given all passengers be identical. Certain situations warrant special treatment in relation to specific passengers. For example, a carrier can refuse to transport a passenger whenever such action is deemed necessary or advisable because of adverse weather conditions.[22] Also, certain regulations are pertinent which relate to exceptions to eligibility for denied boarding compensation.[23] This compensation will not be awarded to a passenger if an airline is unable to accommodate him because of a government requisition of space or a substitution of equipment of lesser capacity when required by operational or safety reasons.[24] Finally, ill or incapacitated passengers may be afforded special treatment.[25]

Although the principal case adds to the confusion with regard to the question of damages[26] for causes of action based on violations of the Federal Aviation Act, positive effects will result from this decision. By allowing federal court jurisdiction[27] in matters arising under the act in question and by recognizing an implied remedy, uniform patterns of relief have been established. Although express legislative provisions which afford civil relief would help to eliminate burdensome and unnecessary litigation, recognition of an implied remedy provides a means to supplement[28] already existing remedies which may at times be inapplicable and inadequate to provide a complaining party with restitution.[29]

The Civil Aeronautics Board regulations regarding denied boarding compensation help to eliminate and cope with conflicts created by the "oversell" problem.[30] However, these regulations do little to offer an effective remedy to a passenger who has suffered unjust discrimination. In the *Wills* case it was stated, "[w]ithout judicial intervention to redress past violations of the statute, the rights of air passengers, as declared in the Act, to travel without undue pref-

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[22] Stough v. North Central Airlines, Inc., 55 Ill. App. 2d 338, 204 N.E.2d 792 (1965).

[23] 14 C.F.R. § 250.6 (1967), states:

> A passenger shall not be eligible for denied boarding compensation if:
>
> (a) The flight for which the passenger holds confirmed reserved space is unable to accommodate him because of: (1) Government requisition of space; or (2) substitution of equipment of lesser capacity when required by operational and/or safety reasons; or
>
> (b) The carrier arranges for comparable ar transportation or for other transportation accepted (i.e. used) by the passenger, which, at the time either such arrangement is made, is planned to arrive at the airport of the passenger's next stopover or, if none, at the airport of his destination earlier than, or not later than 2 hours after, the time the direct or connecting flight, on which confirmed reserved space is held, is planned to arrive in the case of interstate and overseas air transportation. . . .

[24] *Id.*

[25] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 365 (S.D. Cal. 1961).

[26] *Compare* Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) *with* Mortimer v. Delta Air Lines, 302 F. Supp. 276 (N.D. Ill. 1969) *and* Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961).

[27] 28 U.S.C. § 1331(a) (1958); 28 U.S.C. § 1337 (1948).

[28] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 368 (S.D. Cal. 1961), states: "Bear in mind . . . the purpose in granting aggrieved airline passengers a Federal cause of action is to supplement the criminal and *in futuro* remedial provisions of the Act . . . ."

[29] *See* 49 U.S.C.§ 1482(c) (1958).

[30] *See* 60 MICH. L. REV. 798 (1962).

erence or unjust discrimination would be robbed of vitality and the purposes of the Act substantially thwarted."[31] For this reason, a federal cause of action must continue to be recognized in order to offer proper relief to a complaining party. Also, recognition of this remedy will tend to discourage[32] similar displays of discrimination and to give the civil rights movement vitality and credibility with respect to the actions of airline carriers.

THOMAS J. BICE

Constitutional Law—PUBLIC NUDITY IS NOT PRIVILEGED AS AN EXERCISE OF FREE SPEECH WHEN IT IS IN OPPOSITION TO A COMPELLING GOVERNMENTAL STATUTE—*State v. Nelson* (Iowa 1970).

Defendants[1] disrobed at a public meeting in a college student residence hall. The featured speaker at the meeting was a representative of a "men's" magazine. Defendants admitted that their action was a protest against the sexual commercialism in that magazine. The defendants were found guilty of indecent exposure.[2] On appeal to the Supreme Court of Iowa, the defendants asserted that the district court erred in holding that public nudity alone constitutes the crime of indecent exposure, and that the defendants' conduct was not privileged as an exercise of free speech. *Held,* affirmed, three justices dissenting. Freedom of speech is not an absolute right when it is in opposition to a compelling governmental statute. *State v. Nelson,* 178 N.W.2d 434 (Iowa 1970).

A primary question involved in the present case is whether the indictment under the "indecent exposure" statute[3] infringed upon the defendants' freedom of speech protected by the first amendment of the Constitution of the United States. Although the right of free speech *implies* a right to say whatever one may please, it is well settled that freedom of speech is not "unlimited"[4] nor

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31 200 F. Supp. 360, 364 (S.D. Cal. 1961).

32 *See* Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 42 (1916), wherein the Court stated: "[L]iability to private suit is or may be as potent a deterrent as liability to public prosecution . . . ."

1 There were eight defendant-appellants, but their cases were consolidated.

2 IOWA CODE § 725.1 (1966) provides:

> If any man and woman not being married to each other, lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness, and designedly makes an open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be imprisoned in the county jail not exceeding six months, or be fined not exceeding two hundred dollars.

3 *Id.*

4 State v. Elliston, 159 N.W.2d 503, 507 (Iowa 1968), states: "Scores of opinions have been written on the question of whether a particular statute infringes upon the constitutionally protected rights of free speech and assembly guaranteed under the First Amendment to the United States Constitution. These rights are not unlimited."

"absolute."[5] For example, the use of obscene, blasphemous, or scandalous speech may be a public offense and is often prohibited or, at the least, limited.[6]

In *People v. Kratz*,[7] the Supreme Court of Michigan stated that indecent exposure, using the terms "indecent" and "obscene" interchangeably, is any exhibition of the privacies of the human body in direct opposition to instinctive modesty and human decency. Similarly, the Supreme Court of Iowa, in *State v. Martin*,[8] held:

> The words "indecent exposure" clearly imply that the act is either in the actual presence and sight of others, or is in such a place or under such circumstances that the exhibition is liable to be seen by others, and is presumably made for that purpose, or with reckless and criminal disregard of the decencies of life. A person, if so inclined, may dress himself in nothing more substantial than the innocence of Eden, provided he does not "expose" himself in that condition. The exposure becomes "indecent" only when he indulges in such practices at a time and place where, as a reasonable person, he knows, or ought to know, his act is open to the observation of others.[9]

Thus, exposure becomes indecent when one exposes himself in the presence of others.[10]

An alleged obscene or indecent act presents a first amendment question when the action is used as a form of speech. Defendants in the instant case stated that their actions were designed "to express graphically and symbolically an idea."[11] Speech is the *faculty* used in expressing ideas and thoughts.[12] Accordingly, the defendants in the instant case were "speaking their thoughts" as a protest.

While the government must protect the rights of the individuals to free speech, the government must also have the power to protect itself against unlawful conduct and acts.[13] These efforts to protect itself are efforts to protect the public and are not to be disposed of as presumptively bad. In the instant case the government is trying to protect the reckless and criminal disregard of the decensies of life. Disrobing and other acts contrary to good morals were forbidden at common law.[14] Moreover, in *Roth v. United States*,[15] the Court stated that "[a]t the time of the adoption of the First Amendment, obscenity

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[5] Near v. Minnesota, 283 U.S. 697, 708 (1931) states: "Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse."

[6] Beauharnais v. Illinois, 343 U.S. 250, 255-56 (1952).

[7] 230 Mich. 334, 337, 203 N.W. 114, 115 (1925).

[8] 125 Iowa 715, 101 N.W. 637 (1904).

[9] *Id.* at 718, 101 N.W. at 638.

[10] People v. Kratz, 230 Mich. 334, 203 N.W. 114 (1925) and State v. Martin, 125 Iowa 715, 101 N.W. 637 (1904) sufficiently demonstrate the Iowa supreme court's justified interpretation of the Iowa indecency statute.

[11] State v. Nelson, 178 N.W.2d 434, 440 (Iowa 1970).

[12] THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1367 (1967) (emphasis added).

[13] American Communications Ass'n., C.I.O. v. Douds, 339 U.S. 382, 394 (1950).

[14] Knowles v. Connecticut, 3 Day (Conn.) 103, 108 (1808) states: "Every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law."

[15] 354 U.S. 476 (1957).

law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."[16]

The Supreme Court of the United States has held that it would be a nonsequitur to say that the rights of the first amendment may not be regulated, for the first amendment does not hold a preferred position in the hierarchy of the constitutional guarantees.[17] The Court has approved of any reasonable, nondiscriminatory regulation in order to protect public tranquility without inhibiting first amendment guarantees.[18] The value of uninhibited speech must, on occasion, give way to other values and considerations.[19] Under the first amendment, obscenity has been rejected as utterly without social significance[20] and is subject to state regulation under the police power.[21]

As a method of determining whether speech is of the character that ought to be protected under the first amendment, the defendants urged the Supreme Court of Iowa to adopt the "clear and present danger test" as set forth in *Schenck v. United States.*[22] In that case the United States Supreme Court stated that "[t]he question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[23] Although the Court spoke of a clear and present danger of a physical character, the moral hazards may be equally dangerous. As is often stated, conduct which is injurious to the public health, safety and morals may be restrained by the state.[24] The legislature may prohibit obscene conduct, for it has wide discretion in determining which individual rights must concede to the rights of the public as a whole.[25]

It is well established that ideas having the slightest redeeming social importance, even those contrary to the settled climate of opinion, are protected. However, as stated in an obscenity case involving censorship of motion pictures, obscenity is not protected by the first amendment.[26] In addition, speech is not protected if it is in violation of a criminal statute which is within the spirit of

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16 *Id.* at 483.

17 Poulas v. New Hampshire, 345 U.S. 395, 405 (1953).

18 *Id.*

19 Dennis v. United States, 341 U.S. 494, 503 (1951) states: "An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations." *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967).

20 Roth v. United States, 354 U.S. 476, 484-85 (1957).

21 Stromberg v. California, 283 U.S. 359, 368 (1931).

22 249 U.S. 47 (1919).

23 *Id.* at 52.

24 Kovacs v. Cooper, 336 U.S. 77, 83 (1949).

25 Jacobson v. Massachusetts, 197 U.S. 11, 20 (1905) states: "That the legislature has large discretion to determine what personal sacrifice the public health, morals and safety require from individuals is elementary."

26 Lordi v. UA New Jersey Theatres, Inc., 108 N.J. Super. 19, 24, 259 A.2d 734, 737 (1969).

the Constitution.[27]

A case analogous to the instant case is *United States v. O'Brien*,[28] in which the Supreme Court held that destruction of a draft card in protest of the Viet Nam war was not protected speech under the first amendment. In that case, as in the instant case, the Court concluded that when "speech" and "non-speech" elements are combined in the same action, and the non-speech element is contrary to compelling governmental interest, the governmental interest will justify incidental limitations on first amendment freedoms.[29] Thus, even if the action is attached to a speech element, it may still be limited.

In the *O'Brien* case, the Court detailed tests to be applied in determining justifiable regulation of speech. The Court stated that the regulation must be within the constitutional power of the Government, must further an important or substantial governmental interest, must be unrelated to the suppression of free expression, and must be incidental to restrictions on first amendment freedoms.[30]

In *State v. Nelson*, the purpose of the regulation was to protect the public morals and, therefore, was within the power of the government.[31] The interest involved is unrelated to the suppression of free speech. Furthermore, the interest is of much greater significance than the incidental restriction of first amendment freedoms.[32] The students were not punished for their communications, but rather, for the form in which they expressed their communications. The students were punished for exposing their bodies.[33] The dissent stated that our democracy can withstand such conduct without resorting to criminal sanctions.[34] The dissent, however, fails to see that our democracy cannot withstand such an utter disregard of morality. These obscene actions are of such slight social value that the students' conduct ought not be protected.[35]

The Supreme Court of Iowa properly decided that the defendants violated Iowa's obscenity statute. One must accept limitations on free speech in order that all people may obtain the full benefits of democracy. Since the defendants' conduct was in opposition to a compelling governmental statute, the conduct could be regulated.

JAMES C. STEFFES

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[27] United States v. Smith, 249 F. Supp. 515, 518 (S.D. Iowa 1966), *aff'd*, 368 F.2d 529 (8th Cir. 1966); Central States Theatre Corp. v. Sar, 245 Iowa 1254, 1266, 66 N.W.2d 450, 457 (1954).

[28] 391 U.S. 367 (1968).

[29] *Id.* at 376.

[30] *Id.* at 377.

[31] 178 N.W.2d 434, 441 (1970). *See also* Gitlow v. New York, 268 U.S. 652, 666-67 (1925).

[32] Cox v. Louisiana, 379 U.S. 536, 554 (1965), states: "A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection."

[33] 178 N.W.2d 434, 441 (Iowa 1970).

[34] *Id.* at 448.

[35] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

Criminal Law—EVIDENCE OBTAINED BY WARRANTLESS SEARCH OF A HOUSE FOLLOWING ARREST OF PERSON COMMITTING A CRIME IN THE OFFICERS' PRESENCE IS INADMISSIBLE IN STATE CRIMINAL PROCEEDINGS.—*Vale v. Louisiana*, (U.S. Sup. Ct. 1970).

Police officers obtained two warrants for Vale's arrest because his bond had been increased on a previous narcotics charge. They arrived at Vale's mother's house and watched for defendant. Shortly after their arrival, they observed defendant apparently make an illegal drug sale to a known addict in front of the house. When the policemen came forth to make the arrests, the addict swallowed something, apparently the evidence, and Vale hurriedly walked toward the house. He stopped on the front steps when officers told him he was under arrest. The officers searched the house, first to see that no one else was present, and secondly, to search for evidence. They found a quantity of heroin in the bedroom. Three minutes after the first search, Vale's mother and brother returned home. The Louisiana supreme court held that the defendant's fourth amendment rights had not been violated because the search occurred in "the immediate vicinity of the arrest" of Vale and was "substantially contemporaneous therewith."[1] On certiorari to the United States Supreme Court, *Held* reversed. For a search of a house to be incident to an arrest, the arrest must occur inside the house and not on the front steps outside. *Vale v. Louisiana*, 90 S. Ct. 1969 (1970).

In *Vale*, the Supreme Court has specifically drawn a line defining the reasonableness of a warrantless search of a house when that search is conducted incident to a lawful arrest. The arrest *must* have been made *inside* the house and the search must be limited to the room in which the arrest was made.[2] By drawing this line, the Supreme Court has disregarded the intent that the founding fathers had when they approved the amendment; it has disregarded the reasons for the exceptions to the prohibitions of the fourth amendment as set forth by the Court at earlier dates; it has made the prohibition of warrantless searches nearly absolute; and it has managed once again to tie the hands of the nation's law enforcement officers.

The founding fathers never intended that all searches without a warrant be prohibited or that the prohibition be absolute. The most obvious evidence of that is the wording of the fourth amendment itself. It states that the people shall be secure against all "unreasonable searches and seizures."[3] The Court has consistently held this to mean that only searches which are unreasonable are prohibited.[4] Conversely, assuming that reasonable searches are not pro-

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1 State v. Vale, 252 La. 1056, 1070, 215 So. 2d 811, 816 (1968).
2 90 S. Ct. 1969, 1971 (1970).
3 U.S. CONST. amend. IV.
4 Chimel v. California, 395 U.S. 752, 772 (1969) (dissenting opinion); Schmerber v. California, 384 U.S. 757, 768 (1966); United States v. Rabinowitz, 339 U.S. 56, 60 (1950); Harris v. United States, 331 U.S. 145, 150 (1947); Carroll v. United States, 267 U.S 132, 147 (1925); Weeks v. United States, 232 U.S. 383, 390 (1914).