Arguments in support of the dissent have been advanced by individuals and organizations outside the legal profession.[23] These authorities present a strong sociological argument based on the feared consequences of lack of home environment and the association with adult felons. However, the dissent would not reverse the transfer of Wilson merely because of the consequences of association with adult felons. The dissent stated that Wilson may well deserve to be incarcerated in an adult penal institution.[24] Further, the dissent was not influenced by the argument that more juveniles would be tried as adult offenders if the transfer was disallowed and the statute found unconstitutional. If juvenile facilities cannot cope with the delinquent he should be treated as an adult.[25]

The dissent, therefore, recognized the necessity of incarceration of certain juvenile offenders in an adult institution. However, if this was necessary then the juvenile should not be referred to the juvenile court for rehabilitation in the sense of *parens patriae,* but should be granted all the criminal due process guarantees at the outset of the proceedings and tried as an adult. The dissent viewed the statute in question as being violative of the spirit of *parens patriae* and therefore unconstitutional, the unconstitutionality being based on the criminal punishment invoked on the juvenile.

The majority did recognize the practical effect of the decision in the light of the sociological effect that the transfer might have on the juvenile. The majority, however, in holding that the constitutional issue did not encompass the sociological effect on the juvenile, stated that while it felt that a men's reformatory might not be a proper place for a juvenile, yet this was a policy question for the legislature, not the court.[26] Therefore, although the majority did not find a violation of criminal due process, based on its conclusion that the juvenile process was civil, it did recognize the sociological argument against incarceration with adult felons, which the dissent itself did not necessarily find at fault.

Although the Federal District Court[27] was recently of the same mind as the majority, it appears that in the light of the recent United States Supreme Court statement on the matter of the juvenile process in *United States v. Kent,*[28] the dissent may prevail in the last analysis. It appears unrealistic to label this as being civil in nature as a reason for denial of criminal due process when the juvenile is confined to a correctional institution which is designed for the punishment and treatment of convicted felons. As suggested by the *Kent* case, it is time to look beyond the classification of the juvenile process as being civil and view the net effect of the process in relation to the *parens patriae* doctrine of the juvenile process.

JERRY P. ALT — January 1968

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transferred or committed was limited. Only institutions with facilities similar to those of the National Training School were within the Attorney General's discretion.

[23] U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, CHILDREN'S BUREAU, PUB. No. 415, DELINQUENT CHILDREN IN PENAL INSTITUTIONS (1964).

[24] Wilson v. Coughlin, 147 N.W. 2d 175, 187 (Iowa 1966).

[25] *Id.* at 184.

[26] *Id.* at 180.

[27] Wilson v. Haugh, Civil No. 66-C-34-CR, N.D. Iowa, April 5, 1967, where the Federal District Court denied Wilson's petition for a Writ of Habeas Corpus stating that the transfer did not violate the eighth or fourteenth amendment to the United States Constitution.

[28] Kent v. United States, 383 U.S. 541 (1966).

LABOR LAW — Defamation and the doctrine of preemption under the National Labor Relations Act

Linn, an assistant general manager of Pinkerton's National Detective Agency, Inc., brought this action to recover damages arising out of the alleged circulation of defamatory leaflets during a union organizing campaign. The district court dismissed the complaint on the ground that the National Labor Relations Board had exclusive jurisdiction over the subject matter. The Court of Appeals for the Sixth Circuit affirmed.[1] The United States Supreme Court granted certiorari,[2] reversed, four justices dissenting, and *held* that where a party pleads and proves that defamatory material was circulated with malice during a union organizing campaign to his injury, the courts are not precluded by the doctrine of preemption from accepting jurisdiction to apply state remedies. *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

The court of appeals had relied upon *San Diego Bldg. Trades Council v. Garmon*[3] in affirming the district court. In *Garmon* an employer brought action in a California state court against two unions for an injunction to restrain picketing and for damages. The United States Supreme Court reversed a judgment for the employer and held that an activity which is arguably within the compass of the National Labor Relations Act[4] is within the exclusive jurisdiction of the NLRB. The Court thus established the "arguably subject" test as the basic standard for determining whether state or federal courts have jurisdiction to apply state remedies to an activity arising out of a labor dispute. The Court did, however, recognize that courts may exercise jurisdiction over conduct marked by violence and imminent threats to public order either to award damages[5] or to enjoin[6] such conduct, even though "arguably subject" to the NLRA; but found no such compelling state interest in *Garmon*. The court of appeals in *Linn* felt compelled to uphold the decision of the district court — that it lacked jurisdiction — in the absence of a showing of violence or a threat of violence.

The Supreme Court recognized that the alleged libel was "arguably subject" to the NLRA, but disagreed as to the import of the language in *Garmon* which provided an exception to the basic standard. A minority of the Court, speaking through Justice Fortas, interpreted the *Garmon* decision as allowing intervention of courts into activities arising out of labor disputes only where there is a compelling state interest in preventing violence or the threat of violence.[7] The majority of the Court would not establish the

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1 337 F.2d 68 (6th Cir. 1964).

2 381 U.S. 923 (1965).

3 359 U.S. 236, *reversing* 45 Cal.2d 657, 291 P.2d 1 (1955) (The Supreme Court of California held that where the NLRB declines jurisdiction the state courts may exercise jurisdiction).

4 49 Stat. 452 (1935) (amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. §§ 157-58 (1958)).

5 UAW v. Russel, 356 U.S. 634 (1958); United Constr. Workers v. Laburnum Corp., 347 U.S. 656 (1954).

6 Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).

7 The language in *Garmon* upon which the minority relied is as follows:

> Even the States' salutory effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially

type of conduct involved; *i.e.*, intimidation or threats of violence, as the only basis for allowing courts to exercise jurisdiction. The Court, instead, looked to whether or not the protection of the residents of a state from malicious libel was an equally compelling state interest, and held that it was.[8]

The weight of authority prior to *Linn* is in agreement with Justice Fortas and the proposition that libel published in labor disputes is within the exclusive jurisdiction of the NLRB,[9] although there is authority to the contrary.[10] The overriding policy considerations behind these decisions are the protection of the free flow of information to employees, promotion of an early settlement of industrial conflicts and recognition of the need for uniformity.[11] The Supreme Court in *Linn* recognized the need for freedom of discussion and that "representative campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions."[12] Such language might be actionable *per se* in some jurisdictions; and thus, as a means of protecting the free discussion contemplated by the NLRA and the financial stability of labor unions and employers, the Court restricted its holding to situations in which both malice and actual damages were pleaded and proved. The Court appears on solid ground in its belief that actions for malicious libel will not upset the "delicate balance of rights and remedies"[13] created by the NLRA. The Court drew an analogy between the free speech requirements in political campaigns and, relying by analogy upon *New York Times Co. v. Sullivan*,[14] found that actions for malicious libel do not impair the free flow of ideas.

Justice Black, in his dissenting opinion in *Linn*, similarly expresses his fear that libel suits may disrupt the peaceful settlement of labor disputes

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subject to the exclusive federal regulatory scheme . . . . It is true we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to public order. . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

[8] The language in *Garmon* upon which the majority relied is as follows:

[W]ithdrawal from the states of power to regulate [was not required] where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that congress had deprived the States of the power to act. *Id.* at 243-44.

[9] Sullivan v. Day Publishing Co., 239 F.Supp. 677 (D. Conn. 1965); Sill v. Moe, 367 P.2d 739 (Alaska 1961), *cert. denied*, 370 U.S. 916 (1962); Blum v. International Ass'n of Machinists, AFL-CIO, 42 N.J. 389, 201 A.2d 46 (1964); Schnell Tool & Die Corp. v. United Steelworkers, 94 Ohio L. Abs. 231, 200 N.E.2d 727 (C.P. 1964).

[10] Brantley v. Devereaux, 237 F. Supp. 156 (E.D.S.C. 1965) (not arguably subject to the NLRA); Meyer v. Joint Council 53 Int'l Bhd. of Teamsters, 416 Pa. 401, 206 A.2d 382 (1965), *cert. denied*, 382 U.S. 897 (1965) (found compelling state interest). For an excellent case note on *Meyer*, see 78 HARV. L. REV. 1670 (1965).

[11] Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (dissenting opinions by Fortas, J. and Black, J.); Blum v. International Ass'n of Machinists, AFL-CIO, 42 N.J. 389, 201 A.2d 46 (1964).

[12] 383 U.S. at 58.

[13] Machinists v. Gonzales, 356 U.S. 617, 628 (1958).

[14] 376 U.S. 254 (1964).

and in addition that libel actions are inconsistent with the first amendment.[15] Malicious libel, however, has never been protected by the constitutional guarantee of free speech for the reason that such utterances are of negligible social value in comparison with the social interest in order and morality.[16] It seems clear that malicious libel similarly would be of negligible value in the resolution of labor disputes.

A further reason for allowing actions for malicious libel is the distinction between the remedies offered by the NLRB[17] as opposed to the state or federal tribunals, applying state remedies. The NLRB may set aside an election under the NLRA, but the Board looks to the coercive or misleading nature of the statements as related to the election rather than their defamatory quality. The respective remedies provided by the courts and by the Board are by no means exclusive and it should be recognized that each has its proper place.

The solution to the problem of malicious libel arising out of labor disputes involves the balancing of opposing interests. On the one hand, the resolution of labor disputes, as with all disputes in a democratic society, requires the free exchange of ideas, but, on the other hand, an individual should not be required to endure the defamation of his character without a remedy of sorts. In the absence of congressional direction, by requiring proof of malice and actual damage as a prerequisite to the jurisdiction of courts where the activity is "arguably subject" to the NLRA, the Court seems to have arrived at the proper place on the scale.

MARVIN E. DUCKWORTH — June 1968

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[15] In Thornhill v. Alabama, 310 U.S. 88, 102 (1940), the Court said: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

[16] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[17] See Bok, *The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).