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# Criminal Law—Constitutional Law: The Applicability of General Public Lewdness Statutes to Live Theatrical Performances

# CASE COMMENTS

CONSTITUTIONAL LAW—CHARITABLE TRUSTS: *Supreme Court Rejects Applicability of State Action to a Discriminatory Charitable Trust.*

## INTRODUCTION

In *Evans v. Abney*[1] the Supreme Court of the United States affirmed a decision rendered by the Supreme Court of Georgia[2] that certain land devised through a testamentary trust to Macon, Georgia, for the unconstitutional purpose of providing a public park for white persons only should revert to the testator's heirs.

The litigation began in 1963 when members of the park's Board of Managers[3] brought an equitable petition in a state court against the city of Macon, alleging that it had violated the provisions of the trust by admitting blacks into the park.[4] The facts are not in dispute. In 1911, Augustus O. Bacon, a United States Senator, devised to the Mayor and Council of the city of Macon a tract of land (Baconsfield) to be used as a park and pleasure ground by white people only.[5] The city of Macon was designated as trustee, subject to the control of the Board of Managers. The city enforced segregation for some years but then admitted blacks, taking the position that it could not constitutionally maintain a segregated park.[6]

After the Board of Managers initiated its action, the city resigned as trustee. The court appointed three "private persons" as trustees,[7]

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1. 396 U.S. 435 (1970).
2. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).
3. Charles E. Newton and others.
4. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).
5. Senator Bacon's will provided that the park should be for "the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon . . . ." And he continued:

> I take occasion to say that in limiting the use and enjoyment of the property perpetually to white people, I am not influenced by an unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.
>
> I am however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common.

396 U.S. at 442.

6. *See* Watson v. City of Memphis, 373 U.S. 526 (1963).
7. *See* RESTATEMENT (SECOND) OF TRUSTS § 387 (1957) which states: "A court may remove a trustee of a charitable trust if his continuing to act as trustee would be detrimental to the accomplishment of the purposes of the trust."

thereby denying the petition made by several intervening black citizens of Macon[8] who alleged that the racial limitation was violative of the public policy of the United States.[9] The Georgia Supreme Court upheld the trial court's decision,[10] but the United States Supreme Court reversed and remanded in *Evans v. Newton*.[11] Justice Douglas, who wrote the majority opinion,[12] held that the public character of the park required it to be treated as a public institution regardless of who had title under state law.[13] On remand, the Georgia Supreme Court interpreted the reversal as requiring that the park be operated on a non-discriminatory basis. Since the sole purpose of the trust became impossible of accomplishment, the court terminated it.[14] The trial court, on remand to consider a motion for a ruling that the park had reverted to the Bacon estate, refused to apply the *cy pres* doctrine[15] to strike the racial restrictions of the will. It was determined that since the sole purpose of the trust was in irreconcilable conflict with the Constitution, the trust property had, by operation of law, reverted to the heirs of Senator Bacon.[16] On appeal, the Supreme Court of Georgia affirmed the trial court's decision.[17]

*Evans v. Abney* was then brought on a writ of certiorari to the Supreme Court of the United States.[18] Justice Black, writing for the

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8. Reverend E. S. Evans and others.

9. Residuary heirs of Senator Bacon had also intervened asking that if the court did not appoint private trustees the property should revert to them.

10. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).

11. 382 U.S. 296 (1966).

12. Justice White concurred separately, and Justices Black, Harlan and Stewart dissented.

13. 382 U.S. at 302.

14. Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966).

15. Georgia has codified the *cy pres* doctrine as follows:

> When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will nearly as possible effectuate his intention.

GA. CODE ANN. § 108-202 (1959). The *cy pres* doctrine is discussed in 4 A. SCOTT, TRUSTS, § 399 (3d ed. 1967).

16. Senator Bacon apparently did not comtemplate failure of the trust, and he made no provision in his will granting a reverter to any party should the trust fail. However, Georgia law, which, in effect, provides a possibility of reverter to the heirs, makes such an omission irrelevant:

> Where a trust is expressly created, but [its] uses . . . fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.

GA. CODE ANN. § 108-106(4) (1959).

17. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

18. 396 U.S. 435 (1970). Petitioners, the same black citizens of Macon who sought in the courts to integrate Baconsfield, contended that the termination of the trust violated their rights to equal protection and due process under the fourteenth amendment.

majority,[19] held that the Georgia courts did no more than apply well-settled principles of Georgia law in construing the will. Since the Georgia court violated no constitutionally protected rights by concluding that *cy pres* could not be applied to save the park, the Supreme Court affirmed its decision.

## BALANCING RIGHTS

Justice Black balances[20] the state's right to construct its citizens' wills against the desire (apparently not the right) of Macon blacks to enjoy a large public park[21] which had been used exclusively by whites for nearly fifty years and maintained and improved with public funds. The Georgia Supreme Court decided that Senator Bacon would rather see Baconsfield revert to his heirs than to have it used as a racially integrated park.[22] Justice Black states that "construction of wills is essentially a state law question . . . ."[23] Although "no state law can prevail in the face of contrary federal law . . . the action of the Georgia Supreme Court . . . presents no violation of constitutionally protected rights . . . ."[24] He justifies his finding that the state's right to control its property is more important than preserving a park: "the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death."[25]

## FOURTEENTH AMENDMENT CONSIDERATIONS

The black petitioners alleged that their fourteenth amendment rights of "due process" and "equal protection" were violated by the closing of the park. The fourteenth amendment sets forth that no "*State* shall deprive any person of life, liberty, or property, without due process of

19. Justices Douglas and Brennan dissented, and Justice Marshall abstained.

20. Balancing the rights of the parties to decide fourteenth amendment cases, as opposed to searching for significant state action, was perhaps foreshadowed by Justice Black in his dissent in *Bell v. Maryland,* 378 U.S. 226, 242-43 (1964). There he balanced the right asserted by a restaurant owner to use his property as he desired against the right of blacks to be free from discrimination; he found the private owner's right outweighed the right of the blacks to equal accommodations. *See* Kinoy, *The Constitutional Right of Negro Freedom,* 21 RUTGERS L. REV. 387, 418 (1967).

21. Baconsfield comprises about 100 acres.

22. Justice Douglas in his dissent argues that Senator Bacon's purpose was to dedicate the land for some municipal use, and continuation of the use as a municipal park would carry out a larger share of the testator's purpose than would a reversion to his heirs.

23. 396 U.S. at 444.

24. *Id.*

25. *Id.* at 446.

law,"[26] and since the *Civil Rights Cases,*[27] a finding of state action is a prerequisite to the application of the fourteenth amendment.[28] Justice Black avoided the term "state action." He held that the Georgia court correctly applied the state's trust law and that it violated no constitutional rights. He does, however, discuss some cases[29] where a state's actions have violated the fourteenth amendment.

Justice Black distinguishes a public facility closing merely to avoid desegreation by saying that in the instant case a private party, not the state, is injecting the racially discriminatory motivation.[30] This same "private motivation" was present in *Shelley v. Kraemer*[31] and its progeny[32] where a state court's enforcement of a restrictive covenant was held to be state involvement in discrimination violative of the fourteenth amendment.[33] The Court distinguishes *Shelley* by finding another factual difference; the park has been eliminated altogether, and therefore, there is no more discrimination.[34] This "elimination" argument was made in *Griffin v. County School Board,*[35] where a county closed its schools to avoid a court order to desegregate them. The school board alleged there would be no more discrimination in the schools because there would be no more schools, but the Court held that the action of the county in closing the public schools and meanwhile contributing to the support of private, segregated schools resulted in denying to black school children the equal protection of the laws. It cannot be said that the elimination of the public facility eliminates the discrimination; the elimination itself is the discrimination. Perhaps the real significance of the "private motivation" and "elimination" arguments is that they are

26. U.S. CONST. amend. XIV, § 1 (emphasis added).

27. 109 U.S. 3 (1883). "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment." *Id.* at 11.

28. *See, e.g.,* Black, *"State Action," Equal Protection, and California's Proposition 14,* 81 HARV. L. REV. 69 (1967); Kinoy, *The Constitutional Right of Negro Freedom,* 21 RUTGERS L. REV. 387 (1967).

29. 396 U.S. at 445.

30. *Id.* The majority also points out that there is no showing that Senator Bacon was racially motivated by the Georgia statutes which enabled him to devise a discriminatory charitable trust, GA. CODE ANN. § 69-504 (1957), nor that the Georgia judges were racially motivated. 396 U.S. at 446.

31. 334 U.S. 1 (1948).

32. *Barrows v. Jackson,* 346 U.S. 249 (1953), extended the holding of the *Shelley* case to invalidate an attempt at judicial enforcement of a restrictive covenant in a suit for damages.

33. *See also* Marsh v. Alabama, 326 U.S. 501 (1946), where the operation of a company town, and Terry v. Adams, 345 U.S. 461 (1953), where the domination of the elective process are ostensibly private but so governmental in nature that fourteenth amendment limitations must be applied.

34. 396 U.S. at 445.

35. 377 U.S. 218 (1964).

*both* available. In neither *Shelley* nor *Griffin* were both of these factors present, but in the instant case the act of discrimination was the elimination of a public facility, *and* the discrimination was privately motivated.

### State Action and Willing Parties

The issue in *Evans v. Abney* was whether the park property should revert to the heirs. Petitioners alleged that the fourteenth amendment was violated by the Georgia court's decision that Baconsfield did revert; however, the elimination of the park by the Georgia court must be the alleged act of discrimination. The issue was not whether the park can be segregated; *Evans v. Newton*[36] already decided that because of its public character Baconsfield could not remain segregated. Thus in a search for state action which violates "due process" and "equal protection," one must look for state action involved in the *elimination* of the park and not for state action involved in the maintenance of a segregated park.

Justice Brennan in his dissent points to "state action in overwhelming abundance."[37] Baconsfield has been a public park for nearly fifty years; the Georgia legislature gave discrimination a "special preferred status in the law" with statutes which enabled discriminatory charitable trusts;[38] capital improvements have been made with both federal and city money;[39] and general maintenance was the responsibility of the city's superintendent of parks. Furthermore, the Georgia courts appointed private trustees to continue segregation when the city could no longer discriminate.[40] The areas of the state's involvement in Baconsfield argued by Justice Brennan to violate the fourteenth amendment apply to *Evans v. Newton*; if Baconsfield is to be a park, it must be an integrated park. But in *Evans v. Abney* the discrimination complained of is the *elimination* of the park, and the only[41] state involvement in the loss of Baconsfield is the Georgia court's interpretation of Senator Bacon's will.

Justice Brennan's dissent also argues that *Shelley v. Kraemer* is in

36. 382 U.S. 296 (1966).
37. 396 U.S. at 445.
38. *See* Reitman v. Mulkey, 387 U.S. 369 (1967), where the Court held that when a state singles out racial discrimination for particular encouragement, it is in violation of the fourteenth amendment even though the state does not itself impose or compel segregation.
39. In the 1930's the Works Progress Administration transformed Baconsfield from a wilderness to a modern recreational facility upon the city's representation that it was a public park. 396 U.S. at 451.
40. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 160 (1968).
41. It may be argued that the enabling statute, Ga. Code Ann. § 69-504 (1957), played a part in the park's elimination. For an argument that it did not, see Parker, *Evans v. Newton and the Racially Restricted Charitable Trust,* 13 How. L.J. 223, 232-35 (1967).

point and that it should be applied to preserve Baconsfield.[42] Can this judicial action be considered significant state action when compared with *Shelley*? There must be limitations on the application of judicial action to fourteenth amendment cases, or any court which enforces truly *private* discrimination will be subject to reversal by a higher court applying *Shelley* to the fourteenth amendment.[43] The limitation is found in *Shelley's* language: "willing parties" would have done business "but for the active intervention of the state courts. . . ."[44] Were there willing parties in Macon, Georgia, who would have done business "but for" the Georgia courts? Before that question can be answered, it must be determined who are the proper "parties." In *Shelley* there was a "willing" purchaser and a "willing" seller. Except for the restrictive covenant, there is no contention that the seller did not have the power to convey the title. In the instant case, the black citizens of Macon are certainly "willing" to enjoy the park, but who has the "power" to allow integration, contrary to the terms of the trust?[45] There are four possibilities under this testamentary trust: 1) the Board of Managers as superintendents of the park, 2) the city of Macon as trustee and appointor of the Board of Managers, 3) the white citizens as the beneficiaries of the trust or 4) the residual heirs who would receive the property if the trust failed. As Justice Brennan points out, the city was initially willing to admit blacks, and there is no showing that the white beneficiaries were unwilling to share Senator Bacon's generosity with the blacks.[46] The Board of Managers who initiated the suit to enforce segregation are certainly not willing parties nor are the residual heirs who sought reversion. Thus it is doubtful that Justice Brennan has established the applicability of *Shelley*. He does not address himself to the question of who are the proper "willing" parties; he merely states that there is no showing that the city of Macon and its white population are not willing to integrate Baconsfield.[47]

## CONCLUSION

The Supreme Court decided that a state's right to construct its citizens' wills is paramount to the right of black citizens to enjoy a segregated public park. The Court reasons that the fourteenth amendment

42. 396 U.S. at 456-57.
43. *See* Bell v. Maryland, 378 U.S. 226, 231 (1964) (Black, J., dissenting).
44. 334 U.S. at 19.
45. *See* RESTATEMENT (SECOND) OF TRUSTS § 381 (1957).
46. 396 U.S. at 457.
47. The majority states that *Shelley* does not apply because there is no more discrimination since the park is eliminated. This ignores the fact that the elimination of the park *is* the complained of discrimination.

rights of the blacks are not violated because the discrimination was motivated by an individual, and there is no discrimination because the park was eliminated. Although neither fact is sufficient alone to take a case out of the protection of the fourteenth amendment, it is significant that both are present in *Evans v. Abney*. In his dissent, Justice Brennan does not present convincing arguments that *Shelley v. Kraemer* applies nor does he show that state action was involved in the park's elimination. "When a city park is destroyed because the Constitution required it to be integrated, there is reason for everyone to be disheartened,"[48] but the decision seems to be a correct interpretation of the Constitution and the laws of the land.

48. 396 U.S. at 444.

LABOR LAW—CONSTITUTIONAL LAW: *Supreme Court Limits Employer Speech on Unionization.*

## INTRODUCTION

The United States Supreme Court, in *NLRB v. Gissel Packing Co.*,[1] decided several important questions in the areas of labor and constitutional law. The unanimous opinion held, *inter alia*, 1) that an employer's obligation to bargain with a union may arise without a representation election, 2) that union authorization cards, if obtained without misrepresentation or coercion, are sufficiently reliable to indicate a union's majority status, 3) that the National Labor Relations Board[2] may issue a bargaining order to an employer who has rejected a union's indicated card majority while committing unfair labor practices which tend to undermine the union's majority and make a fair election unlikely and 4) that certain types of statements by an employer are not protected under the free speech provision of the first amendment.

The case came to the Supreme Court on a writ of certiorari as a consolidation of four cases, three from the Fourth Circuit[3] and one from the First Circuit.[4] The exact pattern of events varied from case to case; however, in each of the cases from the Fourth Circuit, a union waged an organizational campaign and obtained cards from a majority of

1. 395 U.S. 575 (1969).
2. Hereinafter referred to as NLRB or the Board.
3. NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968); General Steel Products, Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968).
4. NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968).

employees within the bargaining unit. The union then demanded recognition as the employees' bargaining agent. The employers, however, refused recognition because they considered such cards to be an unreliable indicia of employee sentiment. The employers then either began or continued antiunion campaigns.

The NLRB subsequently issued bargaining orders based primarily upon the employers' lack of "good faith doubt" as to the validity of the authorization card majorities in violation of the Taft-Hartley Act.[5] The Fourth Circuit Court of Appeals, however, declined to enforce the orders. The court ruled that union authorization cards were inherently unreliable as an indication of employee sentiment, and therefore a refusal to bargain collectively in violation of section 8(a)(5) of the Taft-Hartley Act did not occur.[6] The court further ruled that unfair labor practices, such as interfering, restraining or coercing employees in the exercise of section 7 rights[7] and discriminating for or against employees to encourage or discourage membership in a union in violation of section 8(a)(1) and (3), were not proper grounds for issuance of a bargaining order since an election is the sole basis provided for representative certification under the Taft-Hartley Act.[8] The fact situation in *NLRB v. Sinclair Co.*[9] was similar; however, the First Circuit Court of Appeals upheld the Board's bargaining order.[10]

The Supreme Court's decision that the representative status of a union may be determined by means other than election is not novel. The decision follows a prior ruling which recognized that section 9(c) of the Taft-Hartley Act does not specify how employees shall select or designate

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5. Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964). The act, in relevant part, provides:

> (a) It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a) of this act.

*Id.*

6. *Id.*

7. Labor Management Relations Act (Taft-Hartley Act) § 7, 29 U.S.C. § 157 (1964). Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

*Id.*

8. *Id.* § 9(c). *See also* 13 NLRB ANN. REP. 32 (1948). The Supreme Court's decision in *Gissel* would seem to imply that if authorization cards can indicate employee sentiment no question of representation exists for determination by election.

9. 397 F.2d 157 (1st Cir. 1968).

10. *Id.*

their collective bargaining representative.[11] If authorization cards accurately reflect the views of the signers, then such cards should be considered a valid means of designating a collective bargaining representative. In order to insure the cards' reliability, the Court specified that they must be unambiguous, single-purpose cards obtained without coercion or misrepresentation.[12]

While violation of section 8(a)(5) will not alone support issuance of a bargaining order,[13] the Court ruled that such violation, coupled with other independent unfair labor practices which also would be insufficient to support an order, may combine to provide a basis for the order to issue.[14]

A more comprehensive discussion of the foregoing points may be found elsewhere.[15] The remainder of this comment will explore the background of Board and court decisions treating the question of employer's free speech rights, some possible effects of the decision in *Gissel* and the absence of dissent in *Gissel*.

## Employer's Free Speech Rights

Historically, the NLRB has taken a number of different positions on the question of the right of an employer to make known to his employees his views on unionization. Under the 1935 Wagner Act,[16] the Board policy was one of silent neutrality.[17] This policy was altered to conform to a Sixth Circuit ruling permitting an employer to circulate printed statements.[18]

In 1942, the Board announced the "captive audience" doctrine, holding that an employer could not speak to his employees on company time because of the coercive effect.[19] This ruling was appealed, and the Sixth Circuit ruled that an employer was free to speak, even to a captive audience, if his speech was without threat and not part of conduct

11. United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62, 71-72 (1955).
12. 395 U.S. at 606-07. *See also id.* at 583 n.4.
13. *Id.* at 601 n.18.
14. *Id.* at 614.
15. Yound, *Supreme Court Decisions*, 55 A.B.A.J. 1079 (1969); 50 B.U.L. Rev. 111 (1969); 21 Case W. Res. L. Rev. 305 (1970); 1969 Duke L.J. 1075 (1969); 38 Geo. Wash. L. Rev. 319 (1969); 83 Harv. L. Rev. 247 (1970); 21 S.C.L. Rev. 805 (1969); 4 Suffolk U.L. Rev. 160 (1969); 21 Syracuse L. Rev. 337 (1969); 15 Vill. L. Rev. 106 (1969).
16. National Labor Relations Act (Wagner Act), 29 U.S.C. §§ 151-66 (1935).
17. S. Cohen, Labor Law 219 (1964) [hereinafter cited as Cohen].
18. NLRB v. Ford Motor Co., 114 F.2d 905 (6th Cir. 1940).
19. American Tube Bending Co., 44 N.L.R.B. 121 (1942).

showing coercion.[20]

The Board then adopted an "equal time" modification;[21] this policy prohibited employer speech to a captive audience unless the union be accorded the same privilege. This policy was approved on appeal by the Second Circuit.[22] The "equal time" modification virtually required employers to maintain silent neutrality; employer comments were permitted only if not coercive, either on their face or as seen in the general course of conduct, and if equal time and opportunity were afforded to the union.[23]

With the passage of the Taft-Hartley Act in 1947,[24] the "equal time" doctrine was abandoned.[25] In 1951, however, the Board apparently revived the doctrine in the *Bonwit Teller* case.[26] On appeal, the Second Circuit held that employees have a right to hear both sides of the question but that the concept of providing strict equal time and opportunity for each side to speak should not be enforced.[27]

Following the *Bonwit Teller* case, the Board continued to demand that equal time and opportunity to be afforded to all parties.[28] This rigid adherence to the original notion of "equal time" was finally overcome in *Livingston Shirt Corp.*[29] This change of policy is best explained, perhaps, by the change in Board personnel occasioned by the appointments of President Eisenhower.[30] Later modifications included a ruling that no party may make speeches within 24 hours of an election[31] and a holding that noncoercive speech accompanied by unfair labor practices would not necessarily constitute a violation of section 8(c) of Taft-Hartley.[32]

Although the term "coercive speech" has frequently been used, no clear definition has emerged.[33] Written expressions that a union was

20. American Tube Bending Co. v. NLRB, 134 F.2d 993 (6th Cir.), *cert. denied*, 320 U.S. 768 (1943).
21. Clark Bros. Co., 70 N.L.R.B. 802 (1946).
22. NLRB v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947).
23. COHEN at 222.
24. Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 141-88 (1964).
25. Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).
26. Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951).
27. Bonwit Teller, Inc., v. NLRB, 197 F.2d 640 (2d Cir. 1952).
28. *See, e.g.*, Onandaga Pottery Co., 100 N.L.R.B. 1143 (1952); Metropolitan Auto Parts, Inc., 99 N.L.R.B. 401 (1952). *See also* COHEN at 226.
29. 107 N.L.R.B. 400 (1953).
30. COHEN at 227.
31. Peerless Plywood Co., 107 N.L.R.B. 427 (1953).
32. NLRB v. United Steelworkers of America, 357 U.S. 257 (1958).
33. Both the Board and courts have struggled for a definition without having arrived at a workable final result.

The expressing of any views, argument, or opinion, or the dissemination

"un-Christian, un-American, and un-Democratic"[34] and a prophecy that unionization might lead to plant closing[35] have been held to be merely opinion and not coercive. An employer's statement that any vote for a union is a sure vote for a strike or lockout was also considered to be noncoercive speech.[36]

The position represented by these decisions, however, was abdicated in 1962 when the Board found statements previously accepted as expressions of opinion to be coercive.[37] This change in Board policy may be attributed to the Kennedy administration appointees to the Board.[38]

The decision of the Supreme Court in *Gissel* has not succeeded in bringing order from the confusion of Board and lower court holdings reflected in the foregoing paragraphs. An employer is still without a clear-cut standard for judging whether his communications will be adjudged coercive. The Court's statement that "he [employer] can easily make his views known without engaging in 'Brinksmanship' " coupled with the proviso that a reviewing court "must recognize the Board's competence" to judge the employer's remarks[39] provides little in the way of positive guidance and may make the NLRB, at least to some extent, the final arbiter on questions of employers' rights of free speech. Many statements which were once acceptable have now been proscribed.[40] Uncertainty concerning the Board's attitude at any given time may have a dampening effect upon employer attempts to express views on questions of unionization.

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thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Labor Management Relations Act (Taft-Hartley Act) § 8(c), 29 U.S.C. § 158(c) (1964).

34. Supplee-Biddle-Steltz Co., 116 N.L.R.B. 458 (1956). In *Supplee-Biddle-Steltz* the employer sent out communications calling the union "un-Christian, un-American, and un-Democratic" and implying that the plant might close in the event of a union victory.

35. Chicopee Mfg. Corp., 107 N.L.R.B. 106 (1953). In *Chicopee* the employer expressed the opinion that his plant might be forced to move should the union win a representative election. Such utterances would now seem proscribed in view of the Supreme Court's agreement with the First Circuit's decision in *Sinclair* that

> [c]onveyance of the employer's belief, even though sincere, that unionization will or may .result in the closing of the plant is not a statement of fact unless, *which is most improbable,* the eventuality of closing is capable of proof.

397 F.2d 157, 160 (1st Cir. 1968) (emphasis added).

36. National Furniture Co., 119 N.L.R.B. 1 (1957).

37. Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962).

38. COHEN at 231.

39. 395 U.S. at 620.

40. *See* notes 34 and 35 *supra* and accompanying text.

## FREE SPEECH AND JUSTICE BLACK

One puzzling aspect of the *Gissel* decision remains. Constitutional scholars may well ask, "Where was Justice Black?" The decision was without dissent although Justice Black has consistently dissented when any barriers to free speech have been sanctioned by the Court.[41] He has summarized his belief in the following statement:

> My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that the government shall not do anything to people, or, in the words of the Magna Carta, move against people, either for the views they have or the views they express or the words they speak or write. . . . As I have said innumerable times before I simply believe that "Congress shall make no Law" means Congress shall make no law.[42]

He has also decried the "balancing test."

> Of these [tests] the most dangerous I believe is the so-called balancing test. The Court's balancing test in effect says that the First Amendment should be read to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the government in stifling these freedoms is greater than the interest of the people in having them exercised." This is closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is reasonable to do so.[43]

It is difficult to imagine how one with such strong views on the absolute quality of freedom of speech could avoid dissent in such a case as *Gissel*.[44] The Court clearly has placed a restriction upon the employer's freedom of speech by use of the balancing test; in spite of this, *Gissel*

41. *See generally* Smith v. California, 361 U.S. 147, 155 (1959); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684 (1959); Roth v. United States, 354 U.S. 476 (1957); Dennis v. United States, 341 U.S. 494 (1951); Adamson v. California, 332 U.S. 46, 71-72 (1947). *See also* Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

42. H. BLACK, A CONSTITUTIONAL FAITH 45 (1969).

43. *Id.* at 50.

44. While all four of the cases consolidated in *Gissel* were factually similar, *Sinclair* seems to present a stronger basis for dissent. The acts and statements of the employer in *Sinclair* bear a marked resemblance to the employer conduct sanctioned by the NLRB during the Eisenhower administration.

was a unanimous decision and we are left with no visible clue to aid in solving the apparent mystery of Justice Black's silence.

### CONCLUSION

There is still a lack of explicit guidelines by which an employer may determine whether his speech or written statements may be adjudged coercive. Employers who are faced with uncertain standards may feel forced to remain silent thus giving the decision in *Gissel* a more restrictive effect than the Court surely intended.

During pre-election campaigns, union organizers may stress the possibility of gaining economic benefits for the workers if the union is chosen to be the employees' bargaining agent. At the same time, the employer may not express his beliefs about the possible effects of unionization upon his company's financial position unless his statements are capable of proof. The requirement of proof, however, is not mentioned in section 8(c).[45]

If employers choose or feel forced to remain silent, the flow of information upon which the employees are to rely as a basis for making their choice will become one-sided. The laboratory conditions which the Board deems necessary for conducting a proper election may be as easily upset by an imbalance of opportunity or information in one direction as in another. This court-approved need for "clinical purity" in the conduct of representative elections is also in conflict with the traditional democratic idea that a free flow of information is absolutely necessary to insure that voters may make an enlightened choice.

It may be difficult to set definite standards for permissible speech by employers because of the problems of semantics and basic human nature. It would seem, however, that a more workable standard should yet emerge.

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45. For the text of § 8(c) see note 33 *supra*.

## CRIMINAL LAW—CONSTITUTIONAL LAW: *The Applicability of General Public Lewdness Statutes to Live Theatrical Performances*

### INTRODUCTION

The theater has always been in the vanguard of experimentation with the various modes of communication and expression. With the dawning of the age of Aquarius it seems that sex and nudity have become the dominant vehicles of experimentation and expression on the

stage. Juxtaposed against this spirit of theatrical permissiveness and iconoclasm is a judicial and legislative struggle to formulate viable perimeters of legitimate expression in the theater. Illustrative of the multidimensional nature of the issues confronting the courts in this area is the applicability of the general public lewdness statute to live theatrical performances. In a recent decision, the Supreme Court of California has addressed itself to these issues and has brought the arguments for and against applicability into focus.

In *Barrows v. Municipal Court*,[1] the Supreme Court of California reversed a lower court refusal to issue a writ of prohibition. The writ had been sought to restrain the Municipal Court of Los Angeles from proceeding with the prosecution of the petitioners. The defendants in the *Barrows* case were charged with violation of section 647(a) of the California Penal Code for their production of a one-act play entitled *The Beard*.[2] Pursuant to section 290 of the California Penal Code, a conviction under section 647(a) would require the convicted individual to register with the local law enforcement officials as a sex offender.[3] In a four to three decision, the *Barrows* court ruled that the portion of section 647(a) making it a misdemeanor to engage in lewd or dissolute conduct in a public place was inapplicable to live performances before an audience.

## THE ARGUMENT AGAINST APPLICABILITY

The majority in the *Barrows* case found the basic purpose of section 647 to be the punishment of vagrancy in its various overt aspects. It found nothing in the legislative history of the statute indicating that it was intended to apply to activities such as live theatrical

1. 1 Cal. 3d 821, 464 P.2d 483, 83 Cal. Rptr. 819 (1970).

2. The petitioners were actors Richard Bright and Alexandria Hay, producer Robert Barrows and director Robert Gist.

The play consists of one act with two actors who portray Jean Harlow and Billy the Kid in a post-death setting. After engaging in various degrees of verbal gymnastics, the two actors conclude the performance with a simulated sex act. The specific acts alleged in the complaint were ones of oral copulation.

CAL. PENAL CODE § 647(a) (West 1967) provides:

> Every person who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to the public view . . . [shall be guilty of disorderly conduct or a misdemeanor].

*Id.*

3. The statute requires the convicted offender to keep the law enforcement officials informed of his location. Since the legislature deemed such individuals likely to commit similar offenses in the future, the statute operates on the theory that persons convicted of crimes enumerated in the statute should be readily available for police questioning at all times.

performances which are prima facie within the ambit of first amendment protection.[4] Speaking for the majority, Justice Mosk asserted that if section 647(a) was applicable to a live performance, there would be no rationale for not also applying the registration provisions of section 290.[5] Justice Mosk stated:

> It would be irrational to impose upon an actor in a theatrical performance or its director a lifetime requirement of registration as a sexual offender because he may have performed or aided in the performance of an act, perhaps an obscene gesture, in a play.[6]

Prior to the *Barrows* decision, the petitioners entered federal district court requesting an injunction against enforcement of section 647(a).[7] Dissenting from the three-judge district court decision to invoke the abstention doctrine and not issue the injunction, Justice Ferguson stated:

> The use of § 647(a) to stop a legitimate theatrical presentation results in censorship of any and all expression which some official of government deems proscribed by the broad and vague language of the statute. In this area it is not only that persons are faced with unascertainable standards of guilt, but that the very vagueness and ambiguity of the statute imposes a self-censorship among all persons who are justifiably uncertain as to its scope. The intolerable end result is a denial of the public's access to constitutionally protected speech and press out of fear of criminal prosecution.[8]

A serious equal protection problem would accompany a ruling of applicability of section 647(a) to live theatrical presentations. Conviction under the lewdness statute for acts committed in a live theatrical production would require the performer's registration as a sex offender. Conviction for the same acts, however, committed in the filming of a motion picture would not require registration.[9]

The *Barrows* decision does not suggest that acts which are independently prohibited by law may be performed on the stage with immunity merely because they occur during the course of a theatrical

4. 1 Cal. 3d at 826, 464 P.2d at 486, 83 Cal. Rptr. at 822.
5. *Id.* at 827, 464 P.2d at 487, 83 Cal. Rptr. at 823.
6. *Id.* at 827, 464 P.2d at 486, 83 Cal. Rptr. at 822.
7. Barrows v. Reddin, 301 F. Supp. 574 (C.D. Cal. 1968).
8. *Id.* at 582.
9. A private movie studio from which the public is excluded would not be a public place, a place open to the public or one exposed to public view.

production.[10] Obviously, dramatic license cannot justify "the actual murder of the villain, the rape of the heroine, or the maiming of the hero."[11] The majority opinion, however, does make it clear that conduct or speech in a theatrical production is to be judged by a different standard than is the same conduct or speech occurring in the streets. Relying upon one of its recent decisions, the *Barrows* court ruled that acts which are unlawful in a different context, circumstance or place may be depicted or incorporated in a stage or screen presentation and come within the protection of the first amendment, losing that protection only if found to be obscene.[12]

## THE ARGUMENT SUPPORTING APPLICABILITY

The dissenting opinion in the *Barrows* case, along with an earlier supreme court decision and a California court of appeals case, delineate the argument for applying the public lewdness statute to live stage productions. The majority in the *Barrows* case found it necessary to clarify and modify its own decision in *In re Giannini*.[13] Although the *Giannini* decision did not directly consider the applicability of the registration requirement to conviction under section 647(a), the decision did appear to stand for the applicability of the section to live theatrical performances.[14] The *Barrows* court also disapproved of *Dixon v. Municipal Court*[15] insofar as the *Dixon* decision was inconsistent with *Barrows*. In attempting to follow the *Giannini* decision, the *Dixon* court had held that section 647(a) was to be applied to a live performance in San Francisco of the very play under consideration in the *Barrows* case.[16]

In response to the majority contention that there was nothing in the legislative history of the statute to indicate an intent to make it applicable to stage productions, Justice Burke, expressing the dissenting opinion of the *Barrows* case, took an opposite approach. He argued that there was nothing in the language of the section which would indicate a legislative intent to exclude such conduct merely because it occurred during a theatrical performance. In the interval between the handing

10. 1 Cal. 3d at 830, 464 P.2d at 489, 83 Cal. Rptr. at 825.
11. *Id.*
12. *In re* Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 644 (1968).
13. *Id.*
14. The action of the court in remanding *the petitioners* for possible retrial is a recognition of the applicability of section 647(a) to theatrical performers.
15. 267 Cal. App. 2d 789, 73 Cal. Rptr. 587 (1968).
16. In both the *Dixon* and *Barrows* cases the actors were also charged with a violation of section 311.6 of the California Penal Code which provides: "Every person who knowingly sings or speaks any obscene song, ballad, or other words, in any public place is guilty of a misdemeanor." CAL. PENAL CODE § 311.6 (West 1967).

down of the *Giannini* decision and the *Barrows* case, the California State Legislature amended portions of section 647 but chose to leave subdivision (a) as it stood. Upon this basis, Justice Burke presumed that the legislature was aware of the judicial construction and approved it. The presumption stemmed from the fact that the statute had been construed by judicial decision and that its judicial construction had not been altered by subsequent legislation.[17] Quoting from the *Dixon* decision, the *Barrows* dissent contended:

> It cannot be reasonably believed that the Legislature intended to allow any and all acts which are patently obscene to be committed on stages, runways or other performing areas—but this would be the effect (except as to acts specifically made criminal under other statutes; for example, sodomy) of holding section 647, subdivision (a), inapplicable.[18]

The Justice asked whether it would not be more logical to withhold judgment on the applicability of section 290 to a theatrical performer rather than hold all persons immune from prosecution for obscene performances because registration may not be highly pertinent to their case.[19] A violation of section 647(a) on the stage could be punishable under section 19 of the California Penal Code as a misdemeanor for which specific punishment is not prescribed.[20] Theatrical performances are not directly referred to in any subdivision of section 647. The omission, absent further evidence of legislative intent, should not be interpreted as creating immunity from prosecution for such activity. In ruling on the applicability of section 647(a), the *Dixon* court reasoned:

> Within the content of a play, a ballet, a dance or another performance, there may be done an act, which, even when it is placed in the dialogue, choreography or surroundings of the whole work, and with all First Amendment protection thrown about it, nevertheless, is a lewd act.[21]

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17. 1 Cal. 3d at 832, 464 P.2d at 491, 83 Cal. Rptr. at 827.
18. *Id.* at 833, 464 P.2d at 490, 83 Cal. Rptr. at 826. The court quoted *Dixon v. Municipal Court*, 267 Cal. App. 2d 789, 73 Cal. Rptr. 587, 589 (1968).
19. 267 Cal. App. 2d 789, 791, 73 Cal. Rptr. 587, 589 (1968).
20. CAL. PENAL CODE § 19 (West 1967) provides:
Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, or by both.
*Id.*
21. 267 Cal. App. 2d 789, 791, 73 Cal. Rptr. 587, 589 (1968).

Dealing with the question of legislative intent, the *Dixon* court contended:

> It would be hard to believe that the Legislature intended that obscene acts of almost any kind are to be outside the law merely because they are incorporated into some kind of dramatic presentation. If it were so, the rankest of acts would be exhibited by writing some lines, somewhat relevant, around the acts.[22]

Despite the extensive discussion of legislative intent by the advocates and opponents to applicability of the lewdness statute, the decisive factor in the findings of the *Barrows* court seems to have been the registration requirement of section 290. Had the petitioners not faced registration as sex offenders, the strength of the argument against applicability would suffer.[23] If at a future date the California State Legislature should find it expedient to provide for an exemption from the registration provision for the person convicted in connection with a theatrical presentation, the Supreme Court of California may once again find itself clarifying and modifying its position on the applicability of section 647(a).

### Postscript on Applicability

As the practitioners of the new modes of theatrical expression disseminate their product, an increasing number of courts will be called upon to determine the applicability of their particular jurisdiction's public lewdness statutes. The courts will be determining whether the general public lewdness statutes are to be employed as tools of effective censorship of theatrical performances.[24] Those who place first priority on freedom of expression in the theater should not assume that the courts in other states will necessarily follow the precedent established in California. California is unique in requiring registration of anyone convicted under provisions similar to section 647(a). Consequently, the arguments for applicability of the lewdness statute are much weaker in California than in jurisdictions lacking registration provisions or corresponding exemptions. The courts do not seem ready to accept violation

22. *Id.*

23. In the absence of a registration requirement, all the arguments for inapplicability except the equal protection problem would lose much of their plausibility. Both the irrationality and legislative intent arguments of the *Barrows* majority are based on the requirement that violators must register as sex offenders.

24. Thirty-five states have statutes essentially the same as California's lewdness provisions. The states, however, do not have registration requirements. The provisions are found under the general heading of lewdness or indecency in the various penal codes. Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364, app. II (1966).

of a criminal statute as a legitimate means of expression on the stage.[25] A live theatrical performance which, when viewed as a whole, is not obscene is entitled to the same first amendment protections as is any other medium for the communication of ideas.[26] The violation of a criminal statute, however, may not be the kind of activity intended to be protected by the first amendment.

The *Barrows* case suggests that legislative intent may be the dominant factor in most decisions regarding the use of public lewdness statutes in determining the boundaries of freedom of expression in the theater. If this is the case, it will be imperative that legislatures clarify their intent that the lewdness provisions are to be inapplicable to live stage productions. This could be accomplished by providing a specific exemption for those activities which the legislature chooses to immunize from prosecution. In at least one jurisdiction, a simple one sentence statement has in the past served as an effective indicator of legislative intent.[27] The legislature may, however, determine that its particular lewdness statute should be applied to live theatrical presentations. Before implementing such an express intention, a court will have to determine that all first amendment protections have been satisfied.

## CONCLUSION

The boundary between criminal activity and legitimate theatrical expression can neither be drawn permanently nor with absolute precision. The theatrical line of demarcation for legitimate experimentation will reflect the dynamic nature of society's constantly changing mores and social values. The theater has traditionally been a shaper and formulator of social change, while the judiciary has had the role of defender of the status quo.[28] With such diverse roles and functions, it is not difficult to understand why a heated conflict has developed between these two

25. In *People v. Bercowitz*, 61 Misc. 2d 974, 308 N.Y.S.2d 1 (City Ct. 1970), the New York public lewdness statute was applied to a live performance of the play *Che*.

26. Live theatrical performances are entitled to the same protection under the first amendment as: 1) motion pictures, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); 2) magazines, Winters v. New York, 333 U.S. 507 (1948); 3) newspapers, New York Times Co. v. Sullivan, 376 U.S. 259 (1964).

27. The provision was made in the former penal law of New York which was amended in 1967. N.Y. PENAL LAW § 1104 (b) (McKinney 1967).

28. The theater has long been a significant medium for the communication of ideas which affected public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

Interesting commentaries on the social and political role of the judiciary can be found in JACOB, JUSTICE IN AMERICA 17-33 (1965) and MARSHALL, INTENTION IN LAW AND SOCIETY 179-82 (1968).

American institutions. On a macro-analytic level, this conflict produces a viable social system while preserving a degree of stability. As important as this conflict may be to the overall direction of the American social system, it has much more immediate and personal ramifications to the individuals involved.

On a micro-analytic level, the conflict appears to be little more than performers and producers being fined and imprisoned when they go beyond the current bounds of acceptable expression. From a pragmatic point of view, performers who chose to participate in the theatrical age of Aquarius may find it advantageous to check the local lewdness provisions or be prepared for uninvited backstage visitors.