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Constitutional Limits on the Use of Contributions Compelled Under Agency Shop Agreements

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CONSTITUTIONAL LIMITS ON THE USE OF CONTRIBUTIONS COMPELLED UNDER AGENCY SHOP AGREEMENTS

Public school teachers sought a declaration that an agency shop provision violated the first amendment to the United States Constitution.[1] The teachers alleged that they opposed collective bargaining in the public sector and other political and ideological activities engaged in by the union. The Supreme Court *held* that the agency shop clause was valid insofar as service charges imposed thereby were used to finance collective bargaining, contract administration, and grievance adjustment, but that first admendment principles prohibited requiring a teacher to contribute to support an ideological cause he might oppose. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The agency shop agreement opposed by the teachers required them to pay the union a service charge equal to regular union dues.[2] Under federal law such an agreement is the "practical equivalent" of a union shop contract, which would require an employee to join the union and to pay normal union dues.[3] The principal justification for agency and union shop agreements is to prevent "free riders" from enjoying the benefits of collective bargaining without sharing in the costs of obtaining those benefits.[4]

The United States Supreme Court first considered the question of the impact of union shop agreements on the first amendment rights of employees in *Railway Employees' Department v. Hanson.*[5] That case involved provisions of the Railway Labor Act which gave effect to agreements for union shops even if they were prohibited by state law.[6] After

1. The agency shop contract was entered into pursuant to a Michigan statute which provided that no law of Michigan would preclude a public employer from making an agreement with a bargaining agent that required, as a condition of employment, that all employees pay to the agent a "service fee" equal to the amount of dues required of members of the agent. 1973 Mich. Comp. Laws 423.210(1)(c).

2. The Supreme Court defined agency shops in *NLRB v. General Motors*, 373 U.S. 734, 743 (1962). *See* Abood v. Detroit Bd. of Ed., 431 U.S. 209, 217 n.8. Under an agency shop, the employee need not formally join the union. For a discussion of the distinctive features of agency and union shops, *see* 3 LAB. L. REP. (CCH) ¶ 4510. Compelled union membership is generally rejected in Europe. *See* Lenhoff, *The Problem of Compulsory Unionism in Europe*, 5 AM. J. COMP. L. 18, 42 (1956).

3. NLRB v. General Motors, 373 U.S. 734, 742, 743 (1962). *See* Abood v. Detroit Bd. of Ed., 431 U.S. 209, 217 n.10 (1977).

4. 96 CONG. REC. 16279 (1950) (statement of Senator Hill); *Hearings on H.R. 7789, House Committee on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 10 (1950) (statement of George M. Harrison, for the Railway Labor Executives Association).

5. 351 U.S. 225 (1956).

6. 45 U.S.C. § 52(11) (1970) provides that, notwithstanding any law of any state, any

deciding that the contested agreement constituted governmental action for first amendment purposes,[7] the Court held that requiring beneficiaries of collective bargaining to support collective bargaining agencies did not violate the first amendment.[8] The Court emphasized that the funds were not exacted as a penalty or as a cover for forcing ideological conformity,[9] and analogized the position of union members to that of members of integrated state bar associations.[10] The Court, however, reserved judgment on the issue of using assessments for purposes not germane to collective bargaining.[11]

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carrier and a duly authorized labor organization shall be permitted "to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization." In contrast, section 14(b) of the National Labor Relations Act which permits union shops is designed to give way before contrary state laws. 29 U.S.C. § 164(b). *See* 3 LAB. L. REP. (CCH) ¶ 4510. Some twenty states have "right to work" laws outlawing union shops. All-State Chart, 1 LAB. L. REP. (CCH) ¶¶ 40, 350.

For an examination of arguments for and against right to work laws *see* Note, 40 IOWA L. REV. 621 (1953). Justice Douglas has noted that a union shop under the National Labor Relations Act may constitute state action because the Act encourages these agreements. Buckley v. American Fed'n of Television & Radio Artists, 419 U.S. 1093 (1975) (Douglas, J., dissenting from denial of certiorari).

7. 351 U.S. at 232. In a case with similar circumstances, Judge Learned Hand found no state action to require constitutional scrutiny, because the statute only permitted rather than required union shop agreements. Otten v. Baltimore & Ohio R.R., 205 F.2d 58 (1953). Other courts have also upheld section 152(11) in similar circumstances. *See, e.g.*, Hudson v. Atlantic Coast Line R.R., 242 N.C. 650, 89 S.E.2d 441 (1955); International Ass'n of Machinists v. Sandberry, 277 S.W.2d 777 (Tex. Civ. App. 1974).

8. 351 U.S. at 238. The Court first determined that section 152(11) of the Railway Labor Act was relevant and appropriate to Congress's powers under the commerce clause. *Id.* at 233. In rejecting claims of a violation of the due process clause, involving the employees' right to work, the Court found that Congress's action might have been made with the intent ultimately to enhance that right. *Id.* at 235.

9. The Court felt that provisions limiting the use to which the funds could be put, as well as the reasons for which a member could be expelled from a union, protected the employee from actions by the union which would force him to conform ideologically. 351 U.S. at 238.

10. 351 U.S. at 238. The conclusion reached in *Hanson* has been criticized on a number of grounds. The analogy with the integrated bar, which was never fully explained, has been said by Justice Douglas, who authored the *Hanson* decision, to have failed on reflection. Lathrop v. Donahue, 367 U.S. 820, 881 (1961) (Douglas, J., dissenting). It has been suggested that *Hanson* effectively ignored the question of freedom of association. Note, 19 GA. B.J. 550 (1957). Another author believes the question of basic individual freedom was sidestepped with an undocumented statement. Note, 6 J. PUB. L. 263 (1957). Justice Powell says that *Hanson* decided first amendment issues summarily and almost viewed them as inconsequential. 431 U.S. at 248 (Powell, J., concurring).

11. 351 U.S. at 238.

The Court reexamined its position on union shops in *International Association of Machinists v. Street*,[12] which also involved the Railway Labor Act. In that case the plaintiff relied upon a finding by the Georgia Supreme Court[13] that funds exacted under the union shop agreement were used to support political candidates, to propagate political and economic doctrines, and to promote legislative programs.[14] A plurality of justices felt that *Street* presented a question unanswered in *Hanson*: the use of compelled contributions for political purposes.[15] The Court avoided the constitutional question by construing the Railway Labor Act to preclude using money exacted from a dissenting union member to support political activities.[16]

After recognizing that "to be required to help finance the union as collective bargaining agent might well be thought to interfere . . . with an employee's freedom to associate to advance beliefs"[17] the Court in the instant case attempted to apply the principles of *Hanson* and *Street* to public sector employees. In its role as negotiator the union could take positions on abortions, strikes, or even wages that would be adverse to the views of individual members.[18] The Court noted that *Hanson* and

12. 367 U.S. 740 (1961).

13. International Ass'n of Machinists v. Street, 215 Ga. 27, 108 S.E.2d 796 (1959), *rev'd*, 367 U.S. 740 (1961).

14. Following *Hanson*, many observers felt that the issue of the validity of the union shop provisions of the Railway Labor Act had been permanently decided. The *Street* case was not considered a significant challenge to that decision. *See* Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 51-54 (to the effect that no new issues were raised by the pleadings in *Street* that were not also raised by *Hanson*); Note, 22 OHIO ST. L.J. 39, 63 (1961).

15. 367 U.S. at 749. The Court in *Street* said that the issues raised fit the exception left by *Hanson*. Justice Frankfurter congently disputed this contention. 367 U.S. at 804 (Frankfurter, J., dissenting). For narrow interpretations of *Hanson*, *see* Note, 24 GA. B.J. 432 (1962); Note, 36 ST. JOHN'S L. REV. 164 (1962); Note, 11 S.W.L.J. 88 (1957).

16. 367 U.S. at 770. This expedient resolution has been criticized as a distortion of Congressional intent. *See* Note, 28 BROOKLYN L. REV. 170 (1961). The remedy of *Street*, the return of the percentage of exacted funds used for political purposes, has been characterized as of little practical value. Note, 61 COLUM. L. REV. 1513 (1961). Another author suggests, however, that the insignificance of the remedy may be fully commensurate with the small harm done. Note, 75 HARV. L. REV. 233 (1961). *Street* has been commended as a useful stopgap. Note, 3 GEO. WASH. L. REV. 541 (1962). A companion case to *Street*, *Lathrop v. Donohue*, 367 U.S. 820 (1961), involved similar first amendment issues in the context of an order of the Wisconsin Supreme Court integrating the state bar. The record was found insufficient for constitutional adjudication, although the Wisconsin court had taken judicial notice of political activities of the state bar, because the plaintiff failed to allege any particular political use of which he disapproved.

17. 431 U.S. at 227.

18. *Id.* at 222. *See also* International Ass'n of Machinists v. Street, 367 U.S. 740, 775,

Street had found any such impact upon first amendment rights to be constitutionally justified by the legislative assessment of the union shop's contribution to labor relations.[19] The same governmental interests identified in *Hanson* and *Street* were found in *Abood* to support presumptively any first amendment deprivation caused by the Michigan statute.[20]

The teachers advanced two reasons for distinguishing *Hanson* and *Street* from the instant case. First, they suggested that government employment constitutes direct state action and thus differs from the permissive state action found in the two earlier cases. The Court refused to make such a distinction at least insofar as first amendment impact was concerned, and noted that the *Hanson* challenge had failed because the Railway Labor Act was found constitutional, not because there was no state action.[21] The teachers also claimed that collective bargaining in the public sector is inherently political, and that to prevent coerced ideological conformity the political interests of government employees should be given greater protection than that afforded in *Hanson*.[22] The Court refused to translate the differences in public and private sector collective bargaining into differences in first amendment rights[23] on the rationale that the first amendment protects all expression and thought, not just political interests.[24]

After rejecting the attempt to distinguish *Hanson* and *Street*, the Court went on to deal with an issue not decided in the two earlier cases:

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780 (1961) (Black & Douglas, JJ., concurring). It has also been recognized that significant interests in expression are involved in collective bargaining. Note, 75 HARV. L. REV. 233 (1961).

19. 431 U.S. at 224.

20. *Id.*

21. *Id.* at 226. *See* Railway Employees' Dep't v. Hanson, 351 U.S. 225, 238 (1956).

22. 431 U.S. at 226. Justice Powell, in his concurrence, sought to distinguish the "permissive" state action found in contracts allowed by the Railway Labor Act, and the "direct" state action involved in *Abood*. *Id.* at 250-54. A careful reading of *Hanson* shows, however, that the same scrutiny was given the constitutional issues despite the statute's permissive form. The Court in *Hanson* found that the federal statute was the "source of the power and authority by which any rights are lost or sacrificed." Railway Employees' Dep't v. Hanson, 351 U.S. 225, 232. *See* Board of R.R. Trainmen v. Howard, 343 U.S. 768 (1952); Public Utilities Comm'n v. Pollack, 343 U.S. 451 (1952); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). Although *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), may suggest that a contract under the Railway Labor Act is not state action, it does not suggest that different levels of state action require differing levels of constitutional scrutiny.

23. 431 U.S. at 232.

24. *Id.* at 231. *See* UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963); Roth v. United States, 354 U.S. 476 (1956); Thornhill v. Alabama, 310 U.S. 88 (1940).

"The use of . . . fees for purposes other than collective bargaining."[25] The *Hanson* decision had been based on the premise that exacted funds were to be used only for purposes germane to collective bargaining.[26] The holding of *Street* involved a statutory construction which denied unions the power to use such funds for political purposes. In *Abood* the Court found that the interests advanced by union shops do not justify compelling contributions to ideological causes unrelated to a union's collective bargaining duties.[27]

This conclusion flows from the belief that any first amendment harms can be justified only by their relation to valid state interests.[28] However, the adoption of the test of *relation to collective bargaining* as a constitutional rule undermined the implication of *Street* that exacted funds could constitutionally be used only for non-political purposes. The Court's application of the test first used in *Hanson* of relation to collective bargaining means that political uses can be justified if they are so related.[29]

The political use of funds exacted from public sector employees as a condition of their employment would appear suspect after the recent case of *Elrod v. Burns*.[30] In *Elrod* the Court relied on the right to associate to advance beliefs[31] when it held that a surrender of constitutional rights could not be a valid predicate of public benefits.[32] Forced contributions

25. 431 U.S. at 232. The language quoted is from the authoritative decision on state law by the Michigan Court of Appeals. Abood v. Detroit Bd. of Ed., 60 Mich. App. 92, 99, 230 N.W.2d 322, 326 (1976).

26. 351 U.S. at 235. It seems clear that what the Court had in mind was the use of exactions or assessments as penalties, to enforce ideological conformity. Nevertheless, the language used was "not germane to collective bargaining." The Court gave no indication that political uses should be so considered.

27. 431 U.S. at 234. The Court relied on the individual's right to associate to advance beliefs, which could not be infringed upon as a requisite for receiving public benefits.

28. 431 U.S. at 224-26, 236. *See also* Elrod v. Burns, 424 U.S. 347 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Kusper v. Pontikes, 414 U.S. 51 (1973); United States v. Robel, 389 U.S. 258 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1959); NAACP v. Alabama, 357 U.S. 449 (1958); Thomas v. Collins, 323 U.S. 516 (1945).

29. One commentator has suggested that relation to collective bargaining would have been a more satisfactory dividing line in *Street*. Note, 61 COLUM. L. REV. 1513 (1961).

30. 427 U.S. 347 (1976). Justice Rehnquist recognized this conflict in *Abood*. 431 U.S. at 242 (Rehnquist, J., concurring). *See also id.* at 244 (Powell, J., concurring).

31. This is of course the right abridged in the instant case. See the text at notes 17-20, *supra*. The court in *Street* failed to recognize this right and followed *Hanson* in applying a bifurcated analysis involving separate issues of association and expression. *See* Lathrop v. Donohue, 367 U.S. 820, 848 (1961) (Harlan, J., concurring).

32. The concept of "benefit" here would include government employment, and em-

infringe upon the individual's interest in being free from forced expression as well as his right to associate to advance beliefs.[33] In *Abood* the Court relied upon an implicit balancing test from *Hanson* and *Street* to decide that the legislative assessment of the union shops' importance justifies their impact on first amendment rights. This decision, however, cannot be reconciled easily with recent standards in the first amendment area.

The Court has used a balancing approach in cases where a state, in the exercise of its power to achieve a legitimate purpose, incidentally has encroached upon first amendment rights.[34] According to current principles, "a significant impairment of first amendment rights must survive exacting scrutiny."[35] The government must show a paramount interest[36] and that the abridgement is necessary to further that interest.[37] A high standard has been applied in determining whether these requirements are met.[38] The Court in *Abood* was divided on the kind of impact on first amendment rights that could be justified by the government interests of labor peace and the distribution of the costs of union activities. A minority of three justices[39] maintained that the interests advanced would not justify compelled political support as a condition of public employment. The plurality, on the other hand, recognized that the Constitution protects all types of thought and speech, not merely political interests.[40] Thus, in balancing individual and state interests, the Court should consider the extent and not the nature of the first amendment abridgement.[41]

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ployment regulated by government as in *Hanson*. *See* Elrod v. Burns, 427 U.S. 347 (1976); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

33. Elrod v. Burns, 427 U.S. 347 (1976); Cousins v. Wigoda, 419 U.S. 477 (1975); Kusper v. Pontikes, 414 U.S. 51 (1973); NAACP v. Alabama, 357 U.S. 449 (1958); West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1942).

34. United States v. Robel, 389 U.S. 258 (1957); Bates v. City of Little Rock, 361 U.S. 516 (1959); Breard v. City of Alexandria, 341 U.S. 622 (1950); American Communications Ass'n, CIO v. Douds, 339 U.S. 382 (1950); Kovacs v. Cooper, 336 U.S. 77 (1949); Mandel v. Mitchell, 325 F. Supp. 620 (1971).

35. Elrod v. Burns, 427 U.S. 347, 362 (1976).

36. *Id.*

37. *See id.* at 363. *See also* Buckley v. Valeo, 424 U.S. 1 (1976); Sherbert v. Verner, 374 U.S. 398 (1963); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

38. On the insufficiency of a mere legitimate state interest, *see* Kusper v. Pontikes, 414 U.S. 51, 59 (1973). On rationality, *see* Sherbert v. Verner, 374 U.S. 398 (1963).

39. *See* 431 U.S. at 244 (Powell, J., concurring).

40. 431 U.S. at 228. *See* UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963); Roth v. United States, 354 U.S. 476 (1956); Thornhill v. Alabama, 310 U.S. 88 (1940).

41. Buckley v. Valeo, 424 U.S. 1 (1976). The consideration given the extent of abridge-

The basic question presented in *Hanson* and *Abood* was whether the government interest in union shops justified any infringement on an employee's constitutionally protected interests.[42] Union or agency shop agreements advance labor peace by buttressing a union's position as collective bargaining agent.[43] The existence of "free riders" may tempt other employees to leave unions, to the detriment of union strength.[44] But even if labor peace can be termed a paramount interest, union shops cannot be justified since they are not *necessary* to maintain union bargaining strength in light of proven alternatives to that end.[45] In addition, once a majority of workers belong to a union (a requisite for union shop agreements), that union is already certifiable as the exclusive bargaining agency and has all the power it is likely to acquire.[46]

On a less exalted plane, unions value union shop agreements because they can thereby exact dues from workers to support collective bargaining and other activities with which the workers may well disagree.[47] This distribution of the costs of union activities is a second governmental interest in union shops. Although couched in terms of

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ment rather than its nature prevents the balancing process from becoming a purely arbitrary value judgment. *See* Konigsberg v. State Bar of Cal., 366 U.S. 36, 56 (1961) (Black, J., dissenting). In this balancing, it should be remembered that, according to *Elrod v. Burns*, any loss of first amendment freedom, even for a minimal amount of time, constitutes "irreparable injury." 427 U.S. at 350.

42. Justice Powell's position that public sector unions are indistinguishable from political parties in many respects could perhaps be applied also to private sector organizations. 431 U.S. at 256-57 (Powell, J., concurring).

43. See the discussion of the purpose of the statute in *International Ass'n of Machinists v. Street*, 367 U.S. 740, 759-66 (1961). Seventy-five to eighty per cent of railroad employees were members of labor organizations by 1950 (the year prior to enactment of the Railway Labor Act), which indicates little need for any legislation to strengthen the union's bargaining position. H.R. REP. NO. 2811, 81st Cong., 2d Sess. 4 (1960). *See also* 96 CONG. REC. 16279 (1960) (statement by Senator Hill).

44. *See Hearings on H.R. 7789, supra* note 4 (statement by George Harrison). *See also* Report of the Presidential Emergency Board (May 24, 1943); Supplemental Report of the Presidential Emergency Board (May 29, 1943). These reports considered union requests for authorization of union shops during World War II after railway workers went on strike. The Board found that union shops were not necessary to protect the union's bargaining position.

45. Other devices, such as the exclusive bargaining agency under the National Labor Relations Act, or dues checkoff, achieve much the same purpose without the constitutional objection. *See* 3 LAB. L. REP. (CCH) ¶ 4501.

46. *See Hearings on H.R. 7789, supra* note 4 (statement of George M. Harrison). *See also* Note, 19 GA. B.J. 550 (1957). The author there would apply the stringent "clear and present danger" test of *Thomas v. Collins*, 323 U.S. 516 (1945), to determine if an abridgement is constitutionally justified.

47. *See* Proceedings of Presidential Emergency Board No. 98 at 150.

preventing "free riders," in fact the government's interest is to finance union activities with the money of unwilling contributors, the complaint of the plaintiff in the instant case. Compelled contribution to support another's beliefs abridges the employee's right of association to advance beliefs, a right which extends into the area of collective bargaining.[48] The government purpose behind the promotion of union shops is to enhance the voice of unions at the expense of dissident members. This is a goal "wholly foreign"[49] to the first amendment, and is not a valid end of legislation.

Nevertheless, the Court held that forced contributions for uses related to collective bargaining were constitutional, without engaging in a detailed analysis of the necessity or importance of the union shop. But by suggesting that further decisions would consider the guidelines drawn in *Street*, the Court may have confused the issues presented in the two cases. At one point the Court suggested that funds spent for the expression of political views would be excluded from permissible use.[50] This language is inconsistent, however, with an earlier statement that the political nature of the use was not to be the key constitutional inquiry and that collective bargaining in the public sector may of itself involve the expression of political views.[51] Thus, expression cannot be deemed unrelated to collective bargaining solely because it is political.

In announcing the collective-bargaining-related standard, the Court failed to delineate the degree or kind of relation required. Since lending support to particular legislation and candidates can have a substantial relation to the ultimate contract under which a union might work (particularly in the public sector),[52] the decision may allow unions to engage in a broad range of political activity affecting first amendment rights

48. One author believes that the Railway Labor Act considered in *Hanson* had the invalid purpose of the elimination of competition and friction. Note, 6 J. PUB. L. 263 (1957). Another author suggests union shops may in fact be aimed at those workers who wish to dissent from union policies by withholding funds from or not joining the union. Taff, *The Case for Voluntary Union Membership*, 40 IOWA L. REV. 626 (1953). Thomas Jefferson, in his 1779 *Bill for Religious Liberty*, called compelled contributions for the propagation of ideas "sinful and tyrannical." I. BRANT, MADISON: THE NATIONALIST 354 (1948).

49. Buckley v. Valeo, 424 U.S. 1 (1976). On the requirement that the government interest be distinct from constitutional abridgement, *see* Konigsberg v. State Bar of Cal., 366 U.S. 36, 56 (1961) (Black, J., dissenting).

50. 431 U.S. at 235-36. The Court said that funds for the expression of political views, on behalf of candidates, or for the advancement of other ideological causes not related to collective bargaining, must be financed by uncoerced contributions.

51. *Id.* at 231.

52. *See* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (Black &

more significantly than is at first apparent. Further litigation may supply a rationale for prohibiting unions from using forced contributions for certain purposes. For example, a distinction could be based on the extent of the abridgement of the individual rights.[53] However, a basic rethinking of the judgment espoused in *Abood* (and attributed to *Hanson* and *Street*) would be a preferable resolution. Such a reexamination would require, of course, an articulation of state interests that might justify the first amendment impact of union shops.

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HEARSAY AND THE CONFRONTATION GUARANTY

During defendant's trial for aggravated rape, hearsay evidence was admitted pertaining to a medical examination of the alleged victim by an assistant coroner who was not called as a witness.[1] The Louisiana Supreme Court reversed[2] and held that admission of a business record as an exception to the hearsay rule is contingent upon proof of the entrant's unavailability. The court noted that introduction of the evidence without such proof probably violates the state[3] and federal[4] constitutional guar-

Douglas, JJ., dissenting). *See also* Abood v. Detroit Bd. of Ed., 431 U.S. 209, 236; Note, 75 HARV. L. REV. 233 (1961).

53. *See* Buckley v. Valeo, 424 U.S. 1, 59 (1976). It is arguable that the impact on employees of the use of their compelled contributions for a particular purpose may not be substantial or significant enough to warrant judicial relief. This line of thought is conceptually different from an inquiry into whether there is *any* impact brought about by those uses.

1. The trial court admitted the evidence under LA. CODE CRIM. P. art. 105 which states: "A coroner's report and a proces verbal of an autopsy shall be competent evidence of death and the cause thereof, but not of any other fact."

2. The Louisiana Supreme Court found Code of Criminal Procedure article 105 inapplicable because the evidence was not used as evidence of death or the cause thereof, but of the presence of sperm in the alleged victim's vagina.

The state also argued that the coroner's report should be admissible under the exception for hospital records, LA. R.S. 13:3714 (Supp. 1966), but the supreme court found this statute inapplicable because there was no evidence introduced to prove the examination was conducted in a hospital.

3. LA. CONST. art. I, § 16 provides in part: "An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf." *See also* La. Const. art. I, § 9 (1921).