Constitutional Law – Criminal Procedure

Miriam Hartley
CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—A suspect’s Sixth Amendment right to counsel at a pre-trial identification proceeding applies only to post-indictment confrontations. Kirby v. Illinois, 406 U.S. 682 (1972).

In Kirby v. Illinois, The Supreme Court reexamined its ruling in United States v. Wade regarding an accused’s right to the assistance of counsel at a pre-trial lineup. In an opinion written by Mr. Justice Stewart, the Court held that the constitutional right to counsel at a pre-trial lineup applied only to those identification proceedings occurring after the initiation of formal adversary criminal proceedings and that the exclusionary rule of Gilbert v. California regarding pre-trial identifications in the absence of counsel did not apply to in-court identifications based on pre-trial lineups conducted prior to an accused’s indictment.

On the morning of February 22, 1968, Thomas Kirby and Ralph Bean were detained on West Madison Street in Chicago by two policemen and were asked to produce identification. In the course of searching through his wallet for identification, Kirby voluntarily surrendered upon request certain travellers checks and a Social Security card bearing the name of Willie Shard. Other papers belonging to Shard were found in Bean’s possession. Failing to receive an adequate explanation of their possession of Shard’s property, the officers placed Kirby and Bean under arrest. At the police station, the arresting officers discovered that Shard had been robbed on the street only two days before. Shard was notified immediately of the appre-
hension of the two suspects, was brought to the police station in a squad car, and, upon entering a room where Kirby and Bean were seated alone at a table in between two policemen, immediately identified the two as the robbers. Neither of the suspects had requested or had been advised of any right to counsel, and no lawyer was present at the time the identification was made. Six weeks later, both were indicted for the Shard robbery. Pre-trial motions to suppress Shard's identification testimony of February 22nd were denied, and Shard was permitted to again identify the two defendants at trial. Both were convicted, and Kirby's conviction was affirmed by the Illinois Appellate Court which relied on an earlier holding by the Illinois Supreme Court in People v. Palmer that the Wade-Gilbert exclusionary rule was applicable only to post-indictment confrontations. The United States Supreme Court granted certiorari, limiting its inquiry to

whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment showup at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred.10

In announcing the judgment of the Court, Mr. Justice Stewart in effect limited the applicability of the Wade and Gilbert decisions to the facts of those cases11 by holding that a suspect's right to counsel at a pre-trial lineup attached only after the suspect had been formally indicted of a criminal offense. The opinion then stated that the right to counsel in all prior Supreme Court decisions dealing with that constitutional issue,12 with the exception of Escobedo v. Illinois and Miranda v. Arizona,13 attached "... at or after the initiation of adversary judicial criminal proceedings—whether

9. 41 Ill.2d 571, 244 N.E.2d 173 (1969).
11. Lineups in both the Wade and Gilbert cases took place after the defendants had been indicted and after they had been appointed counsel.
12. Judicial interpretation of the Sixth Amendment's right to counsel guarantee is a recent development. After laying the foundation in Powell v. Alabama, 287 U.S. 45 (1932), which held that the right to counsel was not limited to the trial itself, the Court in subsequent decisions held that the right attached at "any critical period in the prosecution" by applying the right at arraignment proceedings to raise defenses and to enter pleas (Hamilton v. Alabama, 368 U.S. 52 (1961), and White v. Maryland, 373 U.S. 59 (1963) ); to cases originating in state courts (Gideon v. Wainwright, 372 U.S. 335 (1963) ); to appellate review (Douglas v. California, 372 U.S. 353 (1963) ); to police interrogations (Massiah v. United States, 377 U.S. 201 (1964), Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966) ); to juvenile cases (In re Gault, 387 U.S. 1 (1967) ); to pre-trial identification procedures (United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967) ); and to preliminary hearings (Coleman v. Alabama, 399 U.S. 1 (1970) ).
by way of formal charge, preliminary hearing, indictment, information, or arraignment." However, Justice Stewart emphasized that Escobedo and Miranda were distinguishable in that, although counsel in those cases was required prior to indictment, the requirement was made for the protection of the suspect's fifth and fourteenth amendment privileges against compulsory self-incrimination. From this analysis of judicial precedent, the opinion concluded that a "criminal prosecution" under the sixth amendment commenced only upon indictment or upon the initiation of adversary— as opposed to investigatory—proceedings against the accused. In conclusion, Justice Stewart noted that the rule of Stovall v. Denno adequately protected an accused from prejudicial identification procedures encountered during the pre-indictment investigatory stage:

As the Court pointed out in Wade itself, it is always necessary to 'scrutinize any pretrial confrontation...’ 388 U.S., at 277. The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 388 U.S. 293.

In a concurring opinion, Mr. Chief Justice Burger, in reference to his dissenting opinion in Coleman v. Alabama, strictly interpreted "criminal prosecution" as used in the Sixth Amendment to commence only when an accused was formally charged with a criminal offense. Mr. Justice Powell, in a brief concurring note, called for limited application of the Wade-Gilbert exclusionary rule to post-indictment identification proceedings.

In a dissenting opinion, Mr. Justice Brennan reiterated the Wade decision's interpretation of the sixth amendment guarantee of the right to counsel as being applicable to "critical" stages of the prosecution “... whenever

15. 406 U.S. at 689.  
16. Id. at 688-89. The opinion also reaffirmed the ruling in Schmerber v. California, 384 U.S. 757 (1966), that the fifth amendment guarantee against compulsory self-incrimination does not apply to required participation in an identification lineup.  
17. "The initiation of judicial criminal proceedings ... is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified ... It is this point, therefore, that makes the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable [citations omitted]." 406 U.S. at 689-90.  
20. 399 U.S. 1, 21-25 (Burger, C.J., dissenting opinion).  
21. 406 U.S. at 691.  
22. Id.  
23. Mr. Justice Brennan was joined by Justices Douglas and Marshall. Mr. Justice White wrote a short dissenting statement arguing for reversal under the rule of United States v. Wade and Gilbert v. California. 406 U.S. at 705.
[presence of counsel was] necessary to assure a meaningful 'defence.' [388 U.S.] at 225. Contrary to the majority's view that neither Escobedo nor Miranda were applicable in adjudicating sixth amendment issues surrounding the right to counsel at pre-trial identification proceedings, Justice Brennan noted that the Wade opinion had refused to limit the relevancy of the Escobedo and Miranda decisions solely to protection of fifth amendment rights. Rather, the Court in Wade held that Escobedo and Miranda had been decided on a constitutional principle present in all of the Court's decisions concerning the right to counsel:

... [I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. [388 U.S.] at 226-227.

From this analysis, the Wade decision specifically established that all pre-trial confrontations were open to judicial scrutiny whenever a plea for assistance of counsel under the "critical stage theory" was presented for review. Wade concluded that pre-trial identification confrontations were a critical stage in the prosecution on two counts: First, such confrontations contained inherent dangers in the form of intentional or unintentional suggestiveness capable of prejudicing the judgment of the witness or victim faced with the role of identifying the suspect. Second, the presence of counsel was necessary to accurately reconstruct an account of what had taken place at the lineup so as to safeguard the defendant's right to a meaningful cross-examination of the accusing witnesses at trial. Justice Brennan argued that this was the rationale behind the Wade decision and that the case had not been decided

... simply on the basis of an abstract consideration of the words 'criminal prosecutions' in the Sixth Amendment. ... 'The initiation of adversary criminal proceedings,' ante, at 689, [was] completely irrelevant to whether counsel [was] necessary at a pre-trial confrontation for identification in order to safeguard the accused's constitutional rights to confrontation and the effective assistance of counsel at his trial.

24. 406 U.S. at 693 (Brennan, J., dissenting).
25. Id. at 694 (Emphasis added). Wade specifically pointed out that nothing decided in either Escobedo or Miranda restricted the right to counsel solely to protection of fifth amendment rights. 388 U.S. at 226.
27. Id. at 236-37.
28. 406 U.S. at 696-97 (Brennan, J., dissenting). Indeed, the dissenting Justices in Wade saw no pre-/post-indictment dichotomy in the majority decision: "To all intents and purposes, courtroom identifications are barred if pre-trial identifications have occurred without counsel being present.
The dissent attacked the majority's view that "adversary criminal proceedings" commenced only with the initiation of formal action against the accused—noting that in *Miranda*, the Court had considered such proceedings to have been initiated once the suspect was "... deprived of his freedom of action in any significant way." However, Justice Brennan did not venture to discuss the practical difficulties of furnishing a suspect with counsel immediately upon arrest or under circumstances where an on-the-spot identification was unavoidable. After arguing briefly for an application of the *Wade* rule on the basis of the circumstances surrounding the Kirby identification proceeding, the dissent turned to *Stovall v. Denno*, a companion case to the *Wade* decision in which the petitioner had been identified before his arraignment. Stovall was denied the benefit of the *Wade-Gilbert* exclusionary rule because the Court refused to apply the new rule retroactively—not because his identification had taken place before he was formally indicted. In closing, Justice Brennan observed that

... it is fair to conclude that rather than 'declin[ing] to depart from [the] rationale' of *Wade* and *Gilbert, ante*, at 690, the plurality today, albeit purporting to be engaged in 'principled constitutional adjudication,' *id.*, at 688, refuses even to recognize that "rationale."  

Limiting the applicability of *Wade* and *Gilbert* by use of the simple pre-indictment/post-indictment dichotomy is too mechanical a test when dealing with a complex constitutional issue such as the right to counsel. A suspect is exposed to the same dangers inherent in any pre-trial confrontation—be it a pre-indictment showup or a post-indictment lineup. If his right to preparation for an effective in-court cross-examination may be "irretrievably

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"The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information." *United States v. Wade*, 388 U.S. 218, 251 (1967) (White, J., joined by Harlan and Stewart, JJ., dissenting in part and concurring in part).  

29. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966); 406 U.S. at 698, n.6 (Brennan, J., dissenting). Mr. Justice Brennan might have made a stronger argument to the effect that the accusatory stage does not necessarily commence with the indictment and that, on the facts of the present case, the investigatory stage had for all practical purposes run its course once the arresting officers had learned of the Shard robbery. This line of reasoning was followed in *State v. Isaacs*, 24 Ohio App. 2d 115, 116-17, 265 N.E.2d 327, 328-29 (1970), where Judge Guernsey observed: "[A] suspect is not ordinarily placed in a lineup until ... the investigatory process has disclosed his probable implication in the crime."  

30. 406 U.S. at 698, n.5 (Brennan, J., dissenting).  
32. 406 U.S. at 704 (Brennan, J., dissenting).  
33. 406 U.S. at 697-98 (Brennan, J., dissenting); *United States v. Wade*, 388 U.S. at 228-33.
lost" in a prejudicial lineup, it should make no difference when the lineup occurs. Indeed, if the Wade majority had meant for its ruling to be applied strictly on the facts of that case, it certainly would not have allowed Mr. Justice White's dissent to stand unanswered.

The Kirby majority's distinction between "investigatory" and "accusatory" stages of the criminal process is likewise of questionable value when dealing with the issue of a suspect's right to counsel because the Court in past decisions has recognized that the pre-indictment stage and the accusatory stage overlap to a certain degree in some situations. All in-station identification proceedings are conducted by the police who have a specific crime in mind and who have some reason to believe that one or more of the lineup participants are in some way implicated in that crime. It is difficult to imagine a station house lineup or showup held under such suspicion as being anything less than "accusatory."

Thomas Kirby's identification at the police station was inherently suggestive because a showup, as opposed to a lineup, allows for a one-on-one confrontation between the suspect and the witness. In the environment of the police station, the diffident witness must feel that the police have some reason to believe that the suspect is guilty—otherwise they would not have arranged the confrontation in the first place.

The Kirby decision to apply the right to counsel only to identification proceedings conducted after indictment or after the initiation of other formal adversary criminal proceedings severely threaten to undercut the objectives set forth in Wade and Gilbert by giving the police the opportunity to circumvent the right to counsel requirement by conducting all of its lineups or showups before indictment. In short, Wade can have no real value to a suspect in police custody unless it is applicable to all pre-trial identification confrontations.

Aside from the issues presented in Kirby v. Illinois, the Supreme Court missed an excellent opportunity to examine the effects of Wade on pre-trial criminal procedure over a period of five years—to discover whether or not

34. Supra note 11.
35. Supra note 28.
36. Two state courts have already reached conflicting conclusions as to the point where investigatory proceedings cease and adversary judicial proceedings commence. See Commonwealth v. Lopes, 287 N.E.2d 118 (Mass. Sup. Jud. Ct. 1972) (following Kirby's use of the indictment as the determining factor); contra Arnold v. State, 484 S.W.2d 248 (Mo. Sup. Ct. 1972) (holding that adversary judicial proceedings were initiated upon the filing of a complaint and the issuance of a warrant).
37. Stovall v. Denno takes note of the increased danger of a prejudicial identification where a showup, instead of a lineup, is used. 388 U.S. 293, 302 (1967).
the presence of counsel was serving as an effective solution to the problems inherent in identification proceedings.

The Wade decision presented a clear argument for regulation of police-controlled identification confrontations. However, the requirement of an attorney's presence at all pretrial lineups or showups is at best a questionable remedy. For all practical purposes, the counsel at a lineup is more an observer than a participant in the proceedings, simply because the suspect at that stage has no real constitutional rights to protect. This distinguishes Wade from other "critical stage" cases which provide for the presence of counsel to protect specific constitutional rights. Counsel is required at a lineup to insure the reliability of the identification itself and to be in a better position to prepare for his in-court cross-examination of the identifying witnesses. He is an observer who has no capacity to regulate the confrontation and no authority to order the police to follow specific procedures.

In the absence of any defined rights of the accused to protect [at the lineup], the role of the lawyer in any traditional sense seems limited. To the extent the accused is a passive participant . . . with neither rights to assert nor tactical decisions concerning his defense to make, the accustomed role of the lawyer as counsellor, guide and spokesman is irrelevant.

As an observer of a lineup's reliability, the lawyer places himself in the position of becoming a potential witness and may find himself being called to the stand by the State to testify if he is satisfied that the lineup in which his client was identified had been a fair one! This does little to further a defendant's confidence in the inviolable lawyer-client relationship. Counsel is likewise limited by ethical considerations from being a witness for his client. The end result is a conflict of interest between counsel's role as an impartial observer at the identification confrontation and his role as attorney for the defendant. The number of obstacles confronting the attorney increase markedly where the confrontation takes place prior to the suspect's arrest, at the scene of the crime immediately after the crime was committed, or by pure accident outside police control. And the ever-increasing burden on the Bar Associations to supply attorneys for such a limited role is indicative of the

40. Supra note 12.
42. See ABA CANNONS OF PROFESSIONAL ETHICS NO. 19 (1967): "When a lawyer is a witness for his client, except as to merely formal matters, . . . he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client." The language in the newly adopted Code of Professional Responsibility is substantially the same. See generally ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON 5 (1971).
futility of requiring counsel at a function where an impartial court official or magistrate could accomplish the same results.

This is not to imply that substantial grounds exist for an overturning of United States v. Wade. In Wade and Gilbert the disease was properly diagnosed; the Court merely failed to prescribe the proper cure. The requirement of a right to counsel at pre-trial station house identification confrontations is an inadequate solution to the "critical dangers" confronting the suspect's right to a fair trial. Although the Wade majority invited the legislature and local police departments to draw up appropriate regulations, neither has taken the lead in securing the necessary reforms. Consequently, the only alternative practical solution in the absence of more specific Supreme Court adjudication is for the state courts, along with local law enforcement agencies, to establish their own sets of regulations insuring fairness in station house identification proceedings. The enactments should specifically provide for either the presence of a court magistrate or the use of audio-visual equipment at those proceedings. Such regulations should guarantee an unbiased and accurate record of the identification confrontation and allow the accused's attorney to devote his time to more productive endeavors.

Timothy J. Reagan

CONSTITUTIONAL LAW—Freedom of Speech—Equal Protection—Suspension of High School Students for Protesting the Playing of "Dixie" Is Not a Denial of First and Fourteenth Amendment Rights—Tate v. Board of Education, 453 F.2d 975 (8th Cir. 1972).

Can school authorities constitutionally suspend black students for quietly walking out of a high school pep rally to protest the playing of "Dixie"? In Tate v. Board of Education, the Eighth Circuit held that they can take

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43. 388 U.S. at 239.

1. 453 F.2d 975 (8th Cir. 1972).
such action as part of their "inherent authority to maintain order . . . and discretion in formulating rules and regulations and general standards of conduct."\(^2\)

The controversy took place at Jonesboro High School in Arkansas, a high school voluntarily integrated since 1966. "Dixie" had traditionally been played at pep rallies until September 1968, when a faculty member suggested that the song be omitted due to "a few individual requests" that the song was "offensive to some Negro students."\(^8\) The school authorities decided to experiment by discreetly discontinuing "Dixie" for approximately one month. The experiment ended in response to the complaints of "white students and parents,"\(^4\) and the matter was put before the students for a vote. "Dixie" won the majority, and the song remained with an additional plan allowing students who preferred not to attend the rallies to proceed to the auditorium instead.

The pep rally on November 1, 1968, added to increasing racial tensions and "growing student unrest"\(^6\) in the school. Twenty-five black students and five whites chose not to attend the scheduled rally. Twenty-nine blacks decided to leave the assembly once the song was played.\(^6\) On their way out, "[t]he principal handed them a piece of paper and asked that all who had left the pep assembly sign their names on it."\(^7\) The school authorities decided that the walkout was "disruptive of the school program"\(^8\) and the students were suspended for five days. Following the suspension, a question and answer period conducted by the superintendent and principal for the suspended students was terminated when the students became "loud and unruly."\(^9\) Three days later, the students' parents were informed "that the suspension would be reduced to three days for those who would promise the principal privately that when they returned to school they would come to get an education and do something to make the school a better one."\(^10\)

The case poses an intricate problem of weighing the constitutional rights of secondary students against the responsibility of school authorities to maintain order, discipline, and proper decorum in their task of educating. Plaintiffs argued that their walkout from the assembly constituted symbolic free
speech protected by the first amendment, and that the playing of the song and their suspension from school denied them equal protection and due process under the fourteenth amendment. In a unanimous three-judge opinion written by Judge Mehaffy, the court rejected all three contentions, and affirmed the district court's dismissal of the action.

Relatively few cases involving the constitutional rights of high school students have been adjudicated by the courts, but in an area of increasing litigation over student rights, a certain trend can be detected. The leading Supreme Court decision in this area is Tinker v. Des Moines School District in which the Court upheld the right of secondary school students to wear black armbands in protest of the Vietnam war. In the instant case, the court distinguished Tinker as dealing with "pure speech" and not with disruptive student action. The opinion concluded that Tinker did not dispel the proposition that "first amendment rights may be infringed upon by reasonable regulations necessary for keeping orderly conduct during school sessions," and cited Blackwell v. Issaquena County Board of Education for support.

Blackwell upheld the right of school authorities to prohibit the wearing of "freedom buttons" because those students wearing them harassed others who did not, and caused a breakdown in school order. But the court failed to point out that Blackwell was a companion case to Burnside v. Byars, decided the same day with an opposite result. Burnside involved the same fact situation except that the court did not find any accompanying behavior which disrupted the operation of the school. In the instant case, the court found the facts more closely analogous to Blackwell than to Burnside:

Inasmuch as the walkout took place during the fourth number on the program and involved twenty-nine students we cannot find that no disruption of school 'order and decorum' occurred or that this conduct was a constitutionally protected form of dissent. . . . It is not necessary for school officials to refrain from taking any action until there is a complete breakdown in school discipline such as was involved in Blackwell. . . .

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13. 453 F.2d at 978.
14. Id.
15. 363 F.2d 749 (5th Cir. 1966).
16. 363 F.2d 744 (5th Cir. 1966).
17. 453 F.2d at 978.
Such language, in light of the facts of this case, contrasts sharply to that used in *Tinker*:

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression. Any departure from absolute regimentation may cause trouble.\(^\text{18}\)

Although the court conceded that “plaintiffs’ actions constituted speech,”\(^{19}\) it chose to view the walkout as disruptive in itself and outside the protection of the first amendment. This conclusion ignores the context within which the walkout took place. The scene was a pep rally held inside a gymnasium which echoed noisy band music and the shouts and screams of students and cheerleaders. The Supreme Court’s exception to the *Tinker* rule which would warrant an infringement on a student’s right to free speech is that the speech cause a “material and substantial interference”\(^{20}\) with appropriate discipline. It is hard to imagine how a walkout of such a relatively small number of students from a pep rally can be found so disruptive of school discipline as to result in suspension from school.\(^{21}\)

In considering plaintiffs’ equal protection argument, the court examined the action by the school authorities in administering rules and regulations, and apparently agreed with the defendants that the regulation involved\(^{22}\) was administered in a “fair and impartial manner without regard to race, creed or color.”\(^{23}\) The court also found that the students had not been denied due process:

> Under the circumstances of the case before us, where there was no question as to what acts were involved or what individuals were involved, where notice was given and an opportunity for an informal hearing was given, and where the penalty was mild, there was no violation of due process shown. . . .\(^{24}\)

A proper analysis of “Dixie” itself goes to the heart of plaintiffs’ equal protection argument, and the court responded by issuing a lengthy narrative

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18. 393 U.S. at 508.
19. 453 F.2d at 978.
20. 393 U.S. at 511.
21. The court noted that “[t]hese dissenters did not destroy any property en route to the auditorium.” 453 F.2d at 977.
22. “The school regulation involved here provided: ‘It is strictly against the rules to create a disturbance in assembly.’” *Id.* at 978.
23. *Id.*
on the history of the song. The court acknowledged that "Dixie" was written for minstrel shows, but omitted discussing why blacks would feel offended by the song. The fact that "Dixie" had been previously dropped from the pep rallies points out that school authorities were aware of the song's offensiveness to at least some black students. When "Dixie" is played in the South, many whites usually stand up and cheer. Although this response to the song may be caused by a sense of pride in Southern tradition, it occasionally prompts a few to make insulting, racial remarks.25 It seems a bit unrealistic to assume that the song does not conjure up racial overtones in some minds, or that it has prominence or traditional acceptance outside the South. This is not to say that the song is inherently racist, but rather, in light of the facts of this case, that the school authorities were not truly "fair and impartial" nor justified in allowing the song to be played. The court, however, interpreted "Dixie" differently:

On this record we cannot say that the tune "Dixie" constitutes a badge of slavery or that the playing of the tune under the facts as presented constituted officially sanctioned racial abuse. Such a ruling would lead to the prohibition of the playing of many of our most famous tunes.26

Since the court found nothing racially offensive about the song, it concluded that the school authorities had acted properly in suspending the black students. Such a conclusion ignores the Tinker rationale which protects a student's right of free speech so long as there is no accompanying behavior which "substantially" disrupts school discipline. The decisions made by the school authorities, therefore, should have been more carefully scrutinized by the court. Were the school authorities justified in submitting the question to a student vote in a school presumably dominated by whites during a period of "growing student unrest"? Were the students who were forced to sit in the auditorium rather than hear a song offensive to them denied equal protection? And, finally, were the school authorities "fair and impartial" in offering the suspended students an alternative of only three days suspension instead of five if they promised "to make the school a better

25. In Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970), a black high school student was suspended from band activities because he quit playing his instrument and left the gymnasium when "Dixie" was played. The dissenting opinion cited the "key allegation" in the complaint:

. . . When the band played "Dixie" on January 3, 1969, the white students showed great excitement, as is usual when it is played at Lebanon High School and at other high schools in Tennessee. A group of approximately twelve to fifteen white students began shouting derogatory racial comments in unison, such as 'Nigger, go back and pick that cotton'. Id. at 222.

The case was vacated as moot since the student had moved and attended another high school.

26. 453 F.2d at 982 (emphasis added).
one"? After all, didn't the decision of the suspended students to walk out of the pep rally symbolize their intent to do just that?

David M. Pantalena


If there is one consistent element in obscenity litigation, it is the fact that confusion reigns. Since the classic standards established by Roth v. United States\(^1\) in 1957, the courts, realizing that their efforts might ultimately be rendered futile, have struggled to achieve rational, consistent decisions.\(^2\) Nevertheless, the strife continues and oft bewildered litigants seek clarification each year as to whether or not their activities fall within the ambit of first amendment protection.\(^3\) While the legal community awaits a final, elucidating edict from the Supreme Court, its vigil is many times set back by an abrupt denial of certiorari or an innocuous disposition of the case.\(^4\)

Yet once again, the community's interest is buoyed. Miller v. United States\(^5\) has been docketed for this coming term. Petitioner was charged by indictment with a total of 25 counts relating to obscenity.\(^6\) Counts one through seventeen charged Miller with the mailing of advertisements for obscene matter.\(^7\) Counts 18 through 25 charged him with mailing pictorial

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2. See, e.g., Haldeman v. United States, 340 F.2d 59, 61 (10th Cir. 1965):
   For the past decade the Supreme Court of the United States has struggled with the constitutional question here involved, but it is extremely doubtful if the solution of the individual cases has been made any easier by its decisions.
3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances." U.S. Const. amend. I.
4. See, e.g., Rabe v. State of Washington, 404 U.S. 909 (1972), in which the petitioner sought a clarification between the concepts of the abstract and contextual approaches of obscenity, the necessity of a prior adversary hearing, and the general questions related to the constitutional standards for obscenity. The Court reversed petitioner's conviction on the fact that the statute involved was vague.
5. 455 F.2d 899 (9th Cir. 1972).
6. At trial, the government dismissed two counts of interstate transportation of obscene matter. Id. at 900.
7. These are referred to as the "advertising counts." Id.
magazines and single textual paperbacks. All the counts were based on violations of 18 U.S.C. §§ 1461, 1462.8 The parties waived trial by jury. Petitioner was found guilty of 14 counts9 and was sentenced to a two-year term with an additional fine of $22,500.00.10

Perhaps the most important issue presented by Miller in his petition for certiorari, and one which will hopefully be answered by the Court, is the question of the nature and scope of appellate review in obscenity cases.11 Is a reviewing court limited to an analysis concerning sufficiency of the evidence to support a lower court finding of obscenity, or is the question of obscenity itself a question of law to be decided by the appellate court, without particular deference to a lower court's decision?

The Ninth Circuit's Approach

After describing the materials of each count with no review of the constitutional issues involved, the court concluded that as to the advertising counts "[t]his case is stronger than Ginzburg. We have no doubt as to the validity of the convictions in the first series of counts. . ."12 The court did not concern itself with any comparison or investigation of the Ginzburg13 principles.

The examination of the second series of counts (the mailing of the various materials themselves) was no more energetic. The counts were again enumerated and followed by a characterization of the materials' contents. The

8. 18 U.S.C. § 1461 (1970) declares unmailable:
"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and . . . [e]very written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind of information, directly or indirectly, where or how, or by what means any such matters, articles, or things may be obtained. . . ."
And further declares that:
"Whoever knowingly uses the mails for mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed . . . shall be fined . . . or imprisoned. . . ."
Section 1462 provides in part:
"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, or motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . . [s]hall be fined . . . or imprisoned. . . ."
9. On Feb. 3, 1971, the court found Miller guilty on 14 of the counts; not guilty as to one; and the balance were dismissed. 455 F.2d at 900.
10. Id. at 901.
12. 455 F.2d at 901.
court refrained from any examination of the existing standards for obscenity and their relevance vel non to the case.

The final substantive statement of the reviewing panel touches the issue directly.

There remains the question as to whether obscenity is a question of fact or one of law. United States v. A Motion Picture Film (2d Cir. 1968) 404 F.2d 196. There, a panel of the Second Circuit, Judge Lombard dissenting, held the question is one of law. We prefer the dissenting views of Judge Lombard. We therefore prefer to accept the trial court’s decision. . . . But assuming the majority holding of the Second Circuit, supra, is correct, we hold the material obscene as a matter of law.14

Holding the material to be obscene as a matter of law and determining it to be so are two very distinct procedures. The court’s preference is blatantly manifested. It would prefer to see its appellate function as limited to a finding of “substantial evidence.”

What is the proper appellate scope in obscenity cases? Must appellate review consist of one consideration to the exclusion of the other? Are questions of obscenity actually mixed questions of law and fact, and if so, how is the appellate system to operate? Courts have been split in their characterization of the issue. It is the consideration of these issues which is the scope of this note. While the main thrust of this examination is directed at the appellate level, notice must be taken of statements relating to the trial courts’ treatments of obscenity cases.

In Reed Enterprises v. Corcoran,15 a foundation is laid.

The question in each case as to whether a particular publication is obscene is a mixed one of law and fact. The Supreme Court in Roth held that it was a question which should be submitted to the jury to be determined under proper instructions. 354 U.S. at 489-490. (Id. at 522)

The disparity that has existed on the appellate level then comes into focus. In State v. Jungclaus the reviewing court chose a course similar to the Ninth Circuit. “After a consideration of the evidence, we conclude that it was ample to sustain the finding of the jury that the materials offered in evidence by the State were obscene.”16 State v. Smith17 exhibits the

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14. 455 F.2d at 902.
15. 354 F.2d 519 (D.C. Cir. 1965).
17. 422 S.W.2d 50, 55 (Mo. 1967). See also State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963); People v. Richmond County News, Inc., 9 N.Y.2d
opposite viewpoint. "The constitutional issue having been raised, it is our
duty to reach an independent judgment on the mixed question of law and
fact. . . ."

At the trial court level there is an established policy as stated in State v.
Hudson County News Company.

. . . The trial judge must apply the constitutional standards to
the specific material in the light of any factual findings supported
by the evidence, for if in his judgment the material cannot constitu-
tionally be suppressed, then nothing remains for the jury's con-
sideration.18

The Model Penal Code speaks of this same procedure while adding an
important qualification. "Of course, if the trial judge determines that the
material is not constitutionally protected and should be submitted to the
jury, he should avoid expressing to them his opinion on the issue of ob-
scenity. . . ."19

Those jurisdictions which see their appellate function as one of determin-
ing only the substantiality of the evidence premise their actions on the sup-
position that the trial judge has not erred in his determination that the ma-
terial is obscene as a matter of law. Such an approach is most dangerous,
since denial of constitutional protection rests solely on the determination of
one man. Can a trial judge be deemed infallible in his legal determination—
especially where the relevant law is so complex and often obscure?

In determining which approach is correct, one must always keep in mind
the warning of the Supreme Court in its cornerstone holding of Roth.

The fundamental freedoms of speech and press have contributed
greatly to the development and well-being of our free society and
are indispensable to its continued growth. Ceaseless vigilence is
the watchword to prevent their erosion by Congress or by the
States. The door barring federal and state intrusion into this area
cannot be left ajar; it must be kept tightly closed and opened only
the slightest crack to prevent encroachment upon more important
interests.20

In his concurring opinion in Roth, Justice Harlan places his finger on the
problem's nerve: " . . . if 'obscenity' is suppressed, the question whether
a particular work is of that character involves not really an issue of fact but

578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961); Feiner v. New York, 340 U.S. 315,
316 (1951); Watts v. State of Indiana, 338 U.S. 49, 51 (1949); Norris v. Alabama, 294
20. 354 U.S. at 488.
a question of constitutional judgment of the most sensitive and delicate kind.\textsuperscript{21}

The American Law Institute, aware of the pressing problem, echoed Harlan's opinion in its proposed draft.

...Further, on appeal each appellate court must likewise make an independent determination of whether the attacked material is suppressible within constitutional standards, for the question is not merely one of fact "but a question of constitutional judgment of the most sensitive and delicate kind. . . ."\textsuperscript{22}

\textit{People v. Richmond County News, Inc.,}\textsuperscript{23} recognized the need for appellate review of the legal issue, and chiding those who would ignore this central role stated that "...if an appellate court were to rely upon and be bound by the opinion of the trier of facts...it would be abdicating its role as an arbiter of constitutional issues."

\textbf{Resolution This Term}

While petitioner Miller presents multiple issues for the Court's consideration,\textsuperscript{24} his success or failure (or that of some future litigant) could very possibly hinge on a determination of whether or not the appellate court erred in not determining the legal issue of obscenity. Where would this leave the Court? Would it remand to the Ninth Circuit with directions to determine the legal question, or would it proceed with its own appellate power of final determination? Consideration for the petitioner's energy and expense would suggest the latter course.

In the hope that such will be the chosen course and in the interest of general obscenity litigation, we proceed to a second related, crucial question directed to the Court's attention—what is the effect of the \textit{Ginzburg} "pandering" doctrine\textsuperscript{25} on the standard for determination of obscenity?

The Ninth Circuit initiated its treatment of this question in \textit{Miller} with the proposition that "[m]any cases indicate that product advertising is at least

\begin{footnotes}
\item 21. \textit{Id.} at 497-98.
\item 23. 9 N.Y.2d 578, 579, 175 N.E.2d 681, 682, 216 N.Y.S.2d 369, 370 (1961).
\item 24. (1) If obscenity is a matter of fact as opposed to law, then do the first and fifth amendments compel that a reasonable mistake of fact defense be available to a defendant charged with violations of 18 U.S.C. §§ 1461, 1462 (1970); (2) Do \textit{Ginzburg} and related cases indicate that a prosecution under these sections requires proof of specific as opposed to general intent?; (3) Are the statutes involved unconstitutionally overbroad and therefore violative of the first, ninth and fourteenth amendments?
\item 25. "...the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." 354 U.S. at 495, 496 (Warren, C.J., concurring).
\end{footnotes}
less rigorously protected than other forms of speech." The concept that commercial speech might have less protection than non-commercial speech was introduced in *Jamieson v. Texas* in 1943. The *Jamieson* concept was first attacked in *Cammarano v. United States* in 1959, and put to final rest in 1966, when the *Ginsburg* Court asserted that "... commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."

What then is the effect of the "pandering" doctrine? Is it a question of fact, or one of law, or a mixed question of both? Such a determination necessitates an examination of the developing lines of the Court's holdings.

*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts* points out that under the *Roth* test, each of the three elements must independently be satisfied before the work can be held obscene. The social value of the work can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness. While the elements must be examined independently of one another, this same Court established that the demand that the work be utterly without redeeming social value is subject to further stipulation.

Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance.

Such commercial exploitation is known as "pandering." Yet this particular facet is merely an element in the established standard and is not a separate and distinct test. *Ginsburg* itself enforces such an interpretation.

This evidence, in our view, was relevant in determining the ultimate question of obscenity... the circumstances of presentation and dissemination of material are equally relevant to determining

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26. 455 F.2d at 901, citing Banzhaf v. F.C.C., 405 F.2d 1082, 1101 (D.C. Cir. 1968).
27. 318 U.S. 413, 417 (1943).
28. 358 U.S. 498, 514 (1959). "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive."
29. 383 U.S. at 474.
31. Perhaps better entitled the *Roth-Memoirs* test: Whether to the average person, applying contemporary community standards (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.
32. 383 U.S. at 413.
34. 383 U.S. at 420.
whether social importance claimed . . . in the courtroom was, . . . pretense or reality. . .
. . . . [T]he fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test.\textsuperscript{55}

The Court, aware of the fact that many cases rested on the argument that the work was not \textit{utterly} without redeeming social value, engrafted this “pandering” principle onto the Roth test so as to deny such a defense to those whose primary concern was the dissemination of materials purely for prurient purposes. “Pandering” is therefore seen as a “sub-test” to the third standard of the Roth test—\textit{i.e.}, \textit{utterly} without redeeming social value.

An interpretation of this nature further elucidated the need for a determination of the question of legal obscenity by the appellate court. “Pandering” is not a pure issue of fact. It is part and parcel of the constitutional test for obscenity; therefore, it demands incorporation by the trial judge in his initial investigation as to the legal question, and a separate, independent resolution by the appellate court deciding the same issue.

\textit{Conclusions}

The question persists as to whether the Supreme Court would have to choose one standard of appellate review to the exclusion of the other. Were the Court to determine that appellate courts must examine the legal issue only, no such result would be desired or possible. Examination of the evidence’s substantiality is a fundamental function of a reviewing court. However, a dual approach by the appellate tribunals would serve an even greater purpose than merely preserving a traditional role. Should the court find that the questioned material is not obscene as a matter of law, this would be dispositive of the case and render needless any factual investigation relating to substantiality of evidence. If, however, the court should deem the material legally obscene, the defendant could secondarily be protected by a further investigation relating to substantiality. In either case the constitutional protection afforded by the first amendment is given its full consideration.

As the Court pointed out in “\textit{Memoirs},” “The Constitution forbids abridgment of ‘freedom of speech, or of the press.’ Censorship is the most notorious form of abridgment. It substitutes majority rule where minority tastes or viewpoints were to be tolerated.”\textsuperscript{36} Approaching obscenity cases as a mixed question of law and fact on all judicial levels minimizes (albeit not obliterates) the potential for such destructive censorship.

\textsuperscript{35} 383 U.S. at 470, 471. \textit{See also} United States v. Rebhuhn, 109 F.2d 512 (2d Cir. 1940).
\textsuperscript{36} 383 U.S. at 427.
As the Supreme Court of the State of Washington observed in Fine Arts Guild, Inc. v. Seattle, "... any restraint imposed upon a constitutionally protected medium of expression comes into court bearing a heavy presumption against its constitutionality." To overcome such a presumption, the State would have to demonstrate that a particular activity or medium is in each independent respect out of harmony with the Roth-Memoirs test. In its turn, each court must make its own independent judgment as to the legal obscenity of the matter as well as a determination of whether or not the State has overcome the presumption through its evidence.

This note has not attempted to analyze the merits of petitioner's case as to the concrete issues of legal and factual obscenity. It has rather examined the root problem of petitioner's claim. Perhaps the reason why some jurisdictions on the appellate level have refused to consider the legal question of obscenity is that they are either totally confused as to what standards must be applied in such an examination, or that they feel their efforts would be to no avail. Whatever their reasons, they cannot be sufficient to deny a litigant those protections he is afforded by the Constitution which the courts are sworn to uphold.

Whether this particular issue will be examined at all by the Court is a matter of pure supposition. Nevertheless, it remains as a vexing problem which needs clarification and resolution. Could it be that this time our vigil will be rewarded by an offer of some future stability in this bemuddled area of obscenity?

Brian J. Nash


Appellants were parents of children involved in the so-called "Bannockburn Plan," a program which was to provide voluntary busing of some pupils of a predominantly black elementary school in the District of Columbia to a nearly all-white school in the Maryland suburbs. Shortly after the ap-
proval of the Plan, which was to be wholly financed by the District, pro-
vision § 401(2) was inserted in the District's revenue bill then pending be-
fore Congress, providing that no appropriated funds could be used to pay for
the cost, including transportation, of elementary and secondary education
outside the District, except for handicapped or foster children.\(^1\) Appell-
ants sued to enjoin enforcement of § 401(2) on the grounds that, by in-
tent and effect, it prevented integration of the District's schools, thus vi-
olating the due process clause of the fifth amendment.\(^2\) The appellants' re-
quest for a three-judge court was denied, and their complaint was dis-
missed.\(^3\) In affirming the lower court's action, the court of appeals held that
the congressional refusal to allow funds to be used for the Plan did not in-
volve a substantial claim of a constitutional violation. The dissent, by
Judge Robinson, thought the appellants made a substantial claim on two
grounds. First, it was arguable, after inquiry into the historical context, im-
mediate objective, and ultimate effect of § 401(2), that Congress had
significantly involved itself in private racial discrimination, which, following
Reitman v. Mulkey,\(^4\) was sufficient to invalidate the provision. Secondly,
it could be contended that by placing burdens on those seeking integration
and not on handicapped and foster children, Congress had created a racial
classification, since it treated racial school problems differently from other
school or racial problems.

The appellants argued first, on the basis of the committee report and
the short time between the announcement of the Plan and the insertion of
§ 401(2), that Congress clearly intended the section specifically to eliminate
the Plan. The majority found this argument turned on the intent of Congress
and rejected the contention on the basis of the well settled rule precluding
judicial inquiry into the motives of the legislature.\(^5\) However, where racial

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1. Since all of the District's revenue is appropriated by Congress, § 401(2) pre-
cluded the use of regular funds for the Plan. However, the Plan was sustained for
2. As such, the equal protection clause of the fourteenth amendment does not ap-
ply to the District of Columbia. It is well settled, nevertheless, that equal protection
is inherent in the due process required by the fifth amendment, which does apply to
3. A suit to enjoin an act of Congress must be heard by a special three-judge
panel of the district court. 28 U.S.C. § 2282 (1970). An application for a three-
judge court can be granted only if the constitutional question involved is substantial.
Idewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962). The standard
of substantiality employed by the courts on this question is whether the claim is "obvi-
ously without merit," or such that previous Supreme Court decisions have foreclosed
the subject, so that there is "no room for the inference that the question . . . can be
the subject of controversy." Ex parte Poresky, 290 U.S. 30, 32 (1933).
5. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); McCray v. United States,
195 U.S. 27 (1904); United States v. O'Brien, 391 U.S. 367 (1968), and the cases
discrimination has been charged, some courts have examined legislative intent when the legislation is non-discriminatory on its face. In *Lee v. Nyquist*, for example, a state statute restricting the assignment of pupils for racial equality was found to be a specifically racial classification, partially on the evidence of its intent in a speech by the statute's sponsor. The *Bulluck* court was apparently unwilling to recognize the validity of this line of cases, however, not even to allow the appellants to substantiate a claim in reliance on this rule.

The second attack launched on § 401(2) contended that the effect of the provision was to thwart integration, since it admittedly would terminate the Bannockburn Plan. The court found, however, that termination of the Plan was permissible in view of the fact that appellants had no constitutional rights to interstate integration of public schools. Equal protection requires, the court held, that a state, here the District of Columbia, administer its educational programs equally, not that one state must provide educational opportunities equal to those of another state. This precise question, with reference to the District, has apparently never been faced before, although the court's view seemed well supported by the words of the fourteenth amendment and the tradition of state control over education. The problem was alluded to, however, in *Hobson v. Hansen*, which held certain practices within the District's school system to be discriminatory. Judge J. Skelly Wright noted the necessity of integrated education for all and encouraged the school system, in view of its almost all-black population, to "metropolitanize." However, no extra-territorial desegregation order was given:

> The court need not here even remotely consider what the provisions ought to be of any metropolitan school alliance; indeed, the court disavows any power to dictate those terms, or even compel the suburbs to come to the conference table.

Furthermore, courts have generally been reluctant to recognize evidence of unequal application of the law in territorial variations within a single state.

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8. The Bannockburn Plan was the only means by which District pupils, except for the handicapped and foster children excluded in § 401(2), could obtain an integrated education.
11. *See* McGowan v. Maryland, 366 U.S. 420, 427 (1961); Salsburg v. Maryland,
As the majority pointed out, the appellants were hard put to produce a case which would be a precedent for interstate equality in education. In order to accept the appellants' argument on this point, the court would have been compelled to undertake a major overhaul of equal protection law.

The appellants' final contention was that by excepting handicapped and foster children from the prohibition against supplying funds for extra-territorial education, Congress was discriminating against that class of people who sought integrated education. The majority found that § 401(2) made such a distinction, but held that it was not a racial classification, and as such needed only a "rational basis" to be constitutionally permissible. Such a rational basis was in fact found in the need to reduce the cost of education. The law as to which test applies to a legislative classification regarding education, but which may have racial overtones is not clear. Generally, the "rational basis" test is applied only to economic classifications. However, where a legislative classification concerns a suspect class, like racial minorities, or a fundamental personal right, such a classification can be justified only by a compelling state interest. More relevant to the problem here, a number of recent decisions have supported the proposition that a statute which in effect burdens a right of a racial minority is an explicit racial classification. In Hunter v. Erickson, for example, the Supreme Court struck down a city ordinance which required that any regulation of real property transactions on the basis of race, color, religion, national origin, or ancestry must be approved by a majority of electors. Because it made regulation of real property for racial reasons more difficult to enact than regulation for other purposes, the ordinance created a racial classification requiring a heavier burden of justification. The Hunter principle was applied to educational legislation in Lee v. Nyquist. In that case, a state statute which restricted the assignment of pupils for racial balance to districts where the majority of the school board was elected was found to be explicitly racial. The court held that the statute was invalid because it differentiated between the treatment of racial educational problems and other

346 U.S. 545, 551 (1954); Mathis v. North Carolina, 266 F. Supp. 841, 846 (M.D. N.C. 1967) (dictum). However, in Griffin v. County School Board, 377 U.S. 218 (1964), the Court held that the closing of all schools in the county, to avoid integration, while schools in other counties remained open, was a denial of equal protection.

16. Supra note 6.
educational matters. This rule was applied by the United States District Court for the District of Columbia in *Hobson v. Hansen,* where geographical discrepancies in school spending within the District were found to be invalid because of the discriminatory effect of such differences. On the other hand, the "rational basis" test has been applied to similar state statutes involving educational rights. For instance, in *McInnis v. Shapiro,* a state's unequal school spending according to geographical area was held not to constitute a racial classification. In choosing not to follow the *Hunter* line of cases, the *Bulluck* court did not necessarily reject the basic proposition. Section 401(2) was not an affirmative classification, nor did it burden a minority group as such, but only those within the minority group who sought integrated education. Finally, § 401(2) did not involve an unfair alteration of the governmental structure, which was an essential factor in the *Hunter* and *Lee* decisions. Nevertheless, there seemed to be sufficient lack of clarity in this area, so that a substantial claim of discrimination could have been justified based on the *Hunter* principle if the court had so desired.

It cannot be denied that the trend of school desegregation cases since *Brown v. Board of Education,* has been to expand the rights of minorities against a wider and subtler variety of impediments to integration. Although it possessed the necessary tools, the court here was not interested in remolding the law to further promote racial mixture in the public schools. Unlike so many of its predecessors, the *Bulluck* court seemed more inter-

17. Some courts have significantly extended this line of reasoning. In *Bradley v. Milliken,* 433 F.2d 897 (6th Cir. 1970), a state statute similar to the one here, prohibited the funding of a voluntary integration program within the Detroit public schools. The court held the prohibition was a violation of equal protection, without passing on whether such an integration plan was required. Thus, the holding could be interpreted to mean that whenever state action interferes with an alleged right of a minority, it is invalid, regardless of whether the minority can show it is legally entitled to the right violated. See, e.g., *Wright v. City of Brighton,* 441 F.2d 447 (5th Cir. 1971).


19. In a variety of areas, courts have held that the "compelling state interest" test must apply to an affirmative statutory classification the direct effect of which is discriminatory to the enjoyment of an important right by a racial minority. 327 F. Supp. at 861, and the cases cited therein.


21. The rational basis test has been applied to other areas where personal rights were allegedly violated by state action. *Dandridge v. Williams,* 397 U.S. 471 (1970); *James v. Valtierra,* 402 U.S. 137 (1971).


ested in drawing lines which equal protection may not pass. Concededly, its boundaries were probably built on safe ground, but nevertheless the *Bulluck* decision seems to mark a watershed, especially in regard to the District's schools, in the way in which courts approach desegregation cases, and augured a different outcome in future school suits.

*Richard Ashton*

**ADMINISTRATIVE LAW—Securities Regulation—Private Offering Exemption Does Not Apply Where Offerees Are Given Financial Statements And Intend Only To Invest—S.E.C. v. Continental Tobacco Co. of South Carolina 463 F.2d 137 (5th Cir. 1972).**

Section 4(2)\(^1\) of the Securities Act of 1933 (hereinafter the '33 Act) grants an exemption from the registration requirement of Section 5\(^2\) of the '33 Act to "... transactions by an issuer not involving any public offering." In *S.E.C. v. Continental Tobacco Co. of South Carolina*\(^3\) this exemption

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   (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
      (1) to make use of any means or instruments of transportation or communication in interstate commerce or the mails to sell such security through the use or medium of any prospectus or otherwise; or
      (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.
   (b) It shall be unlawful for any person, directly or indirectly—
      (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or
      (2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.
   (c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.
3. 463 F.2d 137 (1972).
was held not to apply to offerings made to the public even where the offerees were given financial statements by the issuer and intended not to resell but only to invest. The court defined the issue of exemption in terms of the investor's need for information concerning the issuer and the relationship existing between the two.

Prior to the June 2, 1972 decision, there existed an extensive history of litigation between the S.E.C. and Continental Tobacco. A complaint, filed by the S.E.C. in November 1967, sought to enjoin Continental Tobacco and others from engaging in acts constituting violations of the '33 Act and the Securities Exchange Act of 1934 (hereinafter the '34 Act). A preliminary injunction was issued by the federal district court the following month enjoining Continental and certain of its officers and directors from making use of any means or instruments of transportation or communication in interstate commerce to sell securities, unless and until a registration statement had been filed with the S.E.C. The court found that there was a reasonable expectation that the '33 Act would be thwarted if the injunction were not granted. After that decision, the United States District Court for the District of South Carolina approved a plan of arrangement between Continental and its creditors under chapter 11 of the Federal Bankruptcy Act. Continental also entered into a management contract with Contoba Management Corporation of Florida pursuant to an agreement that Continental elect new officers and directors to manage its affairs.

Continental began offering its common stock again in June, 1969. Pursuant to Section 20(b) of the '33 Act, the S.E.C. brought suit to permanently enjoin this second offering, together with the 1967 offering. This second offering of common stock was made to 38 persons, 35 of whom bought the stock. The common stock was not registered pursuant to the provisions of the '33 Act. Nearly all of the investors executed an agreement, in the form of an investment letter, with Continental, prior to the purchase of the common stock, which acknowledged receipt of a brochure concerning the corporation which included unaudited financial statements. There was testimony in the district court to establish that the offerees had received both written and oral information concerning the corporation, that they

4. Supra note 3.
6. Id.
7. Id.
11. 463 F.2d at 146 n.1.
12. 326 F. Supp. at 590.
had access to any additional information which they might have required, and that they had personal contacts with the officers and directors of Continental. The district court held:

The offering of securities, by the defendant, Continental, from June, 1969 to October, 1970, were transactions not involving any public offering, and are, therefore, exempt from the registration provisions of the Securities Act of 1933, as amended, . . . and; No permanent injunction shall issue against the defendant, Continental Tobacco Company of South Carolina, Inc. There is no reasonable expectation nor cognizable danger that this defendant will thwart the policies of the Securities Act of 1933, as amended, by engaging in the activities. . . .13

This decision was appealed by the S.E.C. and the circuit court, applying the "clearly erroneous" test of Rule 52(a) of the Federal Rules of Civil Procedure,14 reviewed the district court's findings of fact, and reversed, holding that the district court's findings were induced by an erroneous view of the law.15

In determining whether or not an exemption existed the circuit court relied principally on S.E.C. v. Ralston Purina.16 Ralston had offered unregistered stock to certain of its "key employees." Ralston argued that the offering was a private one because it was made only to "key employees" and that the transactions were thus exempt from the registration requirement. The Supreme Court held that:

The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions. The natural way to interpret the private offering exemption is in light of the statutory purpose. Since exempt transactions are those as to which 'there is no practical need for [the bill's] application,' the applicability of § 4(2) [sic] should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction not involving any public offering.17

Thus, the Supreme Court answered the exemption question in terms of the need of the offerees for the information which registration would disclose. The Fifth Circuit, recognizing this, said: "The ultimate test, of course, is whether the particular class of persons affected needs the protection of the Act. . . ."18 The court went further in its application of Ralston by saying

13. Id. at 592.
15. 463 F.2d at 156-57.
17. Id. at 124-25 (emphasis added).
18. 463 F.2d at 158.
that the burden of proving that the offerees did not need the protection of the '33 Act fell upon Continental. Once the Commission established its prima facie case, consisting of lack of registration statement, sale or offer, and interstate activity, then "... it became Continental's burden to prove that it was entitled to the claimed exemption, i.e., that there was no public offering of the securities and that registration was not otherwise required. ..."19 In the opinion of the Fifth Circuit, therefore Continental failed to prove that the transactions were exempt, since they were unable to show that these offerees did not "need" the protection of the '33 Act.

In addition to this basic application of the Ralston "need" test, the court relied on two previous interpretations of Ralston. In United States v. Custer Channel Wing Corporation,20 the Fourth Circuit dealt with the problem of investment letters as evidence that enough information had been received by the investors to satisfy the requirements of the '33 Act. The Court held that investment letters were not to be regarded as the basis for exemption from registration.21 And, in Hill York v. American International Franchises,22 the Fifth Circuit said that "mere disclosure of the same information as is required in the registration statement is not the alpha and the omega. ..."23 In applying these standards to Continental's use of financial statements and investment letters, the court in the instant case asserted that Continental had not shown that a "relationship [had been established] making registration unnecessary."24 The test which the court is ultimately applying is whether or not a relationship has been created between the company and the investor which would provide the investor with the information he would otherwise have in a registration statement. As stated in Custer:

Schedule A of the Securities Act ... lists 32 categories of information that should be included in a registration statement. This type of information is designed to protect the investor by furnishing him with detailed knowledge of the company and its affairs to make possible an informed investment decision. A purchaser of unregistered stock must be shown to have been in a position to acquire similar information about the issuer.25

Today, the law defining what constitutes a public offering is derived mainly from the Ralston decision and the Securities Exchange Act Release No. 4552.26 Basically, the test of a private offering exemption had been one

19. Id. at 45.
21. Id. at 679.
22. 448 F.2d 680 (5th Cir. 1971).
23. Id. at 688 n.5.
24. 463 F.2d at 58.
25. 376 F.2d at 678 (emphasis added).
of fact with emphasis placed on all surrounding circumstances which would
give the investor the same information which registration under the '33 Act
would disclose. Although Ralston might have been interpreted as allowing
exemptions in all cases where potential investors have been given the same in-
formation which registration under the '33 Act would disclose, that has not
been the case. Rather, the courts have applied strict fact-finding standards
in determining whether a private offering exemption exists. The courts have
closely analyzed a variety of factors: "... [a]part from the number of
offerees, important factors are their relationship to each other and to the is-
suer, the number of units offered and the manner of offering." Here, in
Continental, the Fifth Circuit has followed this pattern of strict adherence
to the registration requirement through a narrow definition of the private
offering exemption for the protection of the public investor.

What this decision has done, like the many others before it, is to place
the determination as to the existence of a private offering exemption in the
hands of the trier of fact. It also places a substantial burden of proof upon
the issuing company which now must establish exactly what information has
been given to investors and its sufficiency in terms of the Ralston "need"
test.

The private offering exemption, as interpreted by the courts, has been con-
sidered by some to be a hindrance to the general financing of small busi-
nesses. In view of this, the holding in Continental may cause this hindrance
to increase to the extent that it narrows the grounds upon which a private of-
fering exemption may be granted. Henceforth, the "dark clouds" overshad-
ing the small business may indeed be a little darker. Furthermore, it has

The Commission today announced the issuance of a statement regarding the
availability of the exemption from the registration requirements of Section 5
of the Securities Act of 1933 afforded by the second clause of Section 4(1)
[(2)] of the Act for "transactions by an issuer not involving any public of-
fering," the so-called "private offering exemption." Traditionally, the second
clause of Section 4(1) has been regarded as providing an exemption from regis-
tration for bank loans, private placements of securities with institutions and
the promotion of a business venture by a few closely related persons. How-
ever, an increasing tendency to rely upon the exemption for offerings of
 speculative issues to unrelated and uninformed persons prompts this statement
to point out the limitations on its availability.

Whether a transaction is one not involving any public offering is essentially a ques-
tion of fact and necessitates a consideration of all surrounding circumstances, in-
cluding such factors as the relationship between the offerees and the issuer, the nature,
scope, size, type and manner of the offering (emphasis added).

29. Loss, SECURITIES TRADE REGULATION 654 (1951).
30. Note, Dark Clouds in a Blue Sky: An Analysis of the Limited Offering
31. Id.
been pointed out that since the late 1950's there have been "... public financings of ventures that had no semblance of either an earnings or operating history." After the initial run-ups of these ventures, so-called "hot issues," many of them have failed. With proper financing, a significant number of them might have succeeded. Specifically, "going private before going public might have given them a financial track record and a firm foundation from which to move forward in not only a receptive but also in a lasting public market." Presumably, because of the difficulties encountered in gaining the private exemption, these companies went public before they should have, and consequently failed. By narrowing the private offering exemption, Continental has limited the opportunities for small businesses to receive the benefits of public financing without its drawbacks.

Brian P. Fitzgerald


Respondent Biswell was a pawn shop operator. In 1970 a federal Treasury agent paid a routine visit to the shop, identified himself, inspected respondent's books, and requested entry into a locked gun storeroom. Respondent asked if the agent had a search warrant. The investigator replied that he did not, but showed him a copy of § 923(g) of the federal Gun Control Act of 1968 which authorized such inspections. After reading the section respondent replied, "Well, that's what it says so I guess it's okay," and unlocked the storeroom. The agent found and seized two sawed-off rifles which respondent was not licensed to handle. He was indicted and convicted in federal district court of dealing in firearms without having paid

33. Id. at 503.

1. 18 U.S.C. § 923(g) (1970) authorizes official entry during business hours into "the premises (including places of storage) of any firearms or ammunition ... dealer ... for the purpose of inspecting or examining (1) any records or documents required to be kept ... and (2) any firearms or ammunition kept or stored by such ... dealer ... at such premises. ..."
the special occupational tax. The Court of Appeals reversed, holding that § 923(g) was unconstitutional under the fourth amendment because it authorized a search of business premises without either a warrant or the owner's valid consent. The illegally seized rifles were ruled inadmissible as evidence.

After granting certiorari, the United States Supreme Court in an 8 to 1 decision held reversed: a warrantless search of the commercial premises of a licensed firearms dealer during business hours under an inspection procedure authorized by the Gun Control Act of 1968, and the seizure of unlicensed firearms, is not violative of the fourth amendment. Mr. Justice Douglas filed a dissenting opinion reasoning that under the test established in Bumper v. North Carolina, respondent's consent to entry was forced. He argued that since the gun control law does not include forcible entry without a warrant, the seizure of rifles was unconstitutional and the evidence inadmissible in court.

The basic function of the fourth amendment is to protect personal privacy. There is "one governing principle" which has consistently been followed in fourth amendment cases: "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." All well-recognized exceptions entail an emergency situation except govern-


8. U.S. Const. amend. IV provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.


ment administrative inspections. That particular exemption history spans 200 topsy-turvy, inconsistent years of argument as to whether the inspections and their penalties are civil or criminal, and whether they are covered by the fourth amendment at all.\footnote{11}{Sonnenreich & Pinco, The Inspector Knocks: Administrative Inspection Warrants Under an Expanded Fourth Amendment, 24 Sw. L.J. 420 (1970) [hereinafter cited as Sonnenreich & Pinco].}

The important decisional law of search and seizure began in 1886 with \textit{Boyd v. United States},\footnote{12}{116 U.S. 616 (1886).} which involved a statute requiring businessmen to produce evidence which might be used against them for revenue violations. The \textit{Boyd} decision revealed an interplay between the fourth and fifth amendments. The Court reasoned that when the very thing forbidden by the fifth amendment—compulsory self-incrimination—was the object of the search and seizure, then the search and seizure was unreasonable under the fourth amendment. Since the fifth amendment applied only to criminal cases, by extrapolation the fourth amendment applied only to criminal searches and seizures. Therefore the civil administrative inspection was exempted.

Over the next three quarters of a century, that viewpoint began to broaden.\footnote{13}{Sonnenreich & Pinco 424.} In 1949 the United States Court of Appeals for the District of Columbia held that the fourth amendment applied both to civil and criminal proceedings.\footnote{14}{District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), aff'd on other grounds, 339 U.S. 1 (1950). The case involved a warrantless health inspection. It was the first case to expressly apply the fourth amendment to administrative inspections. See Sonnenreich & Pinco 421 n.16.} The court argued that “\[t\]o say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity.”\footnote{15}{178 F.2d at 17.} Such broadmindedness abruptly ceased in 1959 with the Supreme Court opinion of \textit{Frank v. Maryland},\footnote{16}{359 U.S. 360 (1959). \textit{Frank} involved a warrantless health inspection of a home.} which distinguished between criminal searches covered by the fourth amendment, and administrative searches which were not. The Court stated that municipal inspections “touch at most upon the periphery of the important interests safeguarded by the [fourth as applied through the] Fourteenth Amendment’s protection against official intrusion . . . .”\footnote{17}{Id. at 367.} Accordingly, there was no compelling reason for a warrant.

Following \textit{Frank}, developments changed the Court’s attitude. First, the police, in collusion with health inspectors, used the warrantless search to
look for evidence of another crime.\footnote{18} Second, there was a change in the Court’s makeup. The more progressive Justices White and Fortas replaced Justices Whittaker and Frankfurter. So it was no surprise when in 1967 the Court handed down two decisions expressly overruling the Frank v. Maryland doctrine.\footnote{19}

Camara v. Municipal Court\footnote{20} involved a routine warrantless health inspection of an apartment house. The Court re-examined and overruled the Frank distinction that the fourth amendment protected only criminal searches and seizures. Camara demands that a municipal inspector obtain valid consent from a private citizen before conducting a warrantless search,\footnote{21} or in the alternative have an administrative search warrant carefully limiting the areas to be searched. See v. City of Seattle,\footnote{22} argued with Camara and decided the same day, extended the Camara doctrine to business areas: “. . . administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.”\footnote{23} The Court thoughtfully added it did not mean to imply that these requirements were necessary to “such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.”\footnote{24}

In 1969 and 1970, the Court again changed character when Justices Burger and Blackmun replaced Justices Warren and Fortas.\footnote{25} This new Court amplified the last paragraph loophole in See through its decision in Colonnade Catering Corp. v. United States.\footnote{26} Colonnade involved a forcible\footnote{27} warrantless administrative inspection of the storeroom of a liquor dis-

\begin{footnotes}
\footnotetext[19]{19. Sonnenreich & Pinco 428.}
\footnotetext[20]{20. 387 U.S. 523 (1967).}
\footnotetext[21]{21. Valid consent consists of knowledge of the right to refuse consent, and a waiver of that right. For criteria necessary for constitutional waiver of consent, see Bumper v. North Carolina, 391 U.S. 543 (1968). [See also Amos v. United States, 255 U.S. 313 (1921); Johnson v. Zerbst, 304 U.S. 458 (1938); Zap v. United States, 328 U.S. 624 (1946); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).]}
\footnotetext[22]{22. 387 U.S. 541 (1967). The case involved an inspector’s attempt to enter a locked warehouse not open to the public.}
\footnotetext[23]{23. Id. at 545.}
\footnotetext[24]{24. Id. at 546.}
\footnotetext[25]{25. The conservative makeup was completed when Justices Rehnquist and Powell took the Bench in 1972, replacing Justices Harlan and Black.}
\footnotetext[26]{26. 397 U.S. 72 (1970).}
\footnotetext[27]{27. Colonnade involved a “forcible entry” in the sense of violent, physical force: a door was broken open. Bumper involved a “forcible entry” in the sense of coerced consent: permission to enter was granted only because of a show of supposed lawful authority to do so. This distinction of “forcible” has been laid to rest in Biswell, which rejected the Bumper analysis when officers used a valid statute to gain entry.}
\end{footnotes}
tributor. The liquor law authorized only a fine for failure to consent to inspection. The Court held that absent specific federal legislation or exceptional circumstances, forced warrantless administrative inspections violated the fourth amendment. However, the Court made it clear that if Congress had spelled out procedures other than a fine—compliance procedures to carry out the liquor laws—the fourth amendment's requirement of 'reasonableness' would be satisfied. 28

Colonnade displayed the Court's direction; Biswell is its logical extension. 29 Unlike Colonnade where inspectors knocked down the door, Biswell involves no violent show of force, merely a forceful law. When the agent asked to inspect the storeroom, he was within the procedure defined by the gun control statute, "carefully limited in time, place and scope." 30 A fortiori no consent was necessary. Furthermore, such carefully limited inspections impose only limited threats to the privacy of a dealer, who accepts a federal license knowing his records and inventories will be inspected. 31 Although firearms control is "not as deeply rooted in history" 32 as liquor control,

close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist . . . in regulating the firearms traffic . . . . It assures that weapons are distributed . . . in a traceable manner and makes possible the prevention of sales to undesirable customers . . . . If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential . . . . The prerequisite of a warrant could easily frustrate inspection . . . [and] the protections afforded by a warrant would be negligible . . . . 33

It is disturbing that this Court has withdrawn from Camara and See and found another exemption to the warrant requirement. First, establishing the necessity for inspections does not prove they are necessary without a warrant. Viable alternatives to the warrantless search are available. The Court in Camara suggested one alternative: make more flexible the probable cause standard for obtaining a search warrant, so that the government can effec-

28. 397 U.S. at 77.
29. It is ironic that the conservative Biswell opinion is written by the same Justice White who championed a liberal fourth amendment application in Camara and See.
31. "Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. 18 U.S.C. § 921(a)(19). The dealer is not left to wonder about the purposes of the inspector or the limits of his task." Id. at 316.
32. Id. at 315.
tively enforce its policies while protecting the private interests of the citizen. Second, the cases before Biswell stress that an exception to the warrant requirement should only be granted in emergency situations. Granting that weapons require close scrutiny, weapons movement can be forestalled by any number of methods, the simplest being to leave a guard at the door. Thus, a warrant requirement need not “frustrate inspection.” Further, it is not likely that many people would refuse inspection in the first place; to do so would only postpone, not preclude, the inevitable: the inspector would return with a warrant, and the inspection would go on. Finally, the protections a warrant gives are hardly negligible. Perhaps a warrant procedure is less convenient, but the Court has held that convenience is not sufficient reason for by-passing the constitutional requirement of a warrant based on probable cause.

Biswell leaves several questions unanswered. The evils of the search allowed here go beyond those envisioned by the framers of the fourth amendment. Even the writs of assistance did not go this far, but only authorized examination of premises to seize goods on which duty had not been paid. Here the government can search not only to seize, but also to obtain evidence to use in criminal proceedings. Is the inspector required to give Miranda warnings once he has found criminal violations of the statute? When does a “search” stop and an “inventory” begin? The decision does not suggest that the fruits of the search which go beyond the items regulated by the federal Gun Control Act of 1968 will not be used as evidence in other federal or state proceedings. It is clear under the “plain view doctrine” that “objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.” Contrary to the Court’s opinion, such a

34. 387 U.S. at 538.
35. See note 10 supra.
36. The constitutional policy against discretionary searches by government officials has been reaffirmed many times by the Supreme Court. In McDonald v. United States, 335 U.S. 451, 455 (1948), the Court stated:
   The presence of a search warrant serves a high function. Absent some emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police . . . . This was done . . . so that an objective mind might weigh the need to invade that privacy in order to enforce the law.
37. 333 U.S. at 15.
38. 116 U.S. at 623.
41. Id.
42. 406 U.S. at 317.
doctrines read together with the gun control law presents an open invitation for abuse.\textsuperscript{43} Treasury agents who need neither warrant nor probable cause to initiate a search may work in collusion with local police to search for narcotics, stolen property or any other incriminating evidence—all in the name of searching for illegal weapons. Control would be difficult, proof of collusion almost impossible, and the opportunity for harassment obvious.

Despite these anomalies, the practical effect of \textit{Biswell} is clear: a dealer who with notice enters a closely controlled industry regulated by a precise statute defining time, place and scope of search may expect regular, unannounced invasions of his business privacy. Although the Court can only interpret what Congress enacts as law, it is how they reason which gives the law its force. With \textit{Biswell} the change back to a conservative Court has returned us full cycle to the old \textit{Boyd-Frank} rationale. It is a sad day for businessmen when constitutional rights to privacy depend on such a vacillating interpretation of the fourth amendment.

\textit{Eileen Dribin}

\textbf{TORTS—Negligent Design and Strict Liability—Jury Allowed To Decide On Manufacturer’s Liability to A Bystander. Passwaters v. General Motors Corp. 454 F.2d 1270 (8th Cir. 1972).}

Plaintiff's daughter suffered a severe laceration of her left calf while riding as a passenger on a motorcycle which collided with a 1964 Buick Skylark. In passing the motorcycle, the right rear of the automobile struck the left handlebar, causing the plaintiff's leg to strike the unshielded spinning blades of the hubcap on the right rear wheel. Plaintiff\textsuperscript{1} sued the automobile manufacturer on the theories of negligent design and strict liability. At the close of all the evidence, a United States District Court\textsuperscript{2} directed a verdict for the defendant who had contended that the accident between the automobile and the motorcycle constituted an intervening cause, and that the subsequent injury to the plaintiff's daughter was beyond the limits of a manufacturer's

\textsuperscript{43} See note 18 \textit{supra}.

\textsuperscript{1} Suit was brought for Susan Passwaters, the injured passenger, by her father and next friend Donald Passwaters.

\textsuperscript{2} Passwaters v. General Motors Corp., Civil No. 20072 (N.D. Iowa Oct. 28, 1969). To date the decision has not appeared in the reporter series.
foreseeability. The Court of Appeals for the Eighth Circuit held, judgment reversed and remanded for new trial. The court ruled that the jury could decide the issues of negligent design and strict liability.

Two ornamental blades protruded approximately three inches from the wheel cover, but the blades' tips were recessed within the car's body by two and one-eighth inches. The court agreed with the lower tribunal that plaintiff had not established to a reasonable degree of certainty that the protruding blades had caused his daughter's injury, but it noted that in Iowa the jury can determine if circumstantial evidence, such as the blood and flesh on the hubcap and the type of injury sustained, meets the test of certainty. In keeping with one of its prior decisions, the court also recognized the Iowa rule that the jury will decide whether an intervening cause, if found, has insulated the defendant from liability.

On the question of negligent design, the court adhered to a broad concept of foreseeability as expressed in the Restatement of Torts, which holds a manufacturer liable to those "... whom he should expect ... to be endangered by [the product's] probable use ... ." The court held that its earlier ruling in *Schneider v. Chrysler Motors Corp.* did not control because the plaintiff therein, who had injured his eye on the sharp corner of an opened vent window glass, had not acted in a manner reasonably foreseeable by the manufacturer. Although the court recognized that a manufacturer might not readily anticipate the manner and type of injury in the instant case, it found that the unnecessary and unshielded blades on the hubcap "... created a high risk of foreseeable harm to the general public." The court went on to say that a manufacturer has a duty to make a reasonable effort to design an automobile free from unnecessary danger.

When the district court heard the case in 1969, Iowa had not yet embraced the concept of strict liability. However, by 1972 the Court of Appeals had the benefit of the Iowa Supreme Court's ruling in *Hawkeye Security Ins. Co. v. Ford Motor Co.*, which held that a plaintiff could plead

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3. Plaintiff also introduced evidence of the hubcap's detachment from the car, and expert testimony that in a collision between a car and a motorcycle's handlebar, the rear of the motorcycle would have a tendency to swing into the rear of the car.
6. *Id.* at 336.
7. 401 F.2d 549 (8th Cir. 1968).
9. The court cited a series of federal and state cases, most notably Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), which granted relief to plaintiff who suffered head injuries from the excessive rearward displacement of the steering column after a head on collision which had not been caused by the steering design.
strict liability against a truck manufacturer whose allegedly defective brakes caused the collision with a farm tractor. Hawkeye had defended the truck driver in the suit by the injured farmer, but settled out of court and then brought suit against Ford. The Iowa court had allowed Hawkeye to sue because the insurance company had assumed the subrogated rights of the injured farmer. Since the plaintiff in Passwaters was a "bystander," the fact patterns of the two cases did not coincide, and therefore, without a clearly delineated Iowa decision on the plaintiff's status, the court had to predict how the Iowa Supreme Court would rule on the issue. In adopting strict liability, the Iowa court looked for guidance to other jurisdictions. The Court of Appeals noted that these jurisdictions, namely, California, New Jersey and a federal court sitting in Illinois, had later included "bystanders" under the cover of strict liability. The court cited the application of the foreseeability test to bystanders in Lamendola v. Mizell which held that a manufacturer, who annually placed thousands of cars for use on countless highways, can reasonably foresee pedestrians and other travelers as potential victims of automobile defects.

Strict liability, which has achieved increased acceptance as a cause of action, does not require the plaintiff to prove that the defendant failed to exercise reasonable care. The courts have jettisoned that requirement on the basis of a policy decision to place the responsibility on the shoulders of the party with the ability to pay. The action, which evolved from the unsatisfactory nature of the warranty theory, continues, however, to employ the measure of proper standards of care. Although Henningsen v. Bloomfield

11. RESTATEMENT (SECOND) OF TORTS, § 402A (1965) in a caveat states that: "The Institute expresses no opinion as to whether the rules stated in the Section may not apply (1) to persons other than users and consumers." The comments on the caveat state that strict liability arose in large part because of the social pressure, but that same pressure has not appeared "... for the protection of casual strangers." Id. at 357.


13. Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971). The court said that both manufacturer and seller could be held liable under a strict liability action when a motorist whose new car had a defective brake pedal struck plaintiff's car.

14. White v. Jeffrey Galion, Inc., 326 F. Supp. 751 (E.D. Ill. 1971). The court allowed a mine employee to recover from the manufacturer on strict liability for injuries sustained when a defective steering valve sent a ram car out of control, causing a high pressure hose to strike plaintiff.


17. Id.


Motors, Inc.\textsuperscript{20} was the death knell for the privity "citadel," the contract nature of warranty presented recovery difficulties when the parties had not contracted, especially in view of the Uniform Commercial Code's contemplation of a contract between a seller and a buyer.\textsuperscript{21} The Restatement\textsuperscript{22} provided a major thrust in the adoption of strict liability by subjecting the manufacturer to responsibility for harm to an ultimate user even though the manufacturer "... exercised all possible care in the preparation and sale of his product..."\textsuperscript{23} Although the new doctrine provided relief for the injured purchaser, or for those without privity (as in the case of food),\textsuperscript{24} it had not provided any remedy for the innocent bystander.

California began to supply the bystander with his needed remedy in Greenman v. Yuba Power Products, Inc.,\textsuperscript{25} written by Chief Justice Traynor of the California Supreme Court. In Elmore v. American Motors Corp.,\textsuperscript{26} that court amplified the Greenman holding with the persuasive language that bystanders should receive "... greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable," because the bystanders do not have the opportunity to either inspect or select the product.\textsuperscript{27} Other states such as Arizona in Caruth v. Mariani\textsuperscript{28} have followed the lead of California. In Caruth, the Arizona Supreme Court refused to extend strict liability to bystanders. The plaintiff had suffered injuries when a motorist's brakes failed, thereby striking his car in the rear. However, on rehearing\textsuperscript{29} the court reversed its earlier ruling and found that the doctrine of strict liability applied to a bystander as against both the manufacturer and the retailer. At the first hearing of the case, the court expressed reluctance at making a decision which could eventually extend liability to the retail-middleman. However, the new court relied on the Restatement\textsuperscript{30} which had already included the retailer in the strict liability chain. The court\textsuperscript{31} adopted the public policy stand of

\textsuperscript{20} 32 N.J. 358, 161 A.2d 69 (1960).
\textsuperscript{21} Prosser, supra note 19, at 655-56.
\textsuperscript{22} RESTATEMENT (SECOND) OF TORTS § 402A (1965).
\textsuperscript{23} Id. at 348. Comment f indicates that the Section "applies to any manufacturer... or retail dealer." Id. at 350.
\textsuperscript{24} Prosser, The Assault Upon the Citadel, 69 YALE L.J. 1099, 1110 (1960).
\textsuperscript{25} 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
\textsuperscript{26} 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).
\textsuperscript{27} 70 Cal. 2d at 584, 451 P.2d at 89, 75 Cal. Rptr. at 657.
\textsuperscript{29} The court granted a rehearing because of "... some cogent reason for so doing," not because of the reconstitution of the members. 463 P.2d at 84.
\textsuperscript{30} RESTATEMENT (SECOND) OF TORTS § 402A (1965).
\textsuperscript{31} The court followed other state courts in their reliance on the Restatement and the decisions in other jurisdictions. See e.g., Hawkeye-Security Ins. Co. v. Ford
protecting "... 'injured persons' and not just 'users and consumers,'" and passing the responsibility to those "... in the chain of marketing [who] can distribute the risk between themselves by means of insurance and indemnity agreements."[32]

The application of the strict liability doctrine to automobile cases represents a necessary response to the needs of a highly mobile society. The action removes unnecessary legal barriers such as warranty and privity so that a bystander can avoid being victimized by defective design or manufacture. As the court in Elmore suggests, the policy consideration of holding a manufacturer responsible for the harm caused by its product is properly placed because a manufacturer has the greatest capability of preventing harm. Furthermore, the ability to achieve safety does not end with the manufacturer; it also includes the retailer.[33] By holding both parties strictly liable for defects in either design or manufacture, the law provides an incentive for both safety and allocation of cost.[34] As more states[35] hold the two parties strictly liable, perhaps the emphasis on automotive design and marketing will turn to a more proper objective, namely the production of cars that have adequate safety characteristics in both style and operational design. Thus, rigorous pursuit of strict liability could direct the attention of automobile manufacturers away from annual style changes and toward the improvement of one basic style through mechanical and design changes incorporating new safety features.[36]

The Passwaters court declared that strict liability arose from the "... policy considerations of spreading the risk to ... the party financially best able to afford the cost of injuries."[37] The ultimate effect of such decisions

32. 463 P.2d at 86-87.
33. In Caruth the court cited an example to underline the inequity of privity and warranty. Suppose A buys a car and allows his neighbor B to take a "test drive." Assuming no negligence on B's part, B, due to a defective steering mechanism, strikes and injures individual C walking on the sidewalk. Unless strict liability extends to a bystander, only A or B could sue the manufacturer or the retailer. C would be left without a remedy.
35. Id.
36. Prosser, supra note 19, at 663. As of 1971 the jurisdictions adopting strict liability for the bystander constituted a "slight majority."
37. Under present automotive design methods, it would appear that safety features are sometimes sacrificed in the design of a new model in order to achieve a more appealing stylistic appearance. By retaining one basic design and constantly improving on it, the manufacturers could produce a much safer vehicle.
38. 454 F.2d at 1277.
could transform the manufacturer into an insuror or guarantor. As the Elmore court stated, another policy consideration is the incentive for safety. However, if the courts eliminate the participation of fault and place the responsibility only on the manufacturer's shoulders, will not the safety objective be impaired? In the instant case, the initial collision between the car and the motorcycle brought the passenger into contact with the protruding hubcap blades. Admittedly, the blades were unnecessary and foreseeably dangerous. However, one could argue that the design of the motorcycle itself contributed to the accident and the severity of the injury. As the blades were exposed by ill-considered design, so the passenger's leg was exposed by the motorcycle's design. Also, the state contributed to the accident by allowing passengers on motorcycles. The driver faces enough hazards; the passenger could be the nation's most vulnerable rider. Finally, one could attempt to extend partial responsibility to the car owner for his failure to recognize the danger of the hubcap, but since he does not have either the manufacturer's time or facilities to detect mechanical or design defects, such an extension of responsibility would be both unreasonable and impractical.

The comments to the Restatement assert that "... contributory negligence which consists in voluntary and unreasonable proceeding to encounter a known danger," more frequently termed assumption of risk, is a valid defense to strict liability. Given the accepted current transportation methods and rules of law, the Restatement would not apply to the passenger, the motorcycle, the state or the car owner.

The facts in the instant case warrant both recovery for the bystander and strict liability for the manufacturer who can best prevent injury and who has the ability to pay. Hopefully, the courts, now that they have included the bystander, will not transform strict liability into an absolute liability, but will rigorously demand proof of both foreseeability and a "... defective condition [that is] unreasonably dangerous." The courts, although not required to follow the Restatement, have by necessity exceeded its limits in extending coverage to a bystander and in employing the foreseeability standard which borrows a measurement device from the negligent design law. Now that the courts have defined the boundaries, all parties should recognize the demands placed upon them.

Terrence M. Finn

40. Id. at 356.
41. Id. at 347.
LABOR LAW: Airline Carrier's Hot Cargo Agreement Held Within N.L.R.B. Jurisdiction—International Assn. of Machinists (Lufthansa German Airlines). 1

The National Labor Relations Board has recently held for the first time that it is empowered under Section 8(e) of the National Labor Relations Act 2 to determine the lawfulness of a collective bargaining clause executed by a union and a company, both subject to the Railway Labor Act. 3

Lufthansa German Airlines 4, a carrier by air within the meaning of the R.L.A. and therefore not an "employer" within the meaning of Section 2(2) of the N.L.R.A., 5 negotiated a collective bargaining agreement with the International Association of Machinists (IAM), the exclusive bargaining representative of its catering employees. This agreement provided that Lufthansa would subcontract its catering work at the Los Angeles International Airport and Chicago's O'Hare Airport to a union catering firm. 6 In effect, the agreement required Lufthansa to cease doing business with Marriott In-Flite Services, a non-union subcontractor who had been performing Lufthansa's catering work at those two locations. Marriott filed unfair labor practice charges against the Union and Lufthansa alleging a violation of Section 8(e) of the Act. The Union and Lufthansa, while not seriously contesting that the agreement otherwise violated Section 8(e), argued that the N.L.R.B. has no jurisdiction over them, as they are both subject to the R.L.A. The N.L.R.B. disagreed, holding that it "is empowered under Section 8(e) of the Act to determine the lawfulness of the instant agreement executed by IAM, a statutory labor organization, and Lufthansa, an airline within Section 2(1)'s definition of 'any person.'" 7

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2. 29 U.S.C. §§ 151 (1970) [hereinafter N.L.R.A. or the Act]. Section 8(e), added to the Act in 1959, provides:
   It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .
4. Hereinafter Lufthansa or the Company.
5. Section 2(2) provides:
The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any person subject to the Railway Labor Act. . . .
6. This firm's employees, while unionized, are not represented by the IAM.
7. International Ass'n of Machinists and Aerospace Workers, AFL-CIO (Lufthansa
Member Fanning dissented, arguing that Congress did not intend that agreements between an air carrier and the representative of its employees should be regulated by the N.L.R.A.\textsuperscript{8}

Section 8(e) was added to the N.L.R.A. by the 1959 amendments, in response to Congress's concern over certain loopholes that had developed in the Act's secondary boycott provisions.\textsuperscript{9} Prior to 1959, Section 8(b)(4)(A) (now Section 8(b)(4)(B)) made it unfair labor practice for a union to induce "employees of any employer" to engage in certain prohibited conduct when an object is to force any employer or other person to cease doing business with some third party. In \textit{Local 1976, Carpenters [Sand Door] v. N.L.R.B.},\textsuperscript{10} the Supreme Court held that while an employer's voluntary agreement to a so-called "hot cargo" clause—one providing that his employees shall not be required to handle nonunion goods—was not a defense to a charge of a violation of Section 8(b)(4)(A), its mere execution and voluntary observance by an employer does not constitute such a violation. A second "loophole" concerned the meaning of the term "employees of any employer". In \textit{International Rice Milling Co., Inc.},\textsuperscript{11} the Board found it was not unlawful for a Teamsters' local to induce the employees of a railroad to cease handling goods of certain rice mills the Teamsters had struck. The Board reasoned that Section 8(b)(4)(A) only prohibited the inducement of employees of statutory employers, not employees of railroads. The Fifth Circuit Court of Appeals disagreed, holding that the words "any employer" embraced the "class of employers as a whole, and not merely those within the statutory definition of 'employer'".\textsuperscript{12} The Board persisted in its reading of Section 8(b)(4)(A), but its decisions on the matter were not enforced by the Courts of Appeal.\textsuperscript{13} In 1959, Congress responded to these "loopholes" by adding Section 8(e) to the Act and by amending Section 8(b)(4).\textsuperscript{14} Since the 1959 amendments, there has been no Board or

\textsuperscript{8} Petition for Review was filed by the IAM (9th Cir.) on June 16, 1972.
\textsuperscript{10} 357 U.S. 93 (1958).
\textsuperscript{11} 84 NLRB 360 (1949).
\textsuperscript{12} International Rice Milling Co., Inc. v. N.L.R.B., 183 F.2d 21, 25 (5th Cir. 1950), rev'd on other grounds, 341 U.S. 665 (1951).
\textsuperscript{13} See, e.g., Great Northern Ry. Co. v. N.L.R.B., 272 F.2d 741 (9th Cir. 1959); W.T. Smith Lumber Co. v. N.L.R.B, 246 F.2d 129 (5th Cir. 1957).
\textsuperscript{14} Section 8(b)(4) now prohibits a labor organization "(i) . . . to induce . . . any individual employed by any person engaged in commerce . . . to engage in a strike. . ."
court decision interpreting the words "any employer" in Section 8(e), until the Board's decision in the instant case. 15

The validity of the Board's decision here depends on whether it comports with the congressional intent in enacting the 1959 amendments. While the Board's reading of the term "any employer" in Section 8(e) conflicts with the statutory definition of "employer" in Section 2(2) of the Act,16 it is well-established that "... identical words may be used in the same statute ... with quite different meanings. And where they are, it is the duty of the courts to give words 'the meaning which the legislature intended they should have in each instance.' Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)." 17 Thus, the legislative history of the 1959 amendments must be evaluated to determine the meaning of the term "any employer" in Section 8(e).

The relevant amendments to Section 8(b)(4) and the addition of Section 8(e) had their genesis in H.R. 840018 that passed the House and was referred to conference committee to be considered with S. 1555,19 a conflicting Senate Bill. H.R. 8400 included Section 8(e), with language similar to that found in the present clause,20 and included among the objects pro-

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15. In 1969 the Supreme Court was presented with an issue relevant to the Board's Lufthansa decision. In Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), several railway unions composed overwhelmingly of railroad employees (93-98% picketed a terminal owned by several railroads in furtherance of a labor dispute with the Florida East Coast Railway. The Supreme Court found this was a "railway labor dispute pure and simple" and held that "when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act in a dispute with carriers subject to the Railway Labor Act, the organizations must be deemed, pro tanto, exempt from the National Labor Relations Act." (394 U.S. at 376-377)

16. See note 5, supra.
19. Id.
20. The Committee Bill (H.R. 8342, 86th Cong., 1st Sess. (1959) ) made no relevant changes in Section 8(b)(4) but adopted a provision from S. 1555 that made it an unfair labor practice for any labor organization and any employer who is a motor carrier to enter into a hot cargo agreement. (I Leg. Hist. 754-755). The House rejected H.R. 8342 and adopted Congressman Landrum's substitute bill H.R. 8400. In
hibited by Section 8(b)(4)(B) "forcing or requiring any person . . . to cease, or to agree to cease, doing business with any other person. . . ."21

Thus, as amended by H.R. 8400, 8(b)(4) would have prohibited the union from coercing Lufthansa to agree to an 8(e) agreement. The Act as reported out by the conference committee closely paralleled H.R. 8400, but and "forcing or requiring any employer . . . to enter into any agreement the language "or agree to cease" was deleted from Section 8(b)(4)(B) which is prohibited by Section 8(e)" was added to 8(b)(4)(A). Regarding this change, the House Conference Report stated:

[T]he phrase 'or agree to cease' was deleted from Section 8(b)(4) (B) because the committee of conference concluded that the restrictions imposed by such language were included in the other provisions dealing with prohibitions against entering into "hot cargo" agreements, and therefore their retention in Section 8(b) (4)(B) would constitute a duplication of language . . . .22

It would therefore appear that 8(b)(4)(A) was intended to prohibit coercion of any person to enter into an agreement, whereby such person agrees to cease doing business with any other person. But, Section 8(b)(4)(A) speaks in terms of agreements "prohibited by Section 8(e)." Thus only when "any employer" in Section 8(e) is viewed as including employers as a class, can Section 8(b)(4)(A) be read to prohibit coercion to force "any person" to agree to cease doing business with any other person, as clearly would have been the law had the "agree to cease" language been retained in Section 8(b)(4)(B). Accordingly, the Board's reading of the term "any employer" in Section 8(e) to mean employers as a class appears to comport with the legislative history of the 1959 amendments. Moreover, considering the Congress's desire to close loopholes, it would be unreasonable to assume that in 1959 Congress intended to create a new loophole as apparently urged by Lufthansa and the IAM. As the Board stated in Ohio Valley Carpenters District Council:

. . . The validity of a restrictive agreement challenged under

explaining the substitute hot cargo language which was not limited to agreements with motor carriers, Congressman Landrum stated:

The committee bill would deal with this problem only in the very narrow way of proscribing the formal execution of 'hot cargo' contracts with those employers subject to the Interstate Commerce Act, part II. There of course are thousands of employers not covered by such provisions . . . . By not prohibiting the others, . . . the committee bill would indirectly sanction, if indeed not approve, their execution. I submit if such contracts are bad in one segment of our economy, they are undesirable in all segments. II Legislative History of the Labor-Management Reporting & Disclosure Act of 1959 at 1518.

[Hereinafter II LEG. HIST.]

21. II LEG. HIST. 1700.

22. I LEG. HIST. 942 (emphasis added).
8(e) must be considered in terms of whether that agreement, if enforced by prohibited means, would result in an unfair labor practice under Section 8(b)(4)(B). Clearly there is little point and no logic in declaring an agreement lawful under Section 8(e), but in finding its enforcement condemned under Section 8(b)(4)(B) . . . .23

As noted above, the legislative history supports the Board's reading of Section 8(e). In addition, this reading avoids an illogical situation similar to that which existed after Local 1976, Carpenters v. N.L.R.B. [Sand Door]. The final question is, however, whether the Board's decision infringes upon the jurisdiction of the R.L.A. A close reading of Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.24 sheds some light, for there the rationale of the Court's decision was that disputes touching a railroad's (and presumably airline's) employees' terms and conditions of employment should be regulated by the R.L.A. In the instant case, though, Lufthansa's employees' terms and conditions of employment are not affected by Lufthansa's agreement to cease doing business with Marriott. Thus, the rationale of deferring to the R.L.A. would not apply when a carrier subject to the R.L.A. enters into a "hot cargo" agreement directed at a statutory employer. In sum, it would appear the Board's decision is logical, conforms to the legislative history of the 1959 amendments, and honors the respective jurisdictions of the R.L.A. and the N.L.R.A.

Miriam Hartley