The appeal was taken under G.L. c. 211, § 4A, which reads in pertinent part:
The supreme judicial court may also direct any cause or matter to be transferred from a lower court to it in whole or in part for further action or directions, and in case of partial transfer may issue such orders or directions in regard to the part of such cause or matter not so transferred as justice may require.
which are integral to the judicial process." They further contended that the shield must stand until it is demonstrated that the identity of the source is crucial to a particular judicial proceeding, and that such a demonstration is made in a civil libel action only if the party seeking the information "has completed discovery, has exhausted alternative means of acquiring the desired information, and has demonstrated that he can and will succeed only if the identity of the anonymous [informant] is revealed." The Court rejected both this three-pronged test and the constitutional argument supporting it, holding that in a civil libel suit where a reporter is a defendant, the First Amendment imports no privilege, qualified or absolute, to refuse to divulge the identity of a confidential source when requested to do so during discovery. The lower court order compelling discovery was affirmed.11

The Supreme Judicial Court relied on its 1971 decision In re Pappas,12 which rejected, in the context of grand jury proceedings, an argument similar to that asserted by the Dow Jones defendants. The Pappas case was considered with two similar cases by the United States Supreme Court in Branzburg v. Hayes13 in 1972 and was affirmed. The Supreme Court in Branzburg concluded that the First Amendment does not provide any privilege—qualified or absolute—to refrain from divulging the identity of confidential news sources in response to legitimate grand jury questioning.14 Three justices dissented, favoring the adoption of a test similar to the one urged by petitioners in Dow Jones.15

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9 Id. at 1471-72, 303 N.E.2d at 849.
10 Id. This test goes beyond the traditional judicial protection which is afforded a defendant. See text at note 105 infra.
11 Id. at 852.
13 408 U.S. 665 (1972). The companion cases to Pappas were Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971) and Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970). Branzburg was a prohibition proceeding by a newspaper reporter who had been held in contempt of court for refusing to reveal to a grand jury the identity of two hashish dealers about whom he had written an article. The Court held that a Kentucky statute protecting newsman from revealing the identity of an informant from whom he had obtained information was not applicable to events which the newsman had personally observed. Such events included the identity of the hashish dealers. Caldwell concerned efforts by a federal grand jury to compel a reporter to appear before it and bring with him notes and tape recordings of interviews given him for publication by members of the Black Panther Party regarding its aims, purposes and activities. The Court held that, absent some special showing of necessity, the reporter did not have to appear or testify before the grand jury.
14 408 U.S. at 667.
15 Id. at 743. Justice Stewart, joined by Justices Brennan and Marshall, dissented. The dissenters would compel disclosure to a grand jury if (1) there is probable cause to believe that the newsman has information clearly relevant to a specific probable violation of law; (2) the information cannot be obtained by alternative means less destructive of

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This note will examine first the possible sources of a newsman privilege not to reveal confidential news sources. It will explore the development of judicial attitudes toward the existence of a constitutional privilege, focusing on the proposition that newsgathering is an implied right under the First Amendment. Finally, this note will conclude with an examination of the contention that the legislature is the best and, at least in Massachusetts, the only forum for properly weighing the competing interests involved in the newsman privilege question.

Although there are three potential sources of a newsman testimonial privilege—statutory, common law, and constitutional, only the last provides a basis in Massachusetts. Neither Congress nor the Massachusetts General Court has created any statutory scheme to protect newsmen against forced disclosure of confidential sources under any circumstances. The general common law is likewise unavailing. Courts have consistently refused to recognize a common law testimonial privilege for newsmen on the grounds that every citizen has a duty to testify in order to assure the fair administration of justice. However, this duty to testify is not absolute. Exceptions have been created when there is found to be "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." In order to justify breaching this duty to testify by finding that certain communications are privileged, the common law has required that four conditions be met: that (1) the communications originate in a confidence; (2) the element of confidentiality be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation be one which, in the opinion of the community, ought to be fostered; and (4) the injury that would inure to the relation by the disclosure of the communications be greater than First Amendment rights; and (3) there is a compelling and overriding interest in the information. Id. at 743. Justice Douglas wrote a separate dissent on only the Caldwell case. Id. at 711.

At the time of the Branzburg decision, 17 states had passed "shield" laws which provide some evidentiary protection for newsmen to refuse to reveal confidential news sources. 408 U.S. at 689 n.27. Eight states have passed such statutes since Branzburg. Recent Decisions, 9 U. Richmond L. Rev. 171, 175 n.26 (1974).


8 J. Wigmore, Evidence § 2192, at 70 (McNaughton rev. ed. 1961) [hereinafter cited as Wigmore].

Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting), discussing the admissibility of evidence obtained by state officers during a search which would have violated the Fourth Amendment if conducted by federal officers.

Wigmore, supra note 18, lists four types of confidential communications which were privileged at common law: attorney-client, husband-wife, informer-government, and those between jurors. Id. § 2285, at 528. In addition to common law privileges, the Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.
the benefit thereby gained for the proper disposal of litigation.\textsuperscript{21} Courts applying the common law have remained unconvinced that the last three conditions are present in the relationship between a newsman and his source.\textsuperscript{22} However, it should be noted that the development of the common law regarding evidentiary privileges essentially stopped nearly a century ago.\textsuperscript{23}

In the absence of statutory or common law protection, a constitutional argument must be made where a newsman privilege is sought. The principal argument of opponents of a newsman privilege is that journalists should not be exempt from the application of laws and procedural rules in general,\textsuperscript{24} such as the duty to testify. In light of the judicial protection given to other confidential relationships, it is submitted that this contention should not be persuasive since it fails to acknowledge the dual role which a newsman must play. As a private citizen, the journalist is subject to the same duties and obligations as all citizens, including the duty to testify. However, as a newsgatherer he serves the public interest in the dissemination of news. It is submitted that because newsgathering and dissemination are First Amendment interests,\textsuperscript{25} a balancing test must be used to determine whether they should prevail.\textsuperscript{26} The essence of the constitutional argument for a newsman privilege is thus that a newsman can fulfill his public function as a newsgatherer only by being permitted to breach his personal civic duty to testify.\textsuperscript{27}

In \textit{Dow Jones}, the Supreme Judicial Court took the position that even this constitutional argument was precluded by its earlier decision

\textsuperscript{21} Wigmore, supra note 18, § 2285, at 527.
\textsuperscript{22} See Annot., 7 A.L.R. 3d 591, 592-96 (1966) and Wigmore, supra note 18, § 2286, at 528, 529-30 n.9, § 2286, at 62-63 (Supp. 1972).
\textsuperscript{23} McCormick’s Handbook of the Law of Evidence § 77, at 156 (2d ed. E. Cleary 1972). There have been some exceptions. See id. at 156 n.32.
\textsuperscript{24} Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937). The Court held that the Associated Press was engaged in interstate commerce within the meaning of the National Labor Relations Act and Article I, § 8 of the U.S. Constitution and thus regulable by Congress. Id. at 128.
\textsuperscript{25} See text at notes 57-66 infra.
\textsuperscript{26} See Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring). See also Schneider v. State, 308 U.S. 147 (1939) (municipal ordinance prohibiting house-to-house canvassing void as applied to one who canvassed in the name of religion since city’s interest in keeping streets clean from discarded circular does not override freedom of speech); Martin v. Struthers, 319 U.S. 141 (1943) (municipal ordinance forbidding persons from knocking on doors for purpose of distributing handbills was an invalid abridgement of freedom of speech and press); Democratic Nat’l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973) (newsmen has at least a qualified privilege under the First Amendment not to disclose information where there has been no showing that information goes to the heart of the case and alternative sources have been exhausted). See note 44 infra.
\textsuperscript{27} See Note, Beyond \textit{Branzburg}: The Continuing Quest for Reporter’s Privilege, 24 Syracuse L. Rev. 731, 734 (1973).
Paul Pappas was a television reporter-photographer who had been assigned to cover civil disturbances in New Bedford and had been admitted to the local Black Panthers' barricaded headquarters for a press conference. The Panthers later allowed him to re-enter their headquarters on the condition that he report only news about an anticipated police raid. The raid never materialized, however, and accordingly Pappas reported nothing. A grand jury was subsequently convened to identify and indict those responsible for criminal acts during the civil disturbances, and Pappas was subpoenaed to appear before it. When asked about events and persons inside the Panther headquarters, Pappas refused to answer on the ground that the First Amendment afforded him a privilege as a newsman to protect the sources of information acquired in confidence. The Supreme Judicial Court rejected Pappas' claim and held that "there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury."

The Pappas case centered around the issue of the obligation of a news reporter to reveal information to a grand jury deemed relevant to the commission of a crime. The attitudes of the Supreme Judicial Court in Pappas and the United States Supreme Court in affirming Pappas in Branzburg regarding a newsman privilege were intertwined with the judicial perception of the grand jury's role as the investigative arm of the criminal justice system. Although both cases held that the First Amendment does not provide protection for the newsman when such protection would undermine the function of the grand jury, neither case explicitly denied the existence of a First Amendment privilege in other legal proceedings in which it might be asserted.

The Supreme Judicial Court in Dow Jones expressly recognized this limited scope of Branzburg and justified its reliance on Pappas by carefully drawing distinctions between its decision in Pappas and the Supreme Court's decision in Branzburg. The Branzburg decision had emphasized that the sole issue before the Court was "the obligation of reporters to respond to grand jury subpoenas..." The Court in Dow Jones asserted that Pappas was not so restricted since it stressed

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30 358 Mass. at 612, 266 N.E.2d at 302-03.
31 "The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury..." 408 U.S. at 686.
32 358 Mass. at 613-14, 266 N.E.2d at 303-04; 408 U.S. at 690-91.
33 See Significant Developments, 53 B.U.L. Rev. 497, 505-06 (1973) (the Branzburg decision is not limited to the grand jury context).
35 408 U.S. at 682.
the importance of disclosure to the judicial process generally rather than to the criminal process alone, as *Branzburg* had done. However, it is submitted that this distinction between *Pappas* and *Branzburg* is an artificial one. While it is true that *Pappas* contains general language about the duty of a newsman to testify before a court as well as a grand jury, such language was dicta insofar as it went beyond the question of privilege in grand jury proceedings. To accept such a distinction between *Pappas* and *Branzburg* would undermine the Supreme Court's rationale for limiting its holding in *Branzburg*. The Supreme Court properly reserved for itself the opportunity to explore fully, at the proper time, the different societal interests involved in a civil action and how the weight given these particular interests might be affected by the First Amendment concerns expressed in numerous Supreme Court decisions.

It is submitted that determination of the constitutional privilege question in civil actions should turn on a balancing of the interests involved in a particular case and not on a blanket rule. Justice Powell's concurring opinion in *Branzburg* emphasized the need to examine the privilege question on a case-by-case basis.

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony . . . . The balance between these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

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37 358 Mass. at 612, 266 N.E.2d at 302-03. See text at note 30 supra.
38 The *Pappas* court concluded that it could do no more than to state (1) that a grand jury, to carry out its ancient and important public function, must be allowed appropriate scope of investigation; (2) that it is the duty of all citizens . . . to assist in such inquiries . . . ; (3) that the burden rests upon a witness, . . . to establish that the grand jury inquiry is improper or oppressive; and (4) . . . the presiding judge . . . may take into account all pertinent circumstances affecting the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony of the particular witness to the investigation in progress.
39 358 Mass. at 613-14, 266 N.E.2d at 303-04.
30 The U.S. Const. art. 3, § 2 only applies to "cases" and "controversies." Thus the Court can only rule on the actual issue before it. Unlike the federal constitution, the Massachusetts Constitution provides for advisory opinions by the Supreme Judicial Court: "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." Mass. Const. pt. 2, c. 3, art. II.
40 See 408 U.S. at 680 n.17.
41 408 U.S. at 709-10. Since *Branzburg* was a 5-4 decision, Justice Powell's vote was crucial. See Comment, Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis, 24 U. Chi. L. Rev. 99 (1957) for a discussion of the debate on the precedential value of a plurality opinion such as *Branzburg*.
42 408 U.S. at 710.
The outcome of such a balancing test might necessarily be different in the civil context than in the grand jury context because different societal interests are at stake.\(^{43}\) Several post-Branzburg federal civil cases have recognized this. Some of these decisions, although factually distinguishable from \textit{Dow Jones}, have refused to compel disclosure.\(^{44}\)

In \textit{Carey v. Hume},\(^{45}\) a post-Branzburg libel action, the United States Court of Appeals for the District of Columbia Circuit acknowledged that neither the language nor the holding in \textit{Branzburg} precluded the establishment of at least a qualified privilege for newsmen to refuse to reveal confidential sources in civil litigation.\(^{46}\) The \textit{Carey} case arose out of a news story which charged that the plaintiff, who was general counsel to the United Mine Workers, had helped to secretly remove documents from the union's headquarters during a federal investigation of its financial affairs. In a subsequent libel action, the plaintiff sought the identity of the news reporter's sources who were allegedly eyewitnesses to the plaintiff's crime. Noting that the information went to the heart of the plaintiff's claim and that exhausting all other means of obtaining the desired information was impossible, the court concluded that the establishment of an \textit{absolute} privilege to refuse disclosure of the identities of confidential sources of information would not prevail.\(^{47}\) Since it appears that the Supreme Judicial Court rejected the balancing approach when it adopted a uniform application of the \textit{Pappas} reasoning to all situations, it is submitted that \textit{Dow Jones} thus wrongly precludes the establishment of a constitutional newsmen privilege in those civil cases where it would be merited.

Judicial attitudes toward the conflict between the press' interest in nondisclosure and the civil litigants' "right to everyman's evidence"\(^{48}\) have undergone considerable transformation since 1958 when the first constitutional claim for a newsmen privilege was asserted in \textit{Garland v. Torre}.\(^{49}\) In \textit{Garland}, a newspaper columnist for the New York Herald Tribune, Marie Torre, published an article containing defamatory remarks about actress Judy Garland which were attributed

\(^{43}\) See discussion in text at notes 93-100 infra.


\(^{46}\) "[I]t appears to us that \textit{Branzburg}, in language if not in holding, left intact, insofar as civil litigation is concerned, the approach taken in [\textit{Garland v. Torre}]." Id. at 636. See text at notes 49-52 infra for a summary of \textit{Garland} and see text at notes 103-11 infra for a comparison of the \textit{Garland} approach with the three-pronged test advocated by the defendants in \textit{Dow Jones}.

\(^{47}\) Id. at 639.

\(^{48}\) Wigmore, supra note 18, § 2192, at 70.

\(^{49}\) 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).
to an unnamed Columbia Broadcasting System (CBS) executive. In a suit by Garland against CBS for breach of contract and defamation, Garland's counsel deposed the columnist\(^{50}\) in an effort to identify the source of the statement. Torre refused to reveal it and was held in criminal contempt.\(^{51}\) In an opinion written by Judge (now Justice) Stewart, the Second Circuit affirmed the lower court ruling compelling disclosure.\(^{52}\) The Supreme Judicial Court in *Dow Jones* simply acknowledged the existence of *Garland*; it did not examine the *Garland* holding,\(^{53}\) but relied instead on its own decision in *Pappas*. However, an analysis of *Garland* sheds some light on the decisional criteria which *Dow Jones* should have used.

In *Garland*, the court weighed the private interests of the reporter in nondisclosure against the "paramount public interest in the fair administration of justice."\(^{54}\) The *Garland* court concluded that even if there was a First Amendment privilege, it was not absolute\(^{55}\) and was outweighed by the public interest in compelled testimony. It is submitted that the court reached this conclusion for two reasons: first, the court was unsure of the degree to which prior case law had extended First Amendment protection to newsgathering, and second, the court overestimated the weight which should be attributed to the societal interest in compelled testimony.\(^{56}\) Scrutiny of the case law since *Garland* will demonstrate that the premises upon which the holding in *Garland* was based have been called into question so frequently since they were first articulated that they can no longer be accepted uncritically.

*Garland* had only hypothesized that newsgathering might be deserving of First Amendment protection.\(^{57}\) However, several commentators have not been so meek and have asserted that freedom of the press necessarily implies freedom to gather news.\(^{58}\) The framers of the Bill of Rights themselves acknowledged the need for such protection.\(^{59}\) Al-

\(^{50}\) Torre, unlike Gallese in *Dow Jones*, was not a party to the action.
\(^{51}\) 259 F.2d at 547.
\(^{52}\) Id. at 551.
\(^{54}\) 259 F.2d at 549.
\(^{55}\) Id. at 548.
\(^{56}\) "If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice." Id. at 549.
\(^{57}\) Id. at 548.
\(^{59}\) 6 Writings of James Madison 398 (Hunt ed. 1906). "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both."
though the United States Supreme Court has not decided this precise issue, there is strong support in various decisions to indicate that the Court has recognized that the right to gather news is implicit in the First Amendment.

The Supreme Court has established several corollary rights which are essential to freedom of the press, including the rights to publish without prior restraint, to circulate publications, to distribute literature freely, and to receive information without discriminatory state restrictions. It was argued in dissent in \textit{Branzburg} that just as the guarantee of a free press is meaningless without the right to publish and distribute, the right to publish and distribute is worthless without some guarantee of the right to gather information. The Court's oft-repeated support of a free press could thus be read as impliedly supporting that which is essential to the existence of a press in the first instance, i.e., the right to gather information. The majority in \textit{Branzburg} itself gives credence to this interpretation of First Amendment case law, albeit in dicta: "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." Once newsgathering is established as

\begin{itemize}
  \item 60 Yale Note, supra note 58, at 327.
  \item 61 Near v. Minnesota, 283 U.S. 697, 713 (1931).
  \item 62 Grosjean v. American Press Co., 297 U.S. 233, 244-45 (1936).
  \item 64 Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965).
  \item 65 "A corollary of the right to publish must be the right to gather news . . . . Without freedom to acquire information the right to publish would be impermissibly compromised." 408 U.S. at 727-28 (Stewart, J., dissenting). Justices Brennan and Marshall joined in this dissent.
  \item 66 408 U.S. at 681. Some of the cases cited by the Court as the justification for limiting the protection afforded newsgathering may be distinguished from the situation in \textit{Dow Jones}. In \textit{Zemel v. Rusk}, 381 U.S. 1 (1965), cited in 408 U.S. at 684, the Supreme Court upheld the constitutionality of a ban on travel to Cuba by a private individual even though that restriction "render[ed] less than wholly free the flow of information concerning that country." 381 U.S. at 16. The basis of that decision was that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." Id. at 17 (emphasis added). The inference made, however, is that there is at least some right to gather news. \textit{Zemel} can easily be distinguished from the newsmen cases since the potential newsgatherer was a private individual who sought to learn about Cuba for personal intellectual enrichment. Such a distinction points out the problem of determining who should be able to claim the right to a newsman privilege. This issue seemed to bother Justice White in the plurality opinion in \textit{Branzburg} as well. 408 U.S. at 704. In \textit{Estes v. Texas}, 381 U.S. 532 (1965), and in \textit{Sheppard v. Maxwell}, 384 U.S. 333 (1966), cited in 408 U.S. at 685, the Supreme Court also recognized the need to exercise some control over press newsgathering. In each of these cases, however, a criminal defendant's right to a fair trial was at stake. Press conduct was disruptive and excessive in both cases. Therefore, neither decision denies general constitutional protection for newsgathering.
\end{itemize}
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an interest which should be afforded protection by the First Amend-
ment, the extent to which that interest is invaded by forcing disclosure
of a newsman's confidential sources must be determined. Both
Pappas and Branzburg questioned whether such forced disclosure to
the grand jury would result in the diminution of the flow of news to
the public. Dow Jones adopts a similarly skeptical view when the forced
disclosure occurs during civil litigation.

However, other courts which have confronted this issue in the civil
context arrived at a somewhat different conclusion. In Baker v. F &
F Investment, the Second Circuit forsook any uncertainty about the
detrimental impact forced disclosure would have on the news flow in
the civil context. Baker, unlike Garland and Dow Jones, was not a civil
libel action. It involved the efforts of plaintiffs in a civil rights action
alleging racial discrimination in sale of housing to compel a journalist
to disclose the confidential source of his article on "blockbusting." The
journalist had written the article ten years prior to the suit and he was
not a party to the action. While the Garland court acknowledged that
"compulsory disclosure of a journalist's confidential sources of infor-
mation may entail an abridgement of press freedom by imposing
some limitation upon the availability of news," Baker forcefully con-
cluded that "[c]ompelled disclosure of confidential sources unquestion-
ably threatens a journalist's ability to secure information that is
made available to him only on a confidential basis . . . . [This] threats
freedom of the press and the public's need to be informed."

Pappas and Branzburg cite the lack of any positive empirical proof
that forced disclosure has a detrimental impact on news dissemina-
tion as a reason for their reluctance to conclude as a matter of law that
such disclosure results in an impermissible invasion of a First
Amendment interest. These decisions would have been more accu-
rate, however, if they had stated that there exists data showing such a
detrimental impact but that they remained unpersuaded by the con-
clusions of such data.

The most comprehensive statistical study was conducted by Profes-
sor Vincent Blasi of the University of Michigan Law School with the
assistance of Dean Richard Baker of the Columbia Graduate School of
Journalism. This study was comprised of three separate but interre-

67 358 Mass. at 612, 266 N.E.2d at 302.
68 408 U.S. at 698-99.
69 See cases cited in notes 44-45 supra.
70 470 F.2d 778 (2d Cir. 1972). Since Branzburg, this case is perhaps the authority
most frequently cited by proponents of a newsman privilege.
71 259 F.2d 545, 548 (2d Cir.), cert. denied, 358 U.S. 910 (1958) (emphasis added).
72 470 F.2d at 782.
73 358 Mass. at 612, 266 N.E.2d at 302; 408 U.S. at 693-94.
[hereinafter cited as Blasi].

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lated surveys of individual newsmen. In the first survey, Blasi personally interviewed forty-seven reporters and editors from large cities\(^75\) who were "chosen impressionistically on the basis of their expressed willingness to cooperate, their achievements in the profession, the kind of reporting or editing they do, their importance in terms of the number of readers or viewers they reach, and their familiarity with the subpoena problem."\(^76\) In the second study, Blasi and Baker mailed questionnaires to sixty-seven reporters whom they considered to be familiar with the subpoena problem.\(^77\) Since the statistical population was preselected, "[t]he questionnaire was designed to obtain 'qualitative' rather than 'quantitative' information."\(^78\) The third survey was intended to solicit quantitative information. The population involved was nonrandom\(^79\) as it was designed to include primarily reporters from a wide range of media who reach a relatively large number of readers, viewers, or listeners.\(^80\)

Blasi concluded from the quantitative survey that the average newsmen in the population surveyed relies on "regular" confidential sources in approximately 22.2% of his stories and on first-time confidential sources in 12.2%.\(^81\) Many of the reporters interviewed, how-

\(^75\) These cities were New York, Washington, D.C., Chicago, Detroit, Los Angeles, San Francisco, and Denver.

\(^76\) Blasi, supra note 74, at 236.

\(^77\) Such familiarity was judged either on the basis of the personal knowledge of the surveyors or the type of reporting done. Id. Reporters covering the polarized elements of society, such as minorities, political radicals, and criminals, are most likely to have a familiarity with the subpoena problem since they tend to be more dependent upon confidential sources than other reporters. This is the result of the reluctance of such groups to give any information unless they are convinced the reporter is "on their side" and will assure their anonymity. Id. at 241.

\(^78\) Id. at 236.

\(^79\) Blasi had two reasons for choosing a nonrandom population. First, not all kinds of reporters are likely to have a familiarity with the subpoena problem. See note 77 supra. Second, there is a statistical definitional problem in determining who should be labeled as a "journalist." In a society which treasures the right of self-expression, anyone who picks up the pen may fashion himself a "journalist." Blasi therefore limited his sample to newsmen for whom journalism was a full time profession. Blasi, supra note 74, at 236-37.

\(^80\) Id. A total of 1,470 questionnaires were sent out, of which 975 (66.3%) were returned to the surveyors. Id. at 238. The value of a quantitative survey is limited since (1) it limits the subject in the types of responses he may make; (2) the population surveyed could be considered incurably biased from the outset since some kind of privilege to refuse to divulge confidential sources would likely be viewed by most journalists as necessary and beneficial to the profession as a whole; (3) despite an attempt to create a large survey population, the respondents were part of at least a limited selective process as a result of either the surveyors' own conscious efforts or the self-selection of those who chose to return the completed questionnaires; and (4) the study was made from the responses of newsmen and not from the responses of those who have been confidential sources. Id. at 239.

\(^81\) Id. at 247.
ever, stated that their most important stories tend to come from first-time sources.\textsuperscript{82}

In an earlier study, James Guest and Alan Stanzler\textsuperscript{83} surveyed the editors of leading newspapers to determine the percentage of stories which were based on confidential sources.\textsuperscript{84} The percentage results indicating the importance of confidential sources to news stories were generally higher in this study than in the Blasi survey.\textsuperscript{85} This difference may be explained by the less refined and more informal nature of the research method used by Guest and Stanzler.\textsuperscript{86}

In determining what percentage of the stories would be affected by the threat of forced disclosure of the identity of a confidential source for the story, Blasi found that about 8% of the respondents to this question\textsuperscript{87} reported that their coverage of a particular story within the past eighteen months had been adversely affected by the possibility of such a subpoena.\textsuperscript{88} It is extremely difficult to assess the qualitative value of this finding since the statistics give no indication of the relative importance of those stories adversely affected.\textsuperscript{89}

It is submitted that the conclusions drawn from the data from either the Blasi or Guest and Stanzler studies might differ depending

\textsuperscript{82} Id. In response to the question "Have you ever been served with a subpoena in conjunction with your reporting?," \(180\) (18.5%) of the journalists said "yes," \(689\) (70.7%) said "no," and \(106\) (10.9%) did not answer. Id at 260.

\textsuperscript{83} Both Guest and Stanzler are members of the Massachusetts Bar.

\textsuperscript{84} Guest \& Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. U.L. Rev. 18 (1969).

\textsuperscript{85} For example, the Christian Science Monitor reported that 33-50% of its stories involved confidential sources. Id. at 43-44. The San Francisco Chronicle stated that "[a]n absolutely staggering number of stories, political and non-political, arise from information received in confidence." Id. at 60. The Wall Street Journal, however, reported that 15% of its articles were based on confidential information. Id. at 43. This Wall Street Journal figure is less than the figure cited by Blasi for the percentage of stories which regularly rely on confidential sources. It is, however, greater than the Blasi study figure for stories based on first-time confidential sources.

\textsuperscript{86} The Guest and Stanzler study asked only one question: that of what number of stories were based on confidential sources. Additional comments could be made by the editor being surveyed. Id. at 57.

\textsuperscript{87} Only 887 out of the total 975 respondents answered this particular question. Blasi, supra note 74, at 270.

\textsuperscript{88} Ninety-seven (10.9%) said they were not certain whether the possibility of subpoena had had an adverse effect and 719 (81.1%) said the subpoena possibility had not affected their coverage of any story. Id. This question was not asked in the Guest and Stanzler study.

\textsuperscript{89} Perhaps the most well-known but most overworked illustration of this problem is the journalistic exposure of the Watergate-related scandals. Confidential sources were used by a number of investigative reporters, most notably Robert Woodward and Carl Bernstein of the Washington Post. See R. Woodward and C. Bernstein, All the President's Men (1974). Stories of the proportions of the Watergate scandals might very well be part of the 8% of the stories which Blasi found to be adversely affected by the threat of forced disclosure. The 8% figure might therefore be mistakenly viewed as relatively inconsequential.
upon a particular court's predisposition to the value which should be attributed to press interests. Whether the interference with those interests as evidenced by these statistical studies is found to be de minimis or quite harmful and therefore unconstitutional will therefore vary according to the subjective perception of the court. Thus these statistics may be more reinforcements of pre-existing judicial beliefs than weapons of persuasion. Accordingly, advocates of either position—pro or anti-privilege—could find some statistical foundation to support their position.

It should also be noted that both the Blasi and Guest and Stanzler studies were conducted before the *Branzburg* decision. Perhaps the impact of that decision and the publicity surrounding it will increase any detrimental effect which forced disclosure will have on the newsman-source relationship.

If one accepts the premise that newsgathering and dissemination of news are protected by the First Amendment, then any direct or indirect abridgement of these rights through the forced disclosure of confidential news sources can be justified only by a compelling state interest. *Pappas* and *Branzburg* declared that such a paramount interest is to be found in the enforcement of the criminal justice system. However, the Supreme Court, in the context of executive privilege, has pointed out that the set of competing interests that is at stake in criminal proceedings is different from the set involved in civil proceedings, although the Court did not indicate the exact parameters of that difference. The state interest in the criminal justice system is in obtaining information that may aid in the apprehension and conviction of criminals as well as in protecting a criminal defendant's constitutional right of due process. In a civil proceeding, however, although nondisclosure of information may be detrimental to litigants, their right to compel testimony lacks explicit constitutional stature, unlike the protection afforded criminal defendants by the Fifth.

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90 See text at notes 57-66 supra.
92 358 Mass. at 612-13, 266 N.E.2d at 302-03; 408 U.S. at 686-98.
95 U.S. Const. amend. V, quoted in note 20 supra.
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Sixth,96 and Fourteenth97 Amendments. The primary interest of the state in civil litigation is in providing a forum for the peaceful settlement of noncriminal disputes between private individuals. The state has no interest in a particular plaintiff or defendant prevailing. Protecting a plaintiff from an adverse civil judgment is not as compelling as protecting society from the criminal element and affording a criminal defendant the opportunity and the means to prove his innocence.98

The plaintiff in a civil suit does not have a constitutional basis for thwarting the establishment of a newsman privilege.99 Rather, it is the press and its readers which have the constitutional interest at stake. Since the guarantees of the First Amendment are not absolute,100 a court must consider and weigh countervailing interests, such as that of protecting one's reputation, as in Dow Jones, in determining the proper limits of the privilege. The three-pronged test for disclosure advanced by the defendants in Dow Jones101 acknowledges this need. It is submitted that the thrust of this test is not significantly different from that imposed by the court in Garland. Although Garland did not recognize a constitutional newsman privilege, it noted that First Amendment interests might be involved102 and therefore was reluctant to compel disclosure without establishing some preliminary guidelines. Thus, the court stated that disclosure was justified only when the plaintiff had taken active and independent steps to determine the identity of the source103 and when the identity of that source went "to the heart of" the plaintiff's claim.104 It is submitted that even under the Garland standard, the Supreme Judicial Court should have postponed compelling disclosure since there had not yet been any showing in the record that the plaintiff had taken any independent action to find out the identity of the Stoneham official.

The standard asserted by the defendants in Dow Jones is somewhat more stringent than the Garland standard since it would require that

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96 "In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial . . .; to be confronted with the Witnesses against him; have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. amend. VI.
97 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.
98 See Murasky, supra note 94, at 899.
99 One commentator has singled out Massachusetts as an exception to the general rule that the First Amendment protects the right of a journalist to refuse to disclose his informants' identity in a libel action under some circumstances. Murasky, supra note 94, at 911-12.
101 See text at note 10 supra.
102 259 F.2d at 548.
103 Id. at 551.
104 Id. at 550.
discovery be otherwise completed and that all other means of ascertaining the identity of the source be exhausted. The Court in *Dow Jones* rejected the suggestion that a distinction be drawn between pre-trial discovery proceedings and the trial itself for the purpose of the disclosure issue on the grounds that judicial rules provide sufficient protection for any deponent, including the newsman, from "annoyance, undue expense, embarrassment, or oppression." This conclusion, it is submitted, begs the question since it does not address itself to the differences in purpose of pre-trial discovery and the trial itself. Liberal civil discovery rules permit litigants to obtain relevant information which may never be used at trial. The possibility of feigned suits initiated merely to obtain the identity of a source could be minimized, if not eliminated, by postponing disclosure until the trial proceedings. Further, during discovery, the civil litigant's interest in a favorable outcome is not yet directly at stake. There is consequently no justification for infringing upon the defendant's First Amendment interests at this stage in the proceedings. Recent federal civil cases have not required that all other means of ascertaining the source's identity be exhausted before compelling disclosure. It is submitted, however, that such a prerequisite provides a stronger

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106 Compare Mass. Sup. Jud. Ct. R. 3:15, quoted in part at note 5 supra, with Fed. R. Civ. P. 26, which provides in pertinent part:

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery . . . (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence . . . .

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .


107 Murasky, supra note 94, at 899.

108 Id.

109 In Carey v. Hume, 492 F.2d 631, 638-39 (D.C. Cir.), petition for cert. dismissed, 417 U.S. 938 (1974), the court stated that the facts of the case placed an impossible burden upon the plaintiff to investigate all other means of obtaining the identity of the source and therefore did not require it. Id. at 638-39. See text at notes 45-46 supra.
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safeguard against impairment of important First Amendment interests.

Determining whether the identity of the source goes "to the heart" of the plaintiff's claim is difficult since the Garland court never articulated what criteria are to be used to ascertain whether information is crucial to the case. The standard suggested by the defendants in Dow Jones is more easily applied then the Garland "heart of the matter" standard since it specifically states the criteria to be used to determine the necessity of the information sought. The plaintiff must demonstrate that he can and will succeed if and only if he has knowledge of the source's identity. Consequently a court should not require disclosure if the plaintiff's claim is frivolous and without merit or if there is some alternative means for the plaintiff to prevail. Under the Garland test, the existence of alternatives to compelled disclosure available to allow the plaintiff to maintain and prevail in his action was not relevant. However, it is submitted that the use of any and all alternatives to forced disclosure is desirable since it would also reduce those instances where First Amendment interests may be abridged.

The need for establishing prerequisites to forced disclosure with great specificity so as to minimize the infringement of the press' constitutional interests is perhaps best appreciated by considering the landmark Supreme Court decision New York Times Co. v. Sullivan. New York Times and its progeny brought certain defamatory remarks about public officials and figures within the aegis of the First

110 See text at note 10 supra.

111 Federal courts have made preliminary investigations into the merits of particular cases by the use of summary judgment under Fed. R. Civ. P. 56(e), which provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Summary judgment in the Massachusetts courts was available only in contract actions at the time Dow Jones was decided. G.L. c. 231, §§ 59, 59B (1956). The Supreme Judicial Court was therefore justified in rejecting as precedent Cervantes v. Time, 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973), since that case turned on the issue of the appropriateness of summary judgment. 464 F.2d at 994-95. The new Massachusetts Rules of Civil Procedure, which were implemented on July 1, 1974, provide for summary judgment in all actions. The text of Mass. R. Civ. P. 56(e) is the same as Fed. R. Civ. P. 56(e). For a discussion of the problem of the various burdens of proof which might be required for summary judgment in a libel action involving constitutional issues, see Comment, 58 Iowa L. Rev. 618, 629-37 (1973).


Amendment. The Court assured such protection by forcing public official plaintiffs in libel suits to demonstrate "with convincing clarity" that the newspaper showed actual malice or reckless disregard of the truth.\(^\text{114}\) This decision is indicative of the Supreme Court's intention to fashion specific and burdensome standards of proof which will usually prevent plaintiffs from prevailing in libel actions when the absence of such standards would have a chilling effect on the freedom of the press.\(^\text{115}\) Although \textit{New York Times} did not involve a question of privilege, it did acknowledge the great weight which should generally be attributed to First Amendment interests in civil litigation.\(^\text{116}\) \textit{New York Times} was decided after \textit{Garland} and consequently the need for a standard which would limit the detrimental impact on First Amendment interests in civil litigation may not have been as obvious to the \textit{Garland} court as it is today. Since neither \textit{Pappas} nor \textit{Branzburg} were civil libel suits, they did not invoke the policies underlying \textit{New York Times}\(^\text{117}\) but focused instead upon the problems peculiar to grand jury proceedings.\(^\text{118}\)

The Supreme Judicial Court acknowledged that "the standards of the \textit{New York Times} case may be applicable to [\textit{Dow Jones}]."\(^\text{119}\) It maintained, however, that such standards were not relevant to its decision on the discovery-disclosure issue.\(^\text{120}\) The Court stated that the identity of the source was relevant and that "the order compelling discovery must be obeyed regardless of the standard of proof which will eventually be required in this case."\(^\text{121}\) If the Court had accepted the standards for disclosure advocated by the defendants, some consideration of the plaintiff's burden of proof would have been necessary. Further, if the Court had determined that the burden of proof required by \textit{New York Times} did not apply and that the defendant was therefore forced to prove truth, it is much less likely that the identity of the source would have been crucial to the plaintiff's case. If, on the other hand, the Court decided that the \textit{New York Times} burden of proof was applicable, it is probable that the source's identity would have been essential to the plaintiff's case. In order for the plaintiff to discharge his onerous burden of proof under \textit{New York Times}, he would have to show that the newspaper's source was unreliable and that the newspaper failed to adhere to the "standards of good investigation and

\(^{114}\) 376 U.S. at 285-86.
\(^{115}\) Id. at 279.
\(^{118}\) Comment, 58 Iowa L. Rev. 618, 628 (1973).
\(^{120}\) Id.
\(^{121}\) Id.

http://lawdigitalcommons.bc.edu/asml/vol1974/iss1/13
reporting"¹²² in order to verify the informant’s story. Without access to the identity of the source, it is unlikely that the plaintiff saddled with such a burden of proof could prevail.

If the Supreme Judicial Court had found that the New York Times burden of proof was applicable, and it is probable that it would, it would have done so on the basis of Rosenbloom v. Metromedia, Inc.¹²³ Rosenbloom was widely understood to have held that First Amendment protection should be extended to defamatory falsehoods concerning private individuals if the statements involved matters of public concern. The issue of low cost housing involved in the Massachusetts anti-snob zoning law could qualify as such a concern. However, in June, 1974, the Supreme Court refused to follow this widely-held understanding of Rosenbloom and perhaps implicitly overruled it in Gertz v. Robert Welch, Inc.¹²⁴ Gertz held that the New York Times burden of proof was applicable only when a public official or a public figure was the plaintiff in a libel action against the press or where the plaintiff could not show actual damages.¹²⁵ Under Gertz, the plaintiff in Dow Jones would probably have been required to assume the heavy burden of proving "knowledge of . . . falsity or reckless disregard for the truth"¹²⁶ since there is no indication in the record that D’Annolfo could show actual damages.¹²⁷

Finally, it should be emphasized that any constitutional newsman privilege must be limited when the New York Times burden of proof is applicable since to permit a media defendant in a libel action to assert such a privilege when the plaintiff is saddled with this heavy burden of proof would allow it “to shield itself from the consequences of its own wrongdoing.”¹²⁸ Such a result is repugnant to the purposes of the First Amendment. Public policy, therefore, demands that such acts not be afforded protection under the sanction of the Amendment.

In summary, had the Supreme Judicial Court recognized a limited newsman’s privilege and adopted the defendants’ three-pronged test, the result would probably have been the same—to compel disclosure. This conclusion is based on the presumption that the Court would have probably required the plaintiff in Dow Jones to meet the onerous New York Times burden of proof under the widely-held understanding

¹²³ 403 U.S. 29 (1971).
¹²⁴ 418 U.S. at 346.
¹²⁵ Id. at 348-49.
¹²⁶ Id. at 342.
¹²⁷ Since Dow Jones was decided before Gertz, however, the distinction between actual and presumed damages was not yet so crucial. It is possible, therefore, that D’Annolfo could show actual damages if so required in order to prevail on facts not now available in the record.
¹²⁸ Murasky, supra note 94, at 904.
of Rosenbloom. The only difference would have been a postponement of the forced disclosure, assuming that an independent investigation by the plaintiff would not have revealed the name of the source. Had the Court adopted this approach, it is submitted that the decision would have accorded the proper respect which is due to the defendants' First Amendment rights.

Finally, it should be noted that the establishment of a qualified newsmen privilege is still possible in Massachusetts, either through a Supreme Court decision recognizing such a privilege in civil litigation or through state or federal legislative action. Since it is impossible to predict if and when such a Supreme Court opinion might be forthcoming, it appears that any immediate hope for a newsmen privilege in Massachusetts rests with the legislature. However, the Supreme Judicial Court has noted that the Massachusetts legislature has been reluctant to establish such a statutory privilege. In view of this, the only means of establishing a newsmen privilege in Massachusetts in the near future may rest with Congress.

RONNA GREFF SCHNEIDER

§10.8. The husband's role in the abortion decision: Doe v. Doe. In Roe v. Wade and Doe v. Bolton the United States Supreme Court left unresolved the question of whether any private interests, such as those of the father, might limit or curtail a woman's right to an abortion. The Massachusetts Supreme Judicial Court was squarely faced with the issue of the husband's rights in the case of Doe v. Doe.

129 Even if the Court had decided that the New York Times burden of proof was not applicable, at least some preliminary inquiry would have been appropriate.


131 For an examination of the problems of enacting a federal statute which might be applicable to the states, see Dixon, Newsmen's Privilege by Federal Legislation: Within Congressional Power?, 1 Hastings Const'l L.Q. 39 (1974).


2 410 U.S. 113 (1973).

3 410 U.S. 179 (1973). The extent to which the state could regulate abortions to preserve maternal health was the primary issue in Doe v. Bolton; thus that decision does not bear directly on Doe v. Doe.

4 410 U.S. at 165 n.67, quoted in part in text at note 47 infra.

5 This note is concerned only with the possible rights of the father. For other recent cases in which fathers' rights in the abortion issue were discussed, see Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973), appeal dismissed, cert. denied, 417 U.S. 279 (1974) (spousal consent provision of Florida abortion statute held unconstitutional); Doe v. Rampton, 366 F. Supp. 189 (D. Utah), vacated, 410 U.S. 950 (1973) (spousal consent provision of Utah abortion statute held unconstitutional); Jones v. Smith, 278 So. 2d 339 (Fla. Dist. Ct. App. 1973), cert. denied, 415 U.S. 958 (1974) (injunctive relief denied to a putative father objecting to an abortion). See also Doe v. Bellin Memorial
In *Doe*, petitioner-husband sought declaratory and injunctive relief against his estranged wife and her physician to prevent the performance of an abortion.\(^6\) The petitioner and respondent-wife married in April 1973. Prior to the marriage, the respondent had a child by another man. During the course of the marriage the respondent had two pregnancies, one in June 1973 which ended in a miscarriage, and another, the subject of this litigation, in November 1973. The couple separated in January 1974. In February, the petitioner informed his wife that he wished to disavow responsibility for the child and asked that his name be omitted from the birth certificate. In response, in a reversal of previously expressed convictions, the respondent informed the petitioner of her desire to procure an abortion due to her perceived inability to care for two children.\(^7\)

Petitioner objected to the proposed abortion and filed a bill in equity on March 5, 1974.\(^8\) On March 8, a guardian ad litem was appointed to represent the interests of the fetus,\(^9\) and in a hearing before a single justice of the Supreme Judicial Court, Justice Reardon, petitioner testified that he was willing to support the child through his own efforts and those of the respondent's sister.\(^10\) The respondent,

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\(^7\) Id. at 1091, 314 N.E.2d at 129.
\(^8\) The Supreme Judicial Court and superior courts have original and concurrent jurisdiction over suits in equity. G.L. c. 214, § 1. The exercise of this concurrent jurisdiction requires a hearing, in the first instance by a single justice of the Supreme Judicial Court. G.L. c. 214, § 8, formerly G.L. c. 214, § 16.
\(^10\) 1974 Mass. Adv. Sh. at 1091, 314 N.E.2d at 129. The question of the husband's willingness to support the child was the most significant factual dispute at the hearing before the single justice. In the findings of fact by Justice Reardon, it was established that the husband wished to see the pregnancy continued and was willing to support the child. Findings of Fact at 3, *Doe v. Doe*, S-7885 (Reardon, J., March 12, 1974). The respondent moved to supplement the findings of fact with the statement of the husband's previous attempt to disclaim responsibility for the child. Respondent's Motion to Sup-
who was in her eighteenth week of pregnancy, did not believe that either her husband or her sister was capable of caring for the child and declared that if she were prevented from terminating the pregnancy she would never consent to giving the petitioner custody of the child.\footnote{11} After the hearing, injunctive relief was granted restraining both the wife and her physician from proceeding with the abortion, and the case was reserved and reported to the full Court.\footnote{12}

The case was argued on March 13 before the full Supreme Judicial Court, which issued an order the next day vacating the injunctive decree and granting the respondent's prayers for declaratory relief.\footnote{13} On July 3, the Court issued a written opinion\footnote{14} in which it held that the husband had no enforceable right to restrain his wife from having an abortion.\footnote{15} Dissenting in part, Justice Hennessey said that the respondent was under a duty to forbear from procuring the abortion to avoid undue interference with the father's familial right, but concurred in the vacating of the restraining order due to the difficulties of judicial enforcement.\footnote{16} In a separate dissent, Justice Reardon declared that the father's right in his offspring outweighed the difficulties of the wife attendant upon completion of the pregnancy and voted to continue the restraining order.\footnote{17}

It is submitted that the decision of the Supreme Judicial Court in \textit{Doe v. Doe} was correct. This casenote will first trace the development of the right of privacy as recognized by the United States Supreme Court. Possible bases of a father's right to restrain the mother from procuring an abortion and the problems of enforcing such a right will then be examined. It will be submitted that while the husband clearly has important interests in the abortion decision, they are not of sufficient constitutional magnitude to warrant protection in contravention of the woman's right to privacy. It will be further submitted that the difficulty of formulating an adequate remedy virtually forecloses the possibility of legislative response to the decision in the form of an

\footnote{12} Id. At the hearing it was also established that the wife was in the eighteenth week of pregnancy, that the fetus was not viable, that the wife's general health was good, and that there was minimal risk in carrying the pregnancy to full term or in the performance of a saline abortion as long as that procedure was performed prior to the twenty-eighth week of pregnancy. Id., 314 N.E.2d at 130.
\footnote{13} 1974 Mass. Adv. Sh. at 1090, 314 N.E.2d at 129.
\footnote{14} Id. at 1089-90, 314 N.E.2d at 128-29. The opinion presumes that the abortion was performed promptly after the March decision. Id.
\footnote{15} Id. at 1096, 314 N.E.2d at 132.
\footnote{16} Id. at 1097-1100, 314 N.E.2d at 133-34 (Hennessey, J., dissenting in part).
\footnote{17} Id. at 1100-08, 314 N.E.2d at 134-39 (Reardon, J., dissenting).
abortion statute with a spousal consent requirement.

I. THE MOTHER'S RIGHT OF PRIVACY AND THE ABORTION DECISION

Although there is no specific mention of a right of privacy in the United States Constitution, such a right was given implicit recognition as early as the nineteenth century. In recent years various justices of the Supreme Court have derived such a right from the "penumbras" surrounding the guarantees in the Bill of Rights, from the Ninth Amendment; and from the Fourteenth Amendment. The right of privacy has been invoked to protect activities such as the choice of a marriage partner, procreation, contraception and abortion against improper state interference.

The privacy doctrine has been developed most extensively in defining the limits of permissible governmental interference with decisions affecting the marital relationship. Indeed, Griswold v. Connecticut, the landmark case recognized as expressly establishing the right of...

18 This early recognition of the right of privacy can be traced back to Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891), which held that a court could not order a plaintiff in a personal injury suit to submit to a physical examination. Id. at 257. The Court stated: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference, unless by clear and unquestionable authority of law." Id. at 251. See also Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (wiretapping not a violation of the Fourth Amendment).

19 See Griswold v. Connecticut, 381 U.S. 479 (1965), where Justice Douglas, writing for the majority, noted that prior decisions of the Court suggested that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Id. at 484.

20 See id. at 486 (Goldberg, J., concurring). "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

21 See Roe v. Wade, 410 U.S. 113, 155 (1973) (Blackmun, J., for the majority). In a concurring opinion, Justice Stewart found the right of privacy implicit in the concept of "liberty" in the Fourteenth Amendment. Id. at 169.


23 Skinner v. Oklahoma, 316 U.S. 535 (1942) (statute under which a person convicted of two or more specified felonies could be sterilized was unconstitutional). "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Id. at 541. But see Buck v. Bell, 274 U.S. 200 (1927) (statute upheld permitting sterilization of mental patients after court hearing to facilitate release from state institution).


26 E.g., Loving v. Virginia, 388 U.S. 1 (1967); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). In a non-marital context, the right of privacy was held to protect the possession of obscene films in one's own home. Stanley v. Georgia, 394 U.S. 557 (1969).

27 381 U.S. 479 (1965).
privacy\textsuperscript{28} involved this very issue; the Court cited as authority in support of its holding cases involving unreasonable state interference in family affairs\textsuperscript{29}. In \textit{Griswold}, a Connecticut statute prohibiting the use of contraceptives and an aiding and abetting statute providing criminal sanctions for physicians who counseled married couples in their use were held unconstitutional as an invasion of the right of marital privacy\textsuperscript{30}.

Following \textit{Griswold}, the Supreme Court recognized in \textit{Eisenstadt v. Baird}\textsuperscript{31} that the right of privacy protected certain activities of the individual as well as those affecting the marital relationship\textsuperscript{32}. \textit{Eisenstadt} reversed the conviction of a birth control advocate under a Massachusetts statute prohibiting the distribution of contraceptives for birth control purposes by anyone except physicians or pharmacists\textsuperscript{33}.


\textsuperscript{29} 381 U.S. at 481. In \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923), the Court invalidated a Nebraska statute forbidding the teaching of foreign languages below the ninth grade, holding that it infringed the liberty guaranteed by the Fourteenth Amendment. Id. at 402. In \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925), the Court struck down an Oregon statute requiring parents or guardians to send children between the ages of eight and sixteen to a public school, holding that it unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of their children. Id. at 534-35. See also \textit{Wisconsin v. Yoder}, 406 U.S. 205 (1972), upholding as an exercise of the freedom of religion the right of Amish parents to withhold their children from public secondary schools. Id. at 214-15.

\textsuperscript{30} 381 U.S. at 486.

We deal with a right of privacy older than the Bill of Rights .... Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. The statute invalidated was Conn. Gen. Stat. Rev. § 53-32 (1958), repealed, P.A. 828, § 214 (1969). This was the third time the contraception statute was challenged. In \textit{Tileston v. Ullman}, 318 U.S. 44 (1943), the Supreme Court dismissed the case on the ground that the plaintiff physician lacked standing to challenge the statute on behalf of his patients. In \textit{Poe v. Ullman}, 367 U.S. 497 (1961), the case was dismissed for lack of ripeness since the plaintiffs had not been charged with violating the statute and virtually no one had been prosecuted under it since its enactment in 1879. In \textit{Griswold}, appellants had standing to challenge the statute due to their criminal conviction under an aiding and abetting statute as accessories. 381 U.S. at 481.

\textsuperscript{31} 405 U.S. 438 (1972).

\textsuperscript{32} The Court in \textit{Eisenstadt} noted explicitly that in \textit{Griswold} "the right of privacy in question inhered in the marital relationship." Id. at 453.

\textsuperscript{33} Id. at 441-42. The statute which the Court declared unconstitutional was G.L. c. 272, § 21 which read in part:

\textit{Except as provided in section twenty-one A, whoever sells, lends or gives away ... any drug, medicine, instrument, or article whatever for the prevention of conception ... shall be punished in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars.}
and a companion statute limiting the availability of such contraceptives to married couples. The Court held that a classification based on marital status for the purposes of regulating the distribution of contraceptives was unconstitutional. This holding was based on the idea that the right of privacy is an individual right, although the activities protected often affect the marital relationship, and that ultimately the marital "unit" was "but an association of two individuals, each with a separate intellectual and emotional make-up." The individual, not just the marital unit, is protected from unwarranted state interference by the right of privacy.

The major cases involving the right of privacy, particularly Griswold and Eisenstadt, provided the constitutional background for the Supreme Court's decision in Roe v. Wade. Roe held the Texas criminal abortion statute, which proscribed all abortions except where necessary to save the life of the mother, unconstitutional as an invasion of the woman's right of privacy. This right was held to be "broad enough to encompass the woman's decision whether or not to terminate a pregnancy." The right to decide to have an abortion could only be limited when the state was acting to protect certain interests which become compelling at different points during the period

The Court held that the statute did not even rationally relate to the twin goals of the statute as interpreted by the Supreme Judicial Court: (1) to protect the health of the Commonwealth and (2) to protect the public morality by serving to deter fornication.

34 405 U.S. at 441. The statute was G.L. c. 272, § 21A, which read in part: "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or contraception . . . ."

35 405 U.S. at 453. The Court's description of the family in Eisenstadt, in which the individuality of the family members was emphasized, should be compared to the Griswold conception of the family as an entity:

Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting the person as the decision whether to bear or beget a child.

Id. See note 30 supra.

36 405 U.S. at 453.

37 See text at notes 18-36 supra.


40 410 U.S. at 153.

41 Id.
The state's interest in protecting maternal health does not become compelling until the end of the first trimester when the risk of an abortion is commensurate with or greater than the risks of a full term pregnancy. Until that point, the abortion decision is a matter for a woman and her physician. The state's interest in protecting potential life becomes compelling only at the point of fetal viability, the end of the second trimester. At that point, the state may totally proscribe abortions except where necessary to protect maternal health.

The major cases dealing with the right of privacy have addressed only the permissible limits of state interference with the exercise of this right. The decision in Roe v. Wade left unresolved the question of whether there exist any private interests which might warrant constitutional protection so as to limit or curtail the woman's right to have an abortion. However, the Supreme Court implicitly recognized the possible existence of such private interests in a footnote to its decision in Roe:

Neither in this opinion nor in Doe v. Bolton do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and Georgia statutes on their face take no cognizance of the father.

II. THE FATHER AND THE ABORTION DECISION

The petitioner-husband in Doe v. Doe claimed to have "a fundamental right, guaranteed by the Constitution of the United States, to determine that his child shall not be aborted," and cited Mr. Justice Goldberg's concurring opinion in Griswold v. Connecticut as authority.

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42 Id. at 155. "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,'... and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Id. (citations omitted). See Note, 30 Wash. & Lee L. Rev. 628 (1973).
43 410 U.S. at 163. In the respondent's brief in Doe v. Doe, it was noted that the mother's physician had testified before Justice Reardon that in the United States the death rate for saline-type abortions is two deaths out of 40,000 procedures, while the death rate of mothers in childbirth is twenty-one out of 100,000: Brief for Respondent at 7-8, Doe v. Doe, 1974 Mass. Adv. Sh. 1089, 314 N.E.2d 128.
44 410 U.S. at 163-64.
45 Id.
46 See text at notes 18-36 supra.
47 410 U.S. at 165 n.67 (emphasis added).
49 Id. "And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal infringement." Griswold v. Connecticut, 381 U.S. 479, 493 (concurring opinion).
The Supreme Judicial Court rejected this claim as having "no basis."\textsuperscript{50} It is submitted that while the Court ultimately resolved this question correctly, it acted too summarily in rejecting petitioner's claim without carefully examining its possible constitutional basis.\textsuperscript{51}

Since a woman's constitutionally protected right of privacy, which encompasses the right to decide to have an abortion, was deemed "fundamental" in character in \textit{Roe v. Wade},\textsuperscript{52} presumably a right which a father could successfully assert to limit or curtail the mother's right to an abortion must also be fundamental.\textsuperscript{53} A balance would then have to be drawn between these conflicting interests, and a court would have to determine under what conditions and at what stage in the pregnancy a father could enjoin an abortion.

One possible right of sufficient magnitude which a father might assert to balance out the woman's fundamental right to an abortion is the right to procreate. Procreation was found to be a constitutionally protected fundamental right in \textit{Skinner v. Oklahoma},\textsuperscript{54} in which an Oklahoma statute providing for sterilization of certain classes of convicted felons was declared unconstitutional.\textsuperscript{55} The Supreme Court described procreation as "one of the basic civil rights of man."\textsuperscript{56} Clearly, the mother's decision to terminate a pregnancy frustrates the father's natural expectation of procreation. It could be argued that the fundamental right recognized in \textit{Skinner} encompasses the expectancy of procreation as well as the capacity to procreate. Thus, if procreation is

\begin{itemize}
  \item \textsuperscript{50} 1974 Mass. Adv. Sh. at 1093, 314 N.E.2d at 130. The Court likewise found no basis for such a right in either Massachusetts statutes or common law. Id. at 1093-95, 314 N.E.2d at 130-32. However, even if the Court had found a statutory or common law right of the husband to prevent an abortion, such a right could not prevail over the wife's fundamental Constitutional right of privacy.
  \item \textsuperscript{51} Prior to reaching the merits, the Court held that maintenance of the action was not barred by the Massachusetts interspousal immunity statute, G.L. c. 209, § 6 (Supp. 1974), because interspousal immunity does not bar maintenance of an action where there is a recognized ground of equity jurisdiction. 1974 Mass. Adv. Sh. at 1091-92, 314 N.E.2d at 130, citing Charney v. Charney, 315 Mass. 580, 55 N.E.2d 917 (1944).
  \item \textsuperscript{53} In \textit{Coe v. Gerstein}, 376 F. Supp. 695 (S.D. Fla. 1973), appeal dismissed, cert. denied, 417 U.S. 279 (1974), in which a three judge federal district court held the spousal consent provision of the Florida abortion statute unconstitutional, the court suggested that if the state could demonstrate that the statute protected third party interests outside the categories of maternal health and potential life, the statute could withstand constitutional attack. 376 F. Supp. at 697. However, the court in \textit{Coe} did not describe such possible interests nor did it address the question of how substantial these interests would have to be.
  \item \textsuperscript{54} 316 U.S. 535 (1942).
  \item \textsuperscript{55} Id. at 536-37.
  \item \textsuperscript{56} Id. at 541.
\end{itemize}
considered a fundamental right in the abortion context, then it is arguable that the frustration of the expectancy, as opposed to the capacity to procreate, provides the father with a sufficient constitutional basis to require judicial balancing of the respective fundamental rights of father and mother. However, although abortion may frustrate the expectant interest in procreation, it does not destroy it, as sterilization would. Thus, it is submitted that the *Skinner* rationale does not apply.

Since the right to procreate is not being permanently denied when an abortion is performed, the father's interest may therefore be less than "fundamental," in which case his interest should not infringe upon the woman's right to decide to have an abortion.

A second possible basis for a constitutional right of a father to prevent an abortion is the expectant father-child relationship. It is necessary first to determine whether the father's interest in the relationship could be characterized as fundamental. In *Griswold*, Justice Goldberg posited that the existence of a fundamental right is determined by examining the tradition and conscience of a society and ascertaining whether a given principle was so rooted there as to be fundamental. He found that the family relationship was of such a character. However, although the expectant nature of the father-child relationship has been recognized in the common law, the nature of the expectancy was defined primarily in economic terms. For example, as was noted by Justice Reardon in his dissent in *Doe v. Doe*, the father's expectant interest in the unborn child has been recognized in the common law relating to class gifts and tort recovery for

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57 H. Clark, Law of Domestic Relations, § 2.17, at 111 (1966). Such a right would clearly be dependent on the right to procreate, but would differ from it by focusing on such factors as the emotional satisfaction derived from the developing relationship between father and child rather than on a desire in the abstract to see one's bloodline continued. See Pound, Individual Interests in the Domestic Relation, 14 Mich. L. Rev. 177, 181 (1916).

58 381 U.S. at 493 (concurring opinion).

59 Id. at 496.

60 The common law imposed a duty on the father to support his legitimate children during their minority. *Angel v. McLellan*, 16 Mass. (16 Tyng) 27, 29 (1819). This aspect of the common law was so universal that in *Dunbar v. Dunbar*, 190 U.S. 340 (1905), the Supreme Court was able to say that the support obligation existed in all states. Id. at 351. In Massachusetts the obligation is also imposed by statute. G.L. c. 273, § 1. In consideration of this duty the father was deemed entitled to the wages, custody, society, and services of the child. *Benson v. Remington*, 2 Mass. (2 Tyng) 113 (1806). If the child left the father's home or stayed away without just cause, the duty to support ended, absent any statute or court decree to the contrary. *Angel v. McLellan*, 16 Mass. (16 Tyng) 27, 30 (1819). If only the economic interest were involved in the abortion decision, the mother's interest in the exercise of her constitutionally protected personal rights would seem to be superior to the husband's interest in protecting his property right. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).
pre-natal injury. The general rule in tort and property law is to recognize a child as in being from the time of conception when such recognition serves the beneficial interest of the child. However, the interests are contingent and normally do not attach until the live birth of the child.

The difficulty with resolving the issue of paternal rights raised in Doe v. Doe by analogy to concepts of tort and property law is that the legal principles underlying both areas of the law operate to achieve different purposes and protect different interests than are involved in the abortion decision. While the law may recognize the unborn as within the scope of a class gift, this is not as much a symbolic recognition of the fact that parental interests arise during the period of gestation as it is a rule of construction that attempts to give effect to the intent of the testator and promote the settling of estates. Similarly, the allowance of tort recovery for pre-natal injury is an attempt to punish the wrongdoer and compensate the child-victim for the injury sustained. Thus, in the case of abortion, where, as a consequence of Roe v. Wade, there is no legally recognized third-party wrongdoer or victim, the common law of torts and property are inappropriate sources of a paternal right to nullify the mother’s decision.

It has been suggested by commentators and by Justice Reardon in his dissent in Doe that the father’s expectant relational interest in the child was given constitutional protection by the Supreme Court in Stanley v. Illinois. The Court there held that an Illinois statute mak-

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64 See Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834) (a child en ventre sa mere was within the scope of a class gift to grandchildren living at testator’s death).


69 405 U.S. 645 (1972).
ing children of an unwed father wards of the state upon the death of the natural mother was unconstitutional since the unwed father, unlike married fathers and unwed mothers, was not allowed a hearing at which to establish his fitness to retain custody of the child.\(^{70}\) The Court wrote that "the private interest here, that of a man in the children he has *sired and raised* undeniably warrants deference, and absent a powerful countervailing interest, protection."\(^{71}\)

The language in *Stanley* suggests the existence of a constitutionally protected relational right vested in the father. However, the use of the term "sired and raised" may suggest that the expectancy produced merely by the siring of the child is not sufficient to warrant protection. Furthermore, the father's right recognized in *Stanley* was *not* an absolute right to the custody of his children, but a right to a hearing in which he might establish his fitness for custody.\(^{72}\) Thus, it is submitted that the father's rights recognized in *Stanley* are not directly applicable to the abortion situation.

It is clear that the abortion will terminate the father's expectant interest in the particular fetus which is aborted. However, the presence of other children or the possibility of future births from which the father might derive benefits of the paternal expectancy may mitigate the effect of a particular deprivation. The abortion may thus only postpone or merely lessen the expected benefits of the father-child relationship. The impact of the abortion is substantially less under these circumstances than if the possibility of such a relationship were totally and permanently foreclosed. It would seem that, as in the case of the procreation expectancy, such mitigating circumstances would diminish the relative weight of the interests which the father could assert and, as a result, the woman's rights would prevail.

### III. The Remedy Problem

If a father were found to have a fundamental right to procreate and/or raise his children that might outweigh the mother's right to privacy, the problems facing courts attempting to balance these rights on a case-by-case basis\(^{73}\) and to fashion appropriate remedies would

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\(^{70}\) Id. at 646.

\(^{71}\) Id. at 651 (emphasis added).

\(^{72}\) Id. at 657-58.

\(^{73}\) Even though the dissenting justices in *Doe v. Doe* recognized the existence of a right in the husband, both proceeded to analyze the facts of the case and concluded that in the situation before them the right in the father was worthy of recognition. This was based on the long-term loss which the husband would suffer as opposed to the short-term inconvenience which the woman would have to bear. 1974 Mass. Adv. Sh. at 1099, 314 N.E.2d at 134 (Hennessey, J., dissenting in part); id. at 1106-08, 314 N.E.2d at 138-39 (Reardon, J., dissenting).
be formidable. In situations where the father prevails, the result might be the birth of a child unwanted by the mother. Situations might arise where the husband has abandoned the family for a period of time and returned for the purpose of stopping the abortion or has withheld consent out of malice. In such situations it would seem clear that the equities are against granting relief to the husband. Other circumstances, such as the inability of the husband or wife to have further children, may tip the balance in the other direction.

The need to resort to a case-by-case approach would greatly reduce the certainty which the Supreme Judicial Court was trying to achieve.\(^\text{74}\) Doctors and hospitals would still face the uncertainties that preceded \textit{Doe v. Doe} and would be unable to balance the equities without resort to the judicial process. In addition, as the majority in \textit{Doe} noted, the law generally does not seek to resolve questions concerning the marital relationship except in cases of divorce or separation.\(^\text{75}\) Thus, the use of a case-by-case approach, calling upon the courts to play the role of marriage counselors, may be beyond the bounds of general principles of equity jurisprudence.\(^\text{76}\)

The effect of a decision favoring the husband would be to subject the "exercise of the individual right of privacy of the mother in all abortions at all stages of pregnancy, to the consent of others."\(^\text{77}\) Of course, if the father's rights are less than fundamental, they would be inadequate to limit or curtail the woman's right to decide to have an abortion. Were the father's rights found to be "fundamental" and held to prevail, such a decision would amount to a virtual judicial nullification of the decision in \textit{Roe v. Wade} in instances of spousal disharmony and render the woman's right meaningless.\(^\text{78}\)

\(^{74}\) "The practical impact of the existing legal uncertainties on doctors and hospitals is such that clarification is in the public interest ...." Id. at 1092, 314 N.E.2d at 130.

\(^{75}\) Id. at 1096-97, 314 N.E.2d at 132.

\(^{76}\) In Kenyon v. Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946), wherein it was held that a court of equity could act to protect personal rights as well as property rights, it was stated in dictum that there are "personal rights of such delicate and intimate character that direct enforcement of them by any process of the court should never be attempted." Id. at 534, 70 N.E.2d at 245. The Court in \textit{Doe} questioned whether this was such a case, but was able to avoid answering the question by anticipating its decision on the merits and merely stated that equitable considerations were not controlling with respect to declaratory relief. 1974 Mass. Adv. Sh. at 1092, 314 N.E.2d at 130. However, if a right in the father were established, this question would then have to be answered.


\(^{78}\) One of the considerations which the Court took into account in its decision was the possibility that a decision favoring the husband would force women to resort to illegal abortionists. 1974 Mass. Adv. Sh. at 1096, 314 N.E.2d at 132. See People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), where in holding California's abortion statute unconstitutional, it was noted that illegal abortions were the most common single cause of maternal deaths in California. Id. at 965, 458 P.2d at 201, 80 Cal. Rptr. at 361.
If the father is found to have an enforceable right in the abortion decision, situations could arise where the mother is likely to ignore the injunction or actually obtains an abortion in violation of a court order. Extremely difficult problems arise in fashioning effective remedies consistent with current principles of equity jurisprudence. Some of the possible means of enforcing the father's right are: (1) criminal sanctions for the operating physician; 79 (2) the imposition of civil liability on physicians who fail to obtain the father's consent; 80 (3) the use of the contempt remedy to incarcerate the woman to prevent her from procuring an abortion; 81 and (4) incarcerating the woman if she obtains an abortion in violation of an injunction through the criminal contempt remedy. 82 However, as discussed below, none of these possible remedies is consistent with current constitutional law or equity jurisprudence.

The use of criminal sanctions against the physician seems to be foreclosed by Roe v. Wade. Roe implies that the abortion decision may not be regulated through the criminal law except where such sanctions would further the state's interests in protecting maternal health after the first trimester, or protecting potential life after fetal viability. 83 A state statute enforcing a spousal consent provision through the use of criminal sanctions could be interpreted as an attempt to regulate the abortion decision in a manner inconsistent with the holding of Roe v. Wade under the guise of protecting private interests. A statutory or common law tort 84 which substituted the possibility of civil liability for criminal sanctions could suffer from the same defect. A state is foreclosed from imposing civil liability for those "offenses" which it is powerless to punish under the criminal law since the existence of the sanctions in and of themselves would have an inhibitory effect on the exercise of fundamental rights. 85

81 For a discussion of the civil contempt remedy, see Z. Chafee, Some Problems of Equity 296-380 (1950).
83 410 U.S. at 162-65 (by implication).
84 See Herko v. Uviller, 203 Misc. 108, 114 N.Y.S.2d 618 (Sup. Ct. 1952), where a husband sued a doctor for performing an abortion on his wife for deprivation of offspring and loss of consortium. The wife's consent to the abortion was held to bar recovery. Id. at 109, 114 N.Y.S.2d at 619. But see Note, 14 Stan. L. Rev. 901 (1962), commenting on the case of Tourniel v. Benveniste, Civil No. 766790 (L.A., Calif. Super. Ct., Oct. 21, 1961) wherein a trial court allowed a husband to recover on similar facts. The court in that case held that the husband had legally protectible interests in the unborn child which were separate from his wife's and thus her consent did not bar his recovery. 14 Stan. L. Rev. at 901-04.
85 New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964). In this case the Court declared that a large damage award in a libel suit would be as repugnant to the First
The use of either the civil or criminal contempt remedy to enforce an injunction or to penalize the violation of a court order gives rise to different problems. As noted by Justice Hennessy in his dissent in Doe, the only way to insure the woman's effective compliance with a court order would be to incarcerate her until such time as an abortion was no longer practical. This was a prospect which Justice Hennessy found "unthinkable" since the woman was not held criminally responsible even under the old, now invalid, abortion statute. Finally, should the woman procure an abortion in spite of an injunction, a court could seek to vindicate the validity of its enforcement powers by incarcerating the woman or imposing a fine as punishment for the affront to the dignity of the court. This prospect would present a situation whereby a woman would be more vulnerable to court sanctions after Roe v. Wade than before, and thus it is highly questionable whether a court would impose such a penalty.

It appears that the only legal remedy available to a husband in this situation is the post facto remedy of divorce. A legislature could then deal with the woman's non-compliance with the wishes of the husband by declaring that procuring an abortion without spousal consent would be grounds for divorce. Beyond that, the decision in Doe seems to have foreclosed the possibility of legislative response, both in terms of declaring a right or prescribing an appropriate and constitutionally permissible remedy. The situation would be different in the third trimester when the state, acting pursuant to the authority recognized in Roe v. Wade, can proscribe abortions completely except where necessary to protect maternal health. At this point the state might be able to impose a requirement of spousal consent. This does not suggest that the state has greater rights than the father. It merely recognizes that subsequent to viability, the interest of the state and the private interest of the father would coincide and the state could simultaneously vindicate its own interest while protecting that of the father.

**Conclusion**

After Doe v. Doe it appears that there can be no recognition of a father's right in the abortion decision in Massachusetts unless the
United States Supreme Court eventually answers the question it left open in *Roe v. Wade* in favor of the father. Although the state legislature could theoretically enact a law creating such rights, the law would no doubt be unconstitutional if applied in contravention of the woman's exercise of her right of privacy. If, however, the Supreme Court were to recognize a right in the father, the difficulty of providing a remedy to enforce that right consistent with current principles of equity jurisprudence would make the recognition of that right of little value.

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