Chapter 18: Constitutional Law

John D. O'Reilly Jr.
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Constitutional Law

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§18.1. The eligibility of political candidates to be listed on state election ballots. The provisions of the Massachusetts election laws governing the eligibility of independent candidates and of candidates of “minority parties” to be listed on election ballots was reviewed in Baird v. Davoren by a three-judge federal district court. Chapter 53 of the General Laws provides three methods of placing a candidate’s name on the ballot: (1) a party whose candidate received at least three per cent of the votes cast for governor at the last election may nominate a candidate; (2) a party whose candidates in the three preceding elections received at least one-tenth of one percent of the votes cast for governor in such elections may nominate a candidate; or (3) a candidate’s name may be placed on the ballot if it is supported by nomination papers signed by qualified voters equal in number to at least three percent of the number of total votes cast for governor at the last election, provided that no more than one-third of such signatures come from the same county. The first method assures the “major” parties places on the ballot; the third method makes it possible for a non-partisan candidate to run for office. The second method, as its legislative history shows, was designed to save “minority” parties from extinction, which was imminent when the election laws were revised in 1939. The first method is, of course, the usual method for placing the names of partisan candidates on the ballot.

The Baird case was instituted as an action for declaratory relief by various plaintiffs including Baird, an independent candidate running for the U.S. Senate, and various individuals running for state and federal offices.

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§18.1. 1 G.L., c. 53, §§1, 6.
3 G.L., c. 53, §1.
4 Id.
5 Id. §6.
6 Acts of 1939, c. 191, which amended G.L., c. 53, was believed by the governor to endanger the existence of minority parties. After an executive message explaining this fear, the legislature enacted Acts of 1939, c. 371, which amended G.L., c. 53, §1 by inserting the second method of obtaining a place on the ballot. 346 F. Supp. 515, 518 (D. Mass. 1972).
office under the banner of the Socialist Workers Party. The plaintiffs attacked the ballot-access provisions of Chapter 53 with several constitutional claims. Under the three alternative provisions, an "independent" candidate must demonstrate much broader support than a minority party candidate to get on the ballot. The court, in an opinion which thoroughly canvassed the recent Supreme Court decisions in election cases, concluded that such a preference for minority party candidates over independent candidates deprived the independent candidates of the equal protection of the law since it was not "reasonable" to regulate the election process by preserving a status quo.  

Since the preference for minority party candidates was held to deny equal protection, the court could have invalidated either the "one-tenth of one percent" provision for minority party candidates, or the "three percent" provision for independent candidates. The court chose to invalidate the former, thus requiring both minority party and independent candidates to conform to a three percent requirement and affording equal protection to both.  

Proceeding to the section that allows nomination by signatures of registered voters, the court concluded that the provision which disqualifies signatures in any one county in excess of one-third of the total constituted an impermissible dilution of the voting power of registered voters in elections for state-wide office. The Constitution requires equal weight to be accorded to the will of each voter in the election unit. Such a qualification of the right to obtain nomination by signatures was therefore unconstitutional.  

Nevertheless, the court declined to accept the plaintiffs' contention that discrimination was also present in the pattern under which new parties and independents must obtain nominating signatures, while major parties may be represented on the basis of their candidates' records in preceding elections. Such a difference in treatment is constitutionally permissible. Since the state has a legitimate interest in preventing misuse of the election process it may justifiably require some demonstration of support before allowing a candidate's name to appear on the ballot. In the case of major parties, such support would be plainly demonstrated by the history of past elections.  

Finally, the court ruled that the invalidated provisions of Chapter 53 were severable and that their invalidity did not bring down the whole electoral process. In a petition for rehearing the Socialist Workers Party contended that, as a party it was not allowed under Section 6 to...

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12 Id. at 521-22.  
13 Id. at 522-23.
gain ballot access by filing nomination papers, since that section is implicitly reserved for independent candidates. Since the party was not in a position to nominate candidates by primary election or party convention they argued that it would be unconstitutionally driven out of existence. However, the court chose to abstain on that issue; since it was not entirely clear that the statute would prevent the party from selecting a candidate by filing nomination papers, the issue was more appropriate for resolution in state courts.

§18.2. Criminal law: Constitutionality of flag desecration and motorcycle helmet statutes. The 1972 Survey year witnessed a direct conflict between the state and federal courts over the validity of a criminal statute prohibiting the contemptuous treatment of the flag of the United States. In Commonwealth v. Goguen, a rescript opinion, the Supreme Judicial Court affirmed the conviction of a defendant who wore in public an American flag sewn to the seat of his trousers. The Court rejected the defendant's contention that his conduct was constitutionally protected "symbolic speech." It also ruled that Street v. New York and Cohen v. California were not controlling, since it was clear that the defendant was not prosecuted for anything he had said, or for any vulgarity of expression.

Upon his imprisonment, the defendant brought a petition for a writ of habeas corpus, which was granted by the federal district court. That court ruled that one's use of the flag may constitute symbolic expression, and that "[o]nly as necessary to further a substantial or important govern-

14 G.L., c. 53, §6 merely states that "[n]ominations of candidates for any offices to be filled at a state election may be made by nomination papers. . . ." Apparently the Socialist Workers Party was arguing that it was precluded from using this method because ballot access for parties is completely provided in Section 1.


§18.2. 1 G.L., c. 264, §5: "Whoever publicly burns or otherwise mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts . . . shall be punished by a fine of not less than one hundred dollars or by imprisonment for not more than one year, or both."


3 "His communication, if any, was so thoroughly inarticulate as to lack the slightest redeeming social importance." Id. at 303, 279 N.E.2d at 667, citing Roth v. United States, 354 U.S. 476, 484 (1957). The relevance of the Court's citation to Roth is obscure, since the "redeeming social importance" test set forth in that case was created in the context of the state's right to control obscene literature.

4 394 U.S. 576 (1969). Although in this case the petitioner attacked the validity of a flag-burning statute, the Court overturned his conviction on the ground that the jury might have convicted him for what he had said, rather than for what he had done.

5 403 U.S. 15 (1971). In this case petitioner's conviction for breaching the peace was overturned, since the conviction resulted merely from his wearing a jacket on which was sewn an obscene reference to the draft.

mental interest may the state curtail symbolic expression." The court also indicated that a flag-respect statute can easily be overboard unless it is so narrowly drawn as to prohibit only breaches of the peace or to protect the flag itself from physical damage. In any event, the terms of the statute were held to be unconstitutionally vague for failure to define the sort of treatment which constitutes unlawful contempt of the flag. The Court of Appeals for the First Circuit affirmed on the basis of that holding.

In another case a three-judge district court rejected a challenged exercise of the Commonwealth’s police power. In Simon v. Sargent, an action for declaratory judgment, the court sustained per curiam the validity of a statute that requires riders of motorcycles to wear protective helmets. A similar result had been reached four years earlier by the Supreme Judicial Court in a case for which the Supreme Court of the United States denied review. In the Simon case, the court brushed aside the contention that the state has no power to protect a cyclist from the consequences of his imprudence. It pointed out that injuries to a cyclist may have impacts upon society as a whole in the form of imposing burdens upon public health services, the unemployment insurance structure, and the public welfare assistance system. The failure of the statute to require operators of automobiles to wear protective helmets did not present an equal protection deficiency since automobiles offer drivers substantially more structural protection against injury than do motorcycles.

§18.3. Constitutional privilege to protect information sources: Recent developments. A year ago there was noted in these pages the pendency of litigation over the issue of whether the First Amendment confers upon news gatherers a privilege not to disclose information received in confidence. In In re Pappas the Supreme Judicial Court of Massachusetts denied the motion to quash the summons to appear and testify.

9 471 F.2d 88 (1st Cir. 1972).
13 However, the court explicitly declined to base its ruling on "the state's generalized assertion of an interest in the continued productivity of its citizenry." 346 F. Supp. 277, 279 (D. Mass. 1972).
cial Court of Massachusetts held that there was no such privilege; the
Kentucky Court of Appeals ruled similarly in Branzburg v. Pound. However, the United States Court of Appeals for the Ninth Circuit
reversed a reporter's conviction for contempt in Caldwell v. United
States and held that the reporter could not be required to testify before
a grand jury as to confidential interviews with members of the Black
Panther Party. The United States Supreme Court granted review in all
three cases.

On June 29, 1972 the Supreme Court announced its decision, affirming
Branzburg and Pappas, and reversing Caldwell. With four justices dis­
senting, the Court held that the First Amendment did not carve out any
exception for newsmen to the common obligation of all citizens to
answer relevant questions put to them by a grand jury during the course
of an investigation into criminal activity. The dissenters argued that
mandatory disclosure of information gained in confidence would inhibit
the future flow of information from sources who are reluctant to have
their identity or some of their information known. This would frustrate
the public's right to be informed through the media, a right which the
dissenters perceived to be protected by the First Amendment.

The majority and the dissenters alike recognized the danger that the
grand jury process might be subverted if grand jury investigations were
used as tools of political or social harassment. The majority pointed out

that harassment had not been shown in the instant cases, and that, in any event, private rights would be adequately protected by the presiding judge who exercises supervisory control over the grand jury proceeding.\textsuperscript{10} The dissenters, however, argued that the transition from use to abuse of the grand jury investigatory power is so subtle and difficult to establish that the only effective way to assure the free flow of information is to prevent involuntary disclosure of confidential communications.\textsuperscript{11}

Meanwhile, the obligation of witnesses to give testimony to grand juries continues to be litigated on other fronts. Several such cases arose from grand jury investigations into the publication of the so-called "Pentagon Papers." These papers were originally contained in the secret files of the Department of Defense. They consisted of agency reports and other documents, many of which criticized the establishment and maintenance of the recent United States military presence in Southeast Asia. Unauthorized persons made xerox copies of the papers and gave them wide distribution.\textsuperscript{12} Subsequently, United States Senator Mike Gravel obtained a copy of the papers, and introduced them into the proceedings of the Senate Subcommittee on Public Buildings and Grounds of which he was Chairman. Senator Gravel then made arrangements with a private publisher for commercial publication of all the papers.

A federal grand jury in the District of Massachusetts, convened to investigate the release and publication of the Pentagon Papers, summoned many witnesses who objected to testifying on various grounds of constitutional privilege. Two such witnesses were Leonard S. Rodberg, an aide to Senator Gravel, and Howard Webber, the publisher with whom the Senator had consulted. Both witnesses brought motions to quash their subpoenas, and Senator Gravel intervened. The Senator and the two witnesses argued that an order compelling the witnesses to testify would violate the Speech or Debate Clause of the United States Constitution.\textsuperscript{13} Rodberg argued that this clause extends a constitutional privilege

\textsuperscript{10}Id. at 699-708.
\textsuperscript{11}Id. at 719-21.
\textsuperscript{12}The publication of some of the Pentagon Papers in various metropolitan newspapers gave rise to the celebrated and novel case of New York Times v. United States, 403 U.S. 713 (1971). This case was the result of the federal government's efforts to enjoin the continued publication of the papers by the New York Times and the Washington Post during the summer of 1971. The Court, in a per curiam opinion with substantial concurring and dissenting opinions, upheld the denial of the injunctions by the district courts involved. The Court concluded that the government had not met its "heavy burden of showing justification for the imposition of such a [prior] restraint [on expression]." Id. at 714, citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).
\textsuperscript{13}U.S. Const., Art. I, §6, cl. 1 provides in part that "for any Speech or Debate in either House, . . . [Senators and Representatives] shall not be questioned in any other Place."
to the preparation of any speeches or debate material, including the source of any documents used therein. Webber, on the other hand, argued that the clause extends a constitutional privilege to arrangements for a republication of any speeches or debate material.

The federal district court denied both motions to quash, but issued a protective order forbidding any inquiry of Rodberg regarding his or the Senator's conduct at the Subcommittee hearing in preparation for the meeting. On the appeal of both Senator Gravel and the government, the circuit court affirmed. The court held that the Senator's activities in preparation for a speech or debate were protected, and that such protection extended to the sources of material used in preparation. Such protection extended not only to the Senator, but also to any aides involved in the preparation. However, the privilege was not extended to Webber and the district court's refusal to include Webber within the protective order was affirmed.

Petitions for certiorari filed by both Senator Gravel and the government were allowed by the Supreme Court. On review, the Court held that the Speech or Debate Clause covers any act of a Senator's aide which, if done by the Senator personally, would be a "legislative act." Applying this standard, the Supreme Court agreed with the circuit court that arrangements for private publication of the Pentagon Papers were not protected, but that preparation for a speech or debate was protected. However, the Court held that neither the Senator nor his aides had a privilege not to disclose his sources of the Pentagon Papers "as long as no legislative act is implicated by the questions."

The Pentagon Papers grand jury also summoned two other witnesses who were members of the academic community. Each resisted subpoenas to testify as to the identity of persons known by them to have had information about the taking, duplication and distribution of the papers, on the ground that any information they had was received in confidence, and that a breach of that confidence would have a chilling effect on their sources and thus handicap their scholarly research and publication. The federal district court denied a motion to quash a subpoena directed

15 United States v. John Doe, 455 F.2d 753 (1st Cir. 1972).
16 "It seems manifest that allowing a grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them." Id. at 758-59, citing Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970). The Caldwell case was overruled by the Supreme Court in the Branzburg case; see discussion supra.
17 United States v. John Doe, 455 F.2d 753, 761 (1st Cir. 1972).
18 Id. at 761-62.
21 Id. at 622-27.
22 Id. at 628. The Court apparently did not feel compelled to define "legislative act:" nor did it attempt to explain the distinction between "obtaining documents" for a speech or debate and "preparing" for a speech or debate.
to one of the academicians because it found as a fact that the claim of impairment of research potential had not been substantiated. The other witness, however, was convicted of contempt for failure to answer the grand jury’s questions. The circuit court affirmed on the broad ground that the scholar’s privilege is not recognized by the law. The witness was imprisoned, and was released only when the term of the grand jury expired.

The last word in the general controversy over a privilege to protect information sources has probably not yet been spoken. The news media have presented a united and highly vociferous front, deploving the judicial rejections of a constitutional privilege, and urging the establishment of a privilege through legislation. However, there has not been complete agreement even within the media as to the terms which a privilege statute should contain. Questions yet to be resolved include: (1) whether the privilege should be absolute or qualified; (2) whether it should extend to all information acquired in confidence or only to limited categories of data; and (3) whether it should extend to professional reporters only, or also to occasional commentators and academicians.

§18.4. Criminal procedure: Prosecutorial duty to disclose exculpatory information: Harmless error doctrine: Immunity statutes. Commonwealth v. Thompson presented a question regarding the extent of a prosecutor’s pretrial obligation to disclose information that may tend to exculpate the defendant. The defendant was convicted of three assaults allegedly committed in a restaurant. He later obtained two affidavits from the night manager of the restaurant where the assault had occurred. The first affidavit declared that the manager had seen a person other than the defendant enter the restaurant alone prior to the assault, that he recognized this person as a known troublemaker, and that he therefore went into another room in the restaurant to call the police.

25 A group called The Reporters’ Committee for Freedom of the Press has compiled a list of thirty instances in which reporters, publishers, and broadcasters have been threatened with or incurred legal sanctions for refusing to give information sought in connection with law enforcement activities. N.Y. Times, Feb. 18, 1973, at 75, col. 1.
26 Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), discussed supra, is illustrative of the difficulties involved in drafting privilege statutes. Ky. Rev. Stat. §421.100 provides that newsmen are privileged to withhold the sources of information obtained in preparing a story for publication or broadcast. The state court construed this statute as releasing newsmen only from the obligation to reveal the identity of persons who made statements, and not from the obligation to testify as to what the report had seen at marijuana rituals to which he had been invited in confidence. See also In re Bridge, 295 A.2d 3 (N.J. 1972).

§18.4. 1 See also §§1.1-1.7, and §§7.1-7.5, supra.
3 As enunciated in Brady v. Maryland, 373 U.S. 83 (1963), this duty to disclose stems from the Due Process Clause of the Fourteenth Amendment.
Upon hearing a noise, he returned to the public area of the restaurant and saw the assault victim being held by a stranger. He ordered the stranger and his accomplice to leave. Later he observed the defendant through a window at the police station, and stated that the defendant was not in the restaurant at the time of the assault. The second affidavit explained in more detail the manager's belief that the defendant was not the assailant. On the basis of these two affidavits, the defendant made a motion for a new trial. Defendant argued that the failure to disclose the manager's inability to identify the defendant amounted to an unconstitutional suppression of evidence favorable to the defendant. The trial court denied the motion, and the Supreme Judicial Court affirmed. As to the first affidavit, the Court observed that "[i]t could have been found . . . that the affiant was absent during the assault. That being so, such evidence could hardly be favorable to the accused and material to the issue of guilt." 4 Regarding the second affidavit, the Court held that although it contained "evidence very favorable to the defendant which . . . might indeed be material to the issue of guilt," the passage of time between the commission of the crime and the taking of that affidavit justified the trial judge's disbelief of its content. 5

The Thompson case is representative of the difficulty of implementing the legal ideals that have evolved to protect the right of criminal defendants to a fair trial. The prosecutorial duty to disclose information developed from a simple obligation to refrain from knowingly using false or perjured testimony, 6 to the affirmative obligation to disclose exculpatory material, as enunciated in Alcorta v. Texas 7 and Brady v. Maryland. 8 In actual practice, however, the scope of this duty to disclose is far from clear. For example, in Giles v. Maryland, 9 a prosecution for rape, the prosecutor withheld information concerning the conduct and statements of the alleged victim which, if presented to the jury, might have established that the victim consented to the intercourse. However, the Court was unable to reach agreement as to the effect of the non-disclosure on the fairness of the defendant's trial, and chose instead to reverse the conviction on another ground. The Supreme Judicial Court responded in much the same way in Thompson: unconvincled that the withheld

4 Id. at 1507, 286 N.E.2d at 336.
5 Id.
8 373 U.S. 83 (1963). Although there is an intimation in the Brady case that the duty to disclose must be triggered by a defense demand for information, there may be instances where there is a duty to disclose without a prior request. Thus in Giglio v. United States, 405 U.S. 150 (1972), it was error not to disclose that an assistant U.S. attorney had promised a nolle prosequ to a key prosecution witness, although the case was tried by another assistant, who was not aware of the promise of leniency, and thus could not possibly have disclosed the information.
information was in fact exculpatory, the Court in effect held that the duty to disclose never arose.

*Commonwealth v. Thompson*\(^\text{10}\) also involved issues concerning the admissibility at trial of pretrial identifications. These issues are discussed in detail elsewhere in this volume of the *Survey*:\(^\text{11}\) suffice it to say here that the Court's response to these issues represents another area in which courts have been hard-pressed to define legal ideals in concrete terms. Briefly, in *Thompson* the defendant challenged the admission into evidence of the victims' pretrial identifications of him as the assailant, because such identifications were made under conditions which denied him due process of law. While strongly indicating that such evidence was constitutionally admissible, the Court held that even if admitting such evidence was improper, reversal of the conviction was not required, since the error was "harmless beyond a reasonable doubt."\(^\text{12}\)

The use of the harmless error doctrine stems directly from the leading case of *Chapman v. California*,\(^\text{13}\) in which the Supreme Court held that, even where there has been a clear infringement of the constitutional rights of an accused either before or during his trial, a conviction need not be reversed if it appears beyond a reasonable doubt that the defendant's chances at trial were not prejudiced by the error.\(^\text{14}\) Although this doctrine as an ideal is clear, the process of evaluating the presence of "prejudice" when constitutional rights have been infringed has not been clearly articulated and seems frequently to be part of a judicial mystique. For example, Mr. Justice Black's enunciation of the doctrine in *Chapman* indicated that it was a dangerous rule,\(^\text{15}\) and that errors should be strictly scrutinized before being labelled "harmless."\(^\text{16}\) Applying the doctrine in *Chapman*, the Court was not convinced that the prosecutor's numerous references to the defendants' failure to take the stand were harmless.

In spite of those earlier admonitions, recent applications of the harmless error doctrine have broadened its scope. In *Milton v. Wainwright*\(^\text{17}\)


\(^{11}\) See §§7.1-7.3, *supra*.

\(^{12}\) 1972 Mass. Adv. Sh. 1503, 1505, 286 N.E. 333, 335. The basis upon which the Court considered the identifications to be "harmless error" is discussed *infra*.

\(^{13}\) 386 U.S. 18 (1967).

\(^{14}\) The Court in Chapman thus modified the classic pronouncement of Judge Learned Hand that, where constitutional errors are present, there must be a reversal of the conviction even though the guilt of the defendant is clear. United States v. Coplon, 185 F.2d 629 (2d Cir. 1950).

\(^{15}\) "In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." 386 U.S. 18, 22 (1967).

\(^{16}\) "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." (Emphasis added). Id. at 23-24.

\(^{17}\) 407 U.S. 371 (1972).
a conviction was challenged because one of four confessions introduced at the trial had been obtained unconstitutionally. Although this confession was "plainly relevant evidence," and although it was the one most relied upon by the prosecution, the Supreme Court held that its admission was harmless error. The Supreme Judicial Court's approach to the pretrial identification evidence in Thompson was similar, and in other respects even broader than the Supreme Court's approach in Milton. The Court noted that two other witnesses identified the defendant as the assailant and that the witnesses whose pretrial identifications were challenged had failed to identify the defendant at trial. This reasoning apparently assumes that the challenged evidence was harmless simply because it was contradicted by other evidence. Whether Thompson is an expansion of Milton is a question susceptible to differing views. However, it seems clear from these decisions that both courts have lost sight of Mr. Justice Black's admonition that "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless."

Another "ideal" doctrine which is particularly difficult to apply to concrete factual situations is the "fruit of the poisonous tree" doctrine. According to this doctrine, evidence obtained as a result of an unconstitutional act or procedure may not be used in a judicial proceeding. However, even if constitutional rights have been infringed, evidence obtained "independently" of such infringement may be used. The problem of applying the doctrine is a problem of determining whether proffered evidence has an independent source.

This particular problem of applying the "fruit of the poisonous tree" doctrine, usually confined to search and seizure or coerced confession cases, can be expected to arise shortly in the unlikely area of the privilege against self-incrimination. The Crime Control Act of 1970 provides that a witness may not refuse to give evidence on the ground of self-incrimination if he is assured that no testimony and no information "directly or indirectly" derived from testimony will be used against him in a criminal prosecution. The question in applying this immunity statute should be exactly the same as the question in applying the "fruit of the poisonous tree" doctrine: whether the proffered evidence has a source which is independent of the testimony given under immunity. It is perhaps too early to generalize about the effect that the immunity statute

18 Id. at 383 (Stewart, J., dissenting).
19 Id. at 378.
21 The phrase appears to have been first used by Mr. Justice Frankfurter in Nardone v. United States, 308 U.S. 338 (1939), a wiretap case.
22 Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). In this case the government's attempt to justify a subpoena duces tecum with evidence obtained through an unreasonable search and seizure was rejected.
and its interpretive problems may have on the administration of the
criminal law or the privilege against self-incrimination. However, it
should be safe to predict that courts will be faced with knotty problems
in determining the "independence" of proffered evidence—problems that
will depend as much upon the mental processes and state of knowledge
of the obtainer of the evidence as upon the determination of concrete
facts.

It should be noted that the passage of the immunity provision of the
1970 Crime Control Act worked a major change in the scope of im-
munity statutes. Such statutes have a long history, and have traditionally
fallen into two categories. The first major federal immunity statute was
enacted in 1868, and provided immunity against prosecution based on
any testimony given under immunity.25 However in 1892 the Supreme
Court, in Counselman v. Hitchcock,26 held that statute to be constitu-
tionally deficient. It was felt to be insufficiently protective of the privilege
against self-incrimination since evidence derived from any testimony given
under immunity could still be used in a criminal prosecution. In so
holding, the Court expressed its opinion that "[i]n view of the constitu-
tional provision, a statutory enactment, to be valid, must afford absolute
immunity against future prosecution for the offense to which the question
relates."27

In response to Counselman, Congress in 1893 passed a new immunity
statute of somewhat broader scope; basically the new statute granted
immunity against prosecution for any transaction about which the wit-
ness might be required to testify.28 This broader immunity was held to
be sufficiently protective of the privilege against self-incrimination.29

The combined holdings of Counselman and Brown gave rise to a
widespread belief that, to be valid, an immunity statute must grant
transactional immunity and not just testimonial immunity.30 In fact,
most state and federal immunity statutes enacted after Brown followed
the transactional immunity pattern. Clearly, however, the immunity pro-
vision of the 1970 Crime Control Act, which prohibits prosecutions based
on testimony given or on evidence obtained as a result of such testimony,31
does not grant transactional immunity. In spite of this, during the 1972
Survey year the Supreme Court upheld the Act's validity in Kastigar v.

25 Immunity Act of 1868, 15 Stat. 37. The immunity so granted is commonly
referred to as "testimonial immunity."
26 142 U.S. 547 (1892).
27 Id. at 586.
28 Act of Feb. 11, 1893, 27 Stat. 443. The immunity so granted is commonly
referred to as "transactional immunity."
(a), 84 Stat. 927, repealed the 1893 immunity statute (27 Stat. 443). The immu-
nity granted by Section 6002 is commonly referred to as "use and derivative use
immunity."
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United States. The Court felt that the "use and derivative use immunity" was sufficiently protective of the privilege against self-incrimination, which it characterized as affording "protection against being 'forced to give testimony leading to the infliction of 'penalties affixed to... criminal acts.'" The immunity was broad enough because "[i]t prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." Nor was the Court swayed by the broad language from the Counselman opinion; such language was characterized as dictum, unnecessary for the Counselman holding, and not binding authority.

§18.5. Abortion: The interaction between legal doctrine and medical technology. The highly controversial and emotion-ridden issue of the validity of the Massachusetts abortion statute was presented in Commonwealth v. Brunelle, a prosecution for performing an operation upon a pregnant woman for the purpose of inducing miscarriage. Before his superior court trial, the defendant brought a motion to dismiss, which presented the question of whether the statute, which forbade the inducement of abortion for purposes other than the elimination of danger to the life or health of the mother, exceeded the bounds of legislative power.

The superior court judge denied the motion in an elaborate opinion. The judge ruled that the restraints imposed upon a pregnant woman's liberty or right of privacy by preventing abortions solely for personal or socio-economic reasons are justified by a "compelling state interest" in the protection of pre-natal life. Moreover, he ruled, the extent to which the state will protect pre-natal life was solely a matter of legislative judgment.

After trial and conviction, the defendant appealed to the Supreme

32 406 U.S. 441 (1972). A similar result was reached with respect to a comparable state statute in Zicarelli v. New Jersey State Com. of Investigation, 406 U.S. 472 (1972).
34 406 U.S. 441, 453 (1972).
35 See note 27, supra.
36 406 U.S. 441, 453-455 (1972). The Court also addressed itself in Kastigar to the problems, discussed supra, of determining whether proffered evidence has a source independent of testimony given under a grant of immunity. The Court held that once a defendant "demonstrates" that he is being prosecuted for something "related to" previous testimony given under a grant of immunity, the prosecution has an "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Id. at 460. However the Court gives no assurance that anything but a judicial mystique will be used to determine when the prosecutor's "affirmative duty" arises, or when it has been satisfied.
Judicial Court. The Court upheld the denial of the motion to dismiss, but it did not reach the constitutional issues. Rather it concluded that the defendant had no standing to raise those issues because it appeared from the record that the defendant was not a licensed physician. The defendant's conduct would therefore be unlawful even if abortion were a lawful medical procedure. Since "[o]nly persons whose interests are affected by a statute may assert that it is unconstitutional," the plaintiff had no standing.

Shortly after the Brunelle decision, on January 23, 1973, the Supreme Court held that a pregnant woman has a constitutionally protected right of privacy, which includes a right to terminate her pregnancy. While this right was held not to be absolute, state restriction of its exercise must be based upon some "compelling state interest," such as the protection of the health of the woman or the protection of a viable fetus' life. Accordingly, the Court concluded that the abortion decision may be made by the woman and her physician in the first three months of pregnancy without state interference. During the second three months the state may regulate the abortion process only to the extent of requiring procedures calculated to protect the health of the mother. In the final three months, when the fetus has reached the state of "viability" (i.e., the capacity to live outside the womb), the Court conceded that the legislature might find a "compelling interest" sufficient to warrant a restriction to cases where the life or health of the woman is in danger.

The abortion decisions will undoubtedly generate much comment and controversy, and it is not the purpose here to analyze them in great detail. It should be noted, however, that the cases lay great emphasis upon medical technology. The Court attached weight to the fact that under the common law, as well as under the early doctrines of other legal systems, it was not an indictable offense to abort a fetus that had not "quickened." Abortion statutes, first enacted in the early and mid-nineteenth century, are rationalized by the Court as a legislative recognition of the fact that abortion procedures of that period presented a serious threat to the life and health of the women upon whom they were performed. Since modern medical technology has largely eliminated those

5 The Court cited G.L., c. 112, §6, which forbids one who is not a licensed physician to perform a significant surgical or medical procedure.
6 1972 Mass. Adv. Sh. 131, 134, 277 N.E.2d 826, 830. Since the defendant was in fact convicted under the abortion statute, and not for unauthorized practice of medicine, it is difficult to understand why his "interests" were not affected by the abortion statute.
8 The Court's rationale thus extends the "compelling state interest" doctrine from the equal protection area to the due process and right to privacy areas.
9 See note 7, supra.
10 The cases were decided during the 1973 Survey year and will thus be analyzed in the 1973 Annual Survey.
risks, at least in the early stages of pregnancy,\textsuperscript{11} the Court reasoned that the statutes have outlived their utility. At the same time, the Court declined to re-examine the assumption which underlay the common law doctrine—that is, than an “unquickened” fetus is not a human life to be protected from pre-birth destruction.

The process of evaluating legal doctrines in terms of medical advances is certainly not new in the law. In 1787 an English court used the Rule Against Perpetuities to invalidate a gift to the daughters of John and Elizabeth Jee, which was contingent upon the failure of issue of Mary Hall.\textsuperscript{12} Although the Jees were both over age 70 when the gift was made, the court felt that they still might have another daughter who might turn out to be the sole beneficiary of the gift. The doctrine of the “fertile octogenarian” thus became firmly rooted in the law. In 1934, however, the Supreme Court was asked to apply the Jee doctrine to a woman who had undergone surgery for removal of her vital reproductive organs, and the Court refused.\textsuperscript{13} The attorney who opposed the doctrine in that case related that, in preparing his arguments, he ransacked law libraries without finding any persuasive rationale for the Jee doctrine.\textsuperscript{14} However, turning to medical libraries he discovered that the first ovariotomy took place in 1809, and that the development of ether as an anaesthetic in 1846 made abdominal surgery quite practicable at this early date. Thus it became clear that the legal doctrine of continued fertility was founded upon unwarranted medical premises.

The parallelism between the demise of the Jee doctrine and the recent demise of anti-abortion statutes is clear. When abortion of an unquickened fetus was first recognized as an indictable crime research had revealed few of the details of the biological progression from chromosome, to zygote, to embryo, to fetus. The legal doctrine thus evolved in ignorance of the facts to which it applied. Now medical technology has determined that abortion is no longer a dangerous procedure, and that viability is reached at approximately six months and that is the medical basis of the 1973 abortion decisions. It may well be that future developments in scientific research, involving such awesome medical procedures as uterine implants and transplants, will bring more information to bear on the nature of “nascent” life. That information may well require the 1973 abortion cases to be reexamined. If it then appears that the abortion cases are inconsistent with medical fact, then they too should go the way of the fertile octogenarian.

\textbf{§18.6. Miscellaneous cases.} On several occasions during the 1972 Survey year, constitutional attacks were mounted successfully, in federal

\textsuperscript{11} For example, the Court noted that a woman who aborts during the first trimester of pregnancy has a better chance of survival than one who carries through to term. Roe v. Wade, —U.S.—, 93 S.Ct. 705 (1973).
\textsuperscript{13} United States v. Provident Trust Co., 291 U.S. 272 (1934).
court, on statutes, ordinances and administrative practices in Massa­
chusetts. In United States v. State Tax Commission,¹ a state tax was held partially invalid as applied to federal savings and loan associations. State mutual savings banks are authorized to make loans secured by mortgages on land within the state or in contiguous states within a radius of fifty miles from the main office of the institution.² Federal savings and loan associations may extend their mortgage loan operations into contiguous states within a radius of 100 miles from the association’s main office.³ The Massachusetts Bank Excise Tax Act⁴ imposes a tax on the average amount of the bank’s deposits and allows a deduction of the unpaid balance on loans secured by mortgage of land within the Commonwealth or of land in a contiguous state within a radius of fifty miles from the bank’s main office. It was stipulated in the case that federal savings and loan associations in Massachusetts had loan balances of nearly $500,000,000 secured by mortgaged land in other states located between 50 and 100 miles from the associations’ main offices. Under the statute, however, the federal associations were not entitled to deduct those amounts from total deposits in determining their tax liability. The district court held that the denial of this deduction violated a provision of the federal banking law which proscribes a state from imposing upon a federal association any tax “greater than that imposed . . . on [similar state banks].”⁵ In effect, the court found that denying a deduction for the full amount of a federal savings and loan association’s outstanding loans resulted in a higher excise tax rate than that imposed upon state banks. Since the state tax conflicted with federal law, it was invalid under the Supremacy Clause of the Constitution.⁶ Further, the court ruled that the excise tax ran counter to the Commerce Clause. Apparently reasoning that, as a result of the non-deductibility of balances on loans made beyond a fifty-mile radius, federal savings and loan associations would be reluctant to make such loans, the court ruled that the excise tax inhibited the interstate flow of mortgage loan funds.⁷

Boucher v. Minter⁸ was a class action brought in behalf of beneficiaries

² G.L., c. 168, §34 defines this area for mutual savings banks. G.L., c. 170, §23 permits cooperative banks to extend only 25 miles into contiguous states.  
⁴ G.L., c. 63, §11.  
⁷ Id.  
⁸ 349 F. Supp. 1240 (D. Mass. 1972). In this case a three-judge district court was convened to adjudicate the constitutionality of a state administrative regulation, despite the fact that 28 U.S.C. §2281 (1970) requires such a three-judge court to be convened only when a statute is under attack. This follows from the case of Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923), in which the Supreme Court held that the policy behind Section 2281 requires the convening of a three-judge court to restrain enforcement of an administrative policy that has state-wide application. This enlargement of the literal mandate
of Aid to Families with Dependent Children (AFDC)\(^9\) whose mothers had remarried and were living with their new spouses. AFDC funds are distributed by the Massachusetts Department of Public Welfare, which has promulgated schedules that separately indicate the amount of benefits for shelter allocated to AFDC recipients. The schedules further provide that upon the AFDC recipient's remarriage and cohabitation with her new spouse, shelter benefits for her children shall be terminated. This regulation was apparently promulgated on the assumption that the stepfather would provide the shelter formerly financed by AFDC. However, in Massachusetts a stepfather is not legally obligated to support his stepchildren.\(^10\) Since a stepfather may lawfully decline to provide shelter for his stepchildren, the court concluded that the basic assumption could not apply. To apply an irrebuttable presumption that AFDC children would be supported by a new stepfather and to cut off shelter benefits on that account was to deprive the children of property without due process of law.\(^11\) The schedules were also held to deny equal protection, since funds were automatically cut off only when a stepfather moved in, but not when another relative moved in.\(^12\)

_Rozek v. Gaughan\(^13\)_ presented an unusual invocation of the Civil Rights Act.\(^14\) Persons who had been involuntarily committed to the Treatment Center at Bridgewater brought an action against the administrators of the center, alleging that the heating of the building in which they were confined was "grossly inadequate," in consequence of which they suffered personal ills and severe personal discomfort. The complaint alleged that the lack of heating constituted cruel and unusual treatment. The respondents argued that the heating plant was old and incapable of adequate regulation, and that the deficiencies complained of existed despite the defendant's best efforts to supply sufficient heat. The district court dismissed the complaint, but the court of appeals reversed. Without deciding whether the good faith of the defendants would save them from liability for damages, the court concluded that the complaint was at least sufficient to state a claim for equitable relief. The plaintiffs' constitutional rights were invaded if the treatment was in fact cruel, regardless of the absence of bad will or evil purpose on the part of the defendants.\(^15\) The practical consequence of such a ruling may be that

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\(^12\) Id. at 1245.
\(^13\) 459 F.2d 6 (1st Cir. 1972).
\(^15\) 459 F.2d 6, 7-8 (1st Cir. 1972). In the district court the case had been
the Commonwealth will be put to the choice of providing adequate facilities or losing its right to confine persons involuntarily in the existing facility.

*_Wulp v. Corcoran*_ 16 represented a challenge to a Cambridge ordinance that prohibited the peddling of newspapers without a permit and an identification badge. Plaintiffs, who wished to sell various printed publications on the streets of Cambridge, had been threatened with arrest and otherwise harassed because they did not hold permits or exhibit badges; although none had yet been arrested or prosecuted for violating the ordinance, prosecution was the prescribed sanction for violations. The district court denied relief on the ground that the proper remedy was to raise the constitutional claims in defense of a criminal prosecution in a state court, but the circuit court of appeals reversed. Although a line of cases headed by _Younger v. Harris_ 17 seemed to curtail the interposition of federal courts into state criminal procedure by requiring constitutional claims to be raised first in state court criminal proceedings, the circuit court ruled that those cases did not apply to _Wulp_. Its opinion emphasized that (1) _Younger_ was a challenge to criminal statutes by plaintiffs whose interests had not yet been noticeably affected, 18 whereas the plaintiffs in _Wulp_ had all been threatened with arrest under the statute they challenged; and (2) no criminal prosecutions were pending against the plaintiffs, so that an application of the _Younger_ doctrine would defer the prompt determination of First Amendment rights. 19

Turning to the merits, the circuit court found the ordinance invalid on its face. Focusing on the ordinance's requirement that an identification badge be worn by newspaper peddlers, the court held that the peddlers' right of anonymity, an adjunct of the First Amendment's freedom of the press, had been curtailed. 20 Nor did the court accept the defendant's argument that the ordinance was used merely as a device referred to a magistrate, who based his judgment for the defendant on a hearing and on an exculpatory memorandum submitted by defense counsel. The district court judge adopted the magistrate's decision without giving plaintiffs notice of his intention to do so or an opportunity for a hearing. Although the circuit court reversed the dismissal on the merits, it also noted some reservations as to the propriety of the district court procedure. Id. at 8.

16 454 F.2d 826 (1st Cir. 1972).
18 "The Court [in Younger] noted that feelings of 'inhibition', without any claim of a threat of prosecution, or that a prosecution was likely or even remotely possible, are entirely too 'imaginary or speculative' to establish standing." 454 F.2d 826, 830 (1st Cir. 1972).
19 Id. at 830-32.
20 Id. at 834, citing _Talley v. California_, 362 U.S. 60 (1960). See also _Smith v. California_, 361 U.S. 147 (1959), which held that First Amendment protections must be afforded even if the disseminator is seeking commercial gain.
for traffic control in Harvard Square; the ordinance was not sufficiently narrow to focus on that objective.21

In Bray v. Lee22 an administrative act of the Boston School Committee was also invalidated. The highest quality secondary education available in Boston is offered in the Latin schools, admission to which is determined by a competitive examination. Boys and girls are housed in separate buildings, known respectively as Latin School and Girls Latin School. The former has a substantially larger seating capacity, and the examination score required for admission is keyed to the number of seats available for each sex. As a result, in 1970 the critical score for admission to Latin School was 120 points while the critical score for admission to Girls Latin School was 133 points. Thus girls who scored between 120 and 132 were denied admission, while boys with the same score were admitted. This disparity was held a denial of equal protection; the court found that female applicants "have been illegally discriminated against solely because of their sex, and that discrimination has denied them their constitutional right to an education equal to that offered to male students at the Latin school."23

Although the case was not instituted until after the beginning of classes in 1970, the case was not moot since it appeared that it was possible for a student to be admitted to the Latin schools for the ninth through twelfth grades. Accordingly, the court ruled that, to the extent that ninth-grade seats were available in either school, girls who had been discriminatorily refused admission in 1970 at the seventh-grade level should be admitted to either school at the ninth-grade level in 1972.

As an interesting sidelight, the defendant suggested that the court should abstain because the legislature had enacted a statute forbidding the exclusion of any child from any school on the basis, among others, of sex.24 In declining the invitation, the court took judicial notice of the pendency of another bill that would exempt the Latin schools from the new statute. Taking a cynical view, the court indicated that it lacked confidence in voluntary compliance with the new requirements.25

**STUDENT COMMENT**

§18.7. Criminal contempt: Right to trial by jury and prohibition of multiple punishments for single offenses. Within the last decade and a half, the law regarding the right to jury trial for criminal contempt of court has undergone fundamental change after a long history which had

23 Id. at 937.
25 "[T]he mere existence of a law, unfortunately, is no guarantee that it will be complied with by all persons subject thereto." 337 F. Supp. 934, 937 (D. Mass. 1972).
essentially precluded jury trial in this area. Today, where the alleged contempt is deemed "serious," a defendant is entitled to a jury trial, and among the criteria by which "seriousness" is established is whether a sentence of more than six months imprisonment has been imposed. These developments have given rise to a series of new questions for cases in which the alleged contempt lies in a continuing course of conduct—refusal to answer questions under oath, for example, or repeated disruption of court proceedings—rather than in an isolated act. May a court, ostensibly to circumvent the jury requirement, find multiple contempts and impose a series of sentences, each one of six months or less, but running consecutively? If so, what standards govern the division of conduct into separately indictable units?

Some of these problems surfaced recently in the Commonwealth in the case of Baker v. Eisenstadt. The original matter was a criminal information presented on October 4, 1971 against Edward De Saulnier, Jr., an associate justice of the Massachusetts Superior Court, for alleged judicial misconduct. According to the charges, Judge De Saulnier had in 1962 agreed with I. Charles Baker, a surety bail bondsman, to insure a favorable judicial result in certain criminal cases in return for a sum of money. Baker, when later subpoenaed to testify at a hearing inquiring into the charges of misconduct, moved to quash the subpoena, asserting that his Fifth Amendment privilege against self-incrimination would be violated if he were compelled to testify. In response to this claim, the Middlesex County District Attorney, acting in concert with the Attorney General of the Commonwealth, made offers to Baker purporting to guarantee absolute immunity from prosecution. Baker and his counsel were not satisfied with the offers. The Supreme Judicial Court meanwhile denied Baker's Fifth Amendment claim, holding that for Baker to testify as to events prior to January 1, 1965 would involve him in no risk of self-incrimination. Baker nevertheless remained adamant, refusing to answer any of the thirty-five questions asked of him and relying at all times on the claimed privilege.

The Court held Baker in contempt for refusal to answer thirty-three of the thirty-five questions. Each refusal was considered a separate contempt with the total number being divided into five groups for purposes of sentencing. Baker received a sentence of five months imprisonment for each failure to answer a question in Group I, the sentences to run concurrently. For the four remaining groups, the Court imposed a six month sentence for each refusal, the sentences to run concurrently within each group and consecutively as to the groups themselves, including Group

4 456 F.2d 382 (1st Cir. 1972).
I. The aggregate time to be served amounted to twenty-nine months. Baker claimed that even if his claim of privilege was mistaken, his refusal to testify constituted only one contempt and not several; that the twenty-nine month aggregate sentence, being multiple punishment for a single contempt, placed him in double jeopardy; and that the Court's summary imposition of a twenty-nine month sentence for a single offense also violated his constitutional right to trial by jury. The Supreme Judicial Court held that each of Baker's refusals to answer was a separate offense; that for separate distinct offenses, cumulative punishments are constitutionally permissible; and that therefore the aggregate sentence of twenty-nine months did not place Baker in double jeopardy. In so holding, the Court reasoned that no question put to Baker was repetitive, but that each sought to elicit new facts, and that Baker had failed initially to "carve out an area of refusal." The Court further held that since no more than six months imprisonment was imposed for any one contempt, each offense must be considered "petty" for jury trial purposes, and that therefore Baker had no constitutional right to trial by jury.

Baker's petition for habeas corpus was denied by the Massachusetts Federal District Court, but the Court of Appeals for the First Circuit reversed. In doing so the court found that although the Supreme Judicial Court was correct in holding that the absolute immunity offered Baker extinguished whatever privilege against self-incrimination he would have had, the Massachusetts court erred in treating each refusal to answer as a separate offense for which cumulative penalties could be imposed. In finding only one contempt in Baker's refusal to testify, the court reasoned that although Baker had not initially stated expressly that he would not answer any questions, his prior statements and actions, together with his reliance on the Fifth Amendment, clearly indicated at the outset of questioning that he would not testify on the subject at hand. The original refusal to testify said the court, was the sole contempt committed. And since the Fifth Amendment guarantee against double jeopardy as applied to the states through the Fourteenth Amendment, protects against multiple punishment for the same offense, the cumulative penalties imposed on Baker constituted a denial of due process.

The court of appeals acknowledged the doctrine that even where a defendant has failed to "carve out an area of refusal," his refusal to answer several questions will constitute only one contempt where those questions pertain to but a single subject of inquiry. The court declined to analyze the case in terms of this issue, however, citing the unavoidable arbitrariness attendant upon categorizing information in terms of subject matter.

Since the court's disposition of the case reduced Baker's sentence to a point beyond the purview of the Sixth Amendment's requirement of

7 Baker v. Eisenstadt, note 4, supra.
8 See, e.g., United States v. Orman, 207 F.2d 148 (3rd Cir. 1953).
jury trial, the court did not reach the issue of whether the aggregation of six month sentences for separate contempts tried without a jury is a denial of constitutional right.

The decision of the court of appeals in Baker and the other issues suggested therein raise serious problems for Massachusetts and other state courts concerning the permissible treatment of defendants in criminal contempt cases. This article will re-examine the law of contempt in light of several recent cases, both state and federal, which, like Baker, have gone far toward drastically changing the law in this area. Analysis and criticism of these cases will focus primarily on the effect on criminal contempt cases of the right to trial by jury and the prohibition of multiple punishments for single offenses.

I. HISTORICAL DEVELOPMENT OF THE CONTEMPT POWER

Since its original development in the English ecclesiastical courts and its later adoption by the courts of equity,9 the power to punish for contempt has been considered inherent in the courts and dependent for its existence on neither constitutional nor legislative authority.10 It is regarded as necessary for the preservation of order in judicial proceedings and as essential to the enforcement of judgments and other court orders.11

Originally, the law of contempt was purely criminal in nature.12 The sanction of imprisonment was imposed only for conduct constituting active interference with the court or with official agents of the crown. Gradually however, the contempt power took on civil aspects. The courts began to imprison defendants in civil cases as an equitable procedural device to secure obedience to court orders.13 The distinctions which developed at common law between what came to be known as “civil contempt” and “criminal contempt” are still operative today. Basically criminal contempts are deliberate acts in disrespect of the court or in obstruction of the administration of justice.14 Since the injury is to the courts, and therefore to society, such acts are in effect public offenses and very much like ordinary crimes. The contempt proceeding vindicates

10 “The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves; for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory.” 4 W. Blackstone, Commentaries * 286. As early as 1812 the United States Supreme Court held that “[c]ertain implied powers must necessarily result to our courts of justice, from the nature of their institution. . . . To fine for contempt, imprison for contumacy, to enforce the observance of order. . . .” United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 31, 34 (1812).
11 Ex parte Robinson, 86 U.S. (19 Wall) 505, 510 (1873).
13 Id.
14 Id. at 48, citing Rapalje, A Treatise on Contempt 24 (1884).
the dignity and authority of the court, punishes the defendant and deters others from similar conduct. The imprisonment cannot undo the past damage and so is unconditional and for a fixed period. Civil contempts on the other hand consist of refusals or failures to do that which the court requires for the benefit of private parties. The contempt involves merely passive inaction regarding civil obligations and results only in private injury. Here, imprisonment is not punitive but remedial. Since the objective is the defendant’s compliance with the court’s order, the sentence is conditional. The defendant “carries the keys of his prison in his own pocket.” Generally, the nature of the defendant’s conduct, the purpose of the contempt proceedings against him, and the type of punishment imposed determine whether the contempt is civil or criminal.

Contempts were further distinguished in common law England as either direct or indirect, and this categorization is still relevant in the United States. Direct contempts are those committed within the presence and cognizance of the court. Conduct is “in the presence” of the court.

The distinction between civil and criminal contempt is important in that it will determine what procedural safeguards, if any, are available at the contempt proceeding. However, it is often difficult to distinguish one from the other. Indeed, courts in many jurisdictions indicate that it is not necessary to classify contempts as either wholly civil or wholly criminal. In Massachusetts, for example, the Supreme Judicial Court has said that “Massachusetts law has long refused to distinguish rigidly between the civil and criminal aspects of contempt of court. . . . A sentence for contempt in Massachusetts may be ‘partly remedial and partly punitive partaking both of civil and criminal features’.” In re DeSaulnier, 1971 Mass. Adv. Sh. 1817, 1819, 279 N.E.2d 287, 289 (1971). See also, Root v. MacDonald, 260 Mass. 344, 157 N.E. 684 (1927).

The problem of differentiating between civil and criminal contempt is strikingly presented when an individual without privilege refuses to testify in a judicial proceeding. Such conduct has aspects of both civil and criminal contempt. See, e.g., Baker v. Eisenstadt, 456 F.2d 382 (1st Cir. 1972); People v. Riela, 7 N.Y.2d 571, 200 N.Y.S.2d 43, 166 N.E.2d 840 (1960); People v. Saperstein, 2 N.Y.2d 210, 159 N.Y.S.2d 160, 140 N.E.2d 252 (1957). Cases have held that a single act may constitute either a civil or a criminal contempt depending on the court’s inclination. See Gompers v. Bucks Stove & Range Co., supra; Bessete v. W. B. Conkey Co., 194 U.S. 324 (1904). Others have found that the same act can constitute both a civil and a criminal contempt and can be punished as both. Yates v. United States, 355 U.S. 66, 74-75 (1957); United States v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947).

The law of contempt in this area is presently in a state of confusion. In many instances, the traditional distinctions provide little guidance in apprising an individual whether certain contemplated action will be viewed as civil or criminal.

17 Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911). This phrase originated in Williamson’s Case, 26 Pa. 9, 24 (1855), and has been widely repeated by both state and federal courts.

The law of contempt in this area is presently in a state of confusion. In many instances, the traditional distinctions provide little guidance in appraising an individual whether certain contemplated action will be viewed as civil or criminal.
when it occurs either in the courtroom itself (actual presence) or so near to the courtroom as to have an actual as opposed to only a speculative or remotely causal effect on the court's business. Absent a statute to the contrary, a direct contempt is punished summarily and without a trial of any sort. Since the offense is observed by the court in all its nuances, the court's knowledge of the facts supplies the necessary proof for conviction. Any formal proceeding to determine guilt would be unnecessary. Furthermore, courts see a need for immediate action on direct contempts to preserve order in the courtroom.

Indirect contempts are acts, conduct, or inaction which occur outside the court's presence but which nevertheless tend to obstruct the administration of justice. They are also defined as any contempt about which the court has no first hand knowledge. Indirect contempts cannot be

or disruptive act. A polite refusal to cooperate with the court, as in the refusal to testify cases, may suffice. See, e.g., Yates v. United States, note 18, supra; Baker v. Eisenstadt, note 18, supra; People v. Rieha, note 18, supra.

Goldfarb, note 12, supra, at 61. See also Note, Legislative Contempt and Due Process: The Groppi Cases, 46 Ind. L.J. 480, 489 (1971).

Goldfarb, note 12, supra at 61.


Some recent cases question whether it is in fact true that in all cases of direct contempt there are no fact questions left undetermined. In one such case, Harris v. United States, 382 U.S. 162, 166 (1965), in which the contempt consisted of refusals to testify, the Court noted that "[w]hat appears to be a brazen refusal to cooperate with the grand jury may indeed be a case of frightened silence. Refusal to answer may be due to fear—fear of reprisals on the witness or his family. Other extenuating circumstances may be present." The Court went on to say that under these circumstances only a hearing, given after timely notice, would "elucidate all the facts and assure a fair administration of justice." At 167. A similar comment was made by the court in Baker v. Eisenstadt, note 18, supra, at 394-95.

Although in cases of direct contempt there can be no dispute as to whether or not the particular acts or conduct took place, only a formal trial will enable the defendant to introduce evidence of facts which are relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

Where the contempt is a refusal to testify there is no such need for immediate action to preserve order. This was recognized by the court in United States v. Pace, 371 F.2d 810, 811 (2d Cir. 1967), where the court held that "[s]ummary disposition is thus available only when immediate punishment is necessary to put an end to acts disrupting the proceedings. . . . It is not a remedy to be used in a case . . . where the contempt consists of no more than orderly refusal . . . to answer a question on Fifth Amendment grounds before the taking of any testimony." Cf. Harris v. United States, 382 U.S. 162 (1965). The court's holding in Pace was based on a particular interpretation of Rule 42 (a) of the Federal Rules of Criminal Procedure, and not on the Constitution, and hence its applicability does not extend to state courts. See Baker v. Eisenstadt, 456 F.2d 382, 388 (1972).

See Goldfarb, note 12, supra, at 60.

punished summarily. They require a formal hearing in which the defendant is provided all the procedural safeguards required by due process, including timely notice of the charges, a reasonable opportunity to be heard, the right to assistance of counsel, and the right to call witnesses in his behalf.

The early history of summary process in contempt cases is in some dispute, but it is clear that by the late 17th century, contempt cases in England were being tried either summarily or before the court without a jury. Our Constitution was framed in the language of the English common law, and its provisions must be read in the light of common law history. Thus, when the framers of the Constitution provided in Article III that "the trial of all crimes ... shall be by jury" and in the Sixth Amendment that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .", they did not intend to include within the meaning of "crimes" and "criminal prosecutions" either petty offenses or contempts (whether "petty" or not). That the framers did not intend that a defendant have the right to jury trial in contempt cases is supported by the fact that the Judiciary Act of 1789, which stated that federal courts "shall have power to ... punish by fine or imprisonment, at the discretion of said courts, all contempts of authority. . . .", was enacted by a Congress whose Judiciary Committee was composed mainly of members of the Constitutional Convention who were responsible for writing Article III and the Sixth Amendment.

27 Id.
29 Smith v. Alabama, 124 U.S. 465, 478 (1888). See also Eilenbecker v. District Court, 134 U.S. 31, 36 (1890), in which the Court said: "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it."
31 In Green v. United States, 356 U.S. 165 (1958), Justice Harlan, speaking for the Court commented that: "[T]his Court has never deviated from the view that the constitutional guarantee of trial by jury for 'crimes' and 'criminal prosecutions' was not intended to reach to criminal contempts." Id. at 186. See also Justice Frankfurter's concurring opinion. Id. at 191 n.2.
32 See United States v. Barnett, 376 U. S. 681, 694 n.12 (1964) for a list of Supreme Court cases which until 1964 supported the summary disposition of contempts, without trial by jury and without reference to any distinction based on the serious or petty nature of the offense.
tion the contempt power was a relatively minor part of our law. It was seldom used and was then only attended by trivial penalties. Gradually, however, the judiciary—both state and federal—began to employ the handy device of criminal contempt with greater frequency and the punishments imposed became more severe. The contempt power, with its essentially arbitrary procedures, was gradually transformed into a dangerous judicial weapon sometimes used despotically. This trend became notorious in 1831 in the case of Judge Peck who summarily adjudged a lawyer in contempt of court, disbarred, and imprisoned him for writing an article criticizing one of Peck’s decisions that was then pending on appeal. Congress was outraged by this abuse of the contempt power and as a result instituted impeachment proceedings against Judge Peck. The public sentiment for limiting the court’s contempt power which arose out of the impeachment proceedings led to the Judiciary Act of 1831 which confined the summary power of punishment to “misbehavior of any person … in the presence of the courts, or so near thereto as to obstruct the administration of justice. …” While the Act made no mention of a right to trial by jury, it did change then existing law by requiring that in cases of indirect contempt a defendant must be granted a formal hearing before the court in order for his conviction of contempt to be valid. More recently, other statutes have given a limited right to jury trial in certain classes of contempt cases, and still others have limited the punishment for contempt in certain situations. In 1964, Rule 42 of the Federal Rules of Criminal Procedure was enacted.

34 “It appears that alleged offenders were let off after an apology, a reprimand or a small fine or other relatively slight punishment. I have found no instance where anyone was unconditionally imprisoned for even a term of months, let alone years, during that era when extremely harsh penalties were otherwise commonplace.” Green v. United States, 356 U.S. 165, 207 n.21 (Black, J., dissenting).

Contrast the rather severe penalties often imposed today. In Green, for instance, the Supreme Court upheld a conviction for contempt of court, without trial by jury, and a sentence of three years imprisonment.

35 For a detailed account see A. Stansbury, Report of the Trial of James H. Peck (1833); see also Nelles and King, Contempt by Publication in the United States, 28 Colum. L. Rev. 401, 423-30 (1928).


37 See, e.g., 18 U.S.C. §§402, 3691 (1970) (jury trial in criminal contempt proceedings where the act in question constitutes a separate criminal offense under either state or federal law); 18 U.S.C. §3692 (1970) (jury trial in criminal contempt cases arising out of labor disputes); Civil Rights Act of 1957 §151, 42 U.S.C. §1995 (1970) (mandatory jury trial de novo where sentence exceeds 45 days for criminal contempt arising under the Act); Civil Rights Act of 1964, §1101, 42 U.S.C. §2000h (1970) (in any criminal contempt proceeding under the Act, the contempt must have been shown to be intentional and the maximum sentence may not exceed six months.).

38 See, e.g., 10 U.S.C. §848 (1970) (punishment not to exceed confinement for 30 days or a fine of $100, or both, for contempts committed in military courts); 22 U.S.C. §703 (1970) (concerning service courts of friendly foreign forces, limits punishment to a fine of $2,000 or six months imprisonment or both.)
successor to the Judiciary Act of 1831, it narrowed the scope of direct contempts to include only those acts committed "in the actual presence of the court." It also increased the number of specific procedural protections afforded defendants in indirect contempt proceedings. While these changes were taking place in the federal system, state statutes were also limiting the punishment which could be imposed for contempts and in some instances were providing a right to trial by jury.

In addition to these legislative developments, the courts were also moving to limit the potential for abuse inherent in the summary power to punish for contempt. The Supreme Court in *Gompers v. Bucks Stove & Range Co.* held that "in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." Later, *Cooke v. United States* ruled that in the prosecution of a criminal contempt other than one committed in open court due process required that an accused be advised of the charges against him, that he have a reasonable opportunity to meet them, that he have the right to assistance of counsel, if requested, and that he be allowed to call witnesses in his own behalf. *In re Oliver* further recognized that the defendant in criminal contempt proceedings is entitled to a public trial before an unbiased judge.

And yet, although statutes and cases had over the years severely restricted the power of the courts in contempt cases while steadily increasing the number of procedural safeguards, the Supreme Court could say as late as 1958 that "criminal contempts are not subject to jury trial as a matter of constitutional right." The 1960s, however, brought a great change in the Court's traditional outlook on this subject. *United States v. Barnett* gave the first intimation that the Court would soon be willing to find a constitutional right to jury trial in contempt cases. This case arose as the result of the actions of Ross Barnett, then governor of Mississippi who, in denying James Meredith admission to the University of Mississippi, violated an injunction of the Fifth Circuit Court of Appeals. The case was certified to the Supreme Court on the question of whether, under the particular facts presented, the Clayton Act entitled the defendant to trial by jury. The Court held that Barnett could be

40 See Fed. R. Crim. P. 42(b).
42 221 U.S. 418 (1911).
43 Id. at 444.
44 267 U.S. 517 (1925).
45 Id. at 537.
46 333 U.S. 257 (1948).
punished for contempt without the intervention of a jury, but went on to add by way of dictum that "[s]ome members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses."49 Two years later, the Court, in Chelf v. Schnackenberg,50 was called upon to decide whether, after denying the petitioner's demand for jury trial in a criminal contempt proceeding in federal court, a sentence of six months imprisonment was constitutionally permissible under Article III and the Sixth Amendment. The Court, without deciding whether criminal contempts were "crimes" or "criminal prosecutions," found that the petitioner's offense was a "petty" one for which a jury trial was not constitutionally required. The Court went on to add, however, that under its supervisory power over the lower federal courts, it was establishing the rule that henceforth criminal contempt sentences exceeding six months' imprisonment might not be imposed absent a jury trial or a waiver thereof.51

The most important case in this development was Bloom v. Illinois.52 The petitioner in Bloom had been convicted in Illinois of criminal contempt and sentenced to two years imprisonment for willfully petitioning to admit to probate a fraudulent will prepared and executed after the putative testator's death. His request for a jury trial had been refused by the trial court and the Illinois Supreme Court had affirmed his conviction. The United States Supreme Court found that criminal contempt is a crime in every essential respect and that serious criminal contempts are so nearly like other serious crimes that they are subject to the Constitution's jury trial provisions.53 Having already held, in Duncan v. Louisiana,54 that the Sixth Amendment right to jury trial was applicable to the states through the Fourteenth Amendment, the Court in Bloom reversed and remanded. In doing so it held that since the petitioner was sentenced to two years imprisonment, his offense must be considered "serious" for jury trial purposes. The Court chose to look to the penalty actually imposed to determine whether an offense was "serious" or "petty," and therefore, whether a jury trial was constitutionally required.55 It was not known until Baldwin v. New York,56

49 Id. at 695 n.12.
51 Since the Court's ruling was not based on constitutional grounds, it had no application to the states.
53 Id. at 198-202.
55 "Our analysis of Barnett ... and Chelf ... makes it clear that criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved. Under the rule in Chelf, when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense." 391 U.S. at 211.

The dissenters felt that in determining whether or not a contempt is serious
however, where the line would be drawn in determining just how lengthy a sentence would have to be in order for it to be considered “serious” for jury trial purposes. In Baldwin, the petitioner, whose request for a jury trial had been denied, was convicted in a New York state court of “jostling” and was sentenced to imprisonment for one year, the maximum penalty under the New York statute which created the offense. The Court there held that no offense can be deemed “petty” for purposes of the right to trial by jury where imprisonment for more than six months is authorized. As applied to contempt cases in which no maximum penalty has been fixed by the legislature, the rule now seems to be that where the penalty actually imposed exceeds six months imprisonment, it is “serious” and a jury trial is constitutionally required.

II. THE PETTY-SERIOUS DISTINCTION

With the Court’s abandonment in Bloom of the position it had traditionally taken in the area of contempt, a new and important constitutional rule of law has developed. In both state and federal courts today, criminal contempts must be treated as ordinary “crimes” for the purposes of the right to trial by jury. In jurisdictions in which there is no limit on the punishment which can be imposed for contempt, the penalty actually imposed is considered the best evidence of the seriousness of for purposes of the right to trial by jury, the “principal inquiry . . . relates to the character and gravity of the offense itself.” Id. at 390. They reasoned that contempts should be treated like other crimes for jury trial purposes and that since the courts had traditionally looked to the nature of the offense to determine whether or not other crimes were serious, they should use this same approach in the contempt area. They also felt that even where the contemptuous conduct could not be considered serious in nature, it could still be classified as a serious offense for jury trial purposes where punishable by imprisonment for greater than six months. They considered the maximum authorized penalty a relevant factor since it “sheds light on the seriousness with which the community and the legislature regard the offense.” Id. at 390-91. Since reference to the sentence actually imposed does not serve this purpose however, Justices Black and Douglas regarded this “after the fact” test as “constitutionally irrelevant.” They went on to add that where the legislature has not differentiated among the several different types of contempt, but has lumped them all together under the single rubric of “contempt,” the serious nature of some contempts and the harsh sentence often imposed in such cases control the legal character of all contempts, with the result that none can be considered “petty” for jury trial purposes.

57 In the federal system, “petty” offenses had been defined as those punishable by no more than six months in prison and a $500 fine. 18 U.S.C. §1 (1970).

For a list of state statutes in force at the time of the Bloom decision which imposed no limit on the punishment a judge could impose for criminal contempt, see Note, 20 Case W. Res. L. Rev. 481, 487 n.31 (1969).
the offense. Moreover, the rule applies to both direct and indirect contempts. As to civil contempts and petty criminal contempts, however, the rule is preserved that a right to jury trial is not constitutionally required.

The Court in *Bloom* seems to have reasoned that to determine "seriousness" for purposes of the right to trial by jury, a court should look to the legislature's view on the matter as indicated by the maximum statutory penalty it has authorized for the particular offense. Where no maximum penalty is provided, however, the legislature has not spoken on the subject, and hence it cannot be determined whether it considered the offense serious or petty. In such a situation the best evidence of the seriousness of the offense is the penalty actually imposed. In so holding the Court refused to adopt the position taken by Justices Douglas and Black in *Cheff v. Schnackenberg* that in any case where no maximum penalty has been established for contempt, a jury trial should always be available because the penalty imposed could exceed six months imprisonment. The Court's disinclination to apply this rationale is understandable since under Black's and Douglas's reasoning a jury trial would be required in all contempt cases in jurisdictions having no maximum statutory penalties for contempt no matter how trivial the offense actually committed, and no matter how unlikely a sentence in excess of six months imprisonment might be.

It is not so clear, however, why the Court made no reference to the "nature of the offense" test, long ago established by the Supreme Court, to determine whether a particular offense is "serious" or "petty." In 1888, when the question first arose whether the Sixth Amendment guarantee of right to trial by jury extended to all criminal cases, the Court developed the petty-serious distinction, holding that only in serious cases was there a right to jury trial. It found that conspiracy, the particular crime for which the petitioner had been prosecuted, was a serious offense. The Court reasoned that conspiracy had a grave character which affected the public at large. The Court followed this approach until 1937, looking in each case to the "nature" or "character" of an offense to determine its seriousness. In 1937, the Court, in *District of Columbia v. Clawans*, introduced a new element to be used in determining whether a defendant was entitled to a jury trial. The Court held that regardless of the nature

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60 391 U.S. at 210.
61 Id. at 209.
63 "Until the time when petty criminal contempts are properly defined and isolated from other species of contempts, I see no escape from the conclusion that punishment for all manner of criminal contempts can constitutionally be imposed only after a trial by jury." Id. at 393.
64 Callan v. Wilson, 127 U.S. 540 (1888).
66 300 U.S. 617 (1937).
of the offense, where the penalty which might be imposed is severe, the offense should be considered serious for purposes of the right to trial by jury. The Court’s purpose in Clawans was to enlarge the area in which criminal offenses would be subject to the constitutional jury trial requirement, and not to replace the “nature of the offense” test as a viable standard for characterizing an offense as either serious or petty. Recognizing that where an offense is serious in nature a jury trial is required, the Court went on to add that even where the offense was not of a grave character, where a severe penalty was authorized by statute the defendant was entitled to a jury trial. A recent Supreme Court case indicates that the “nature of the offense” test is still a viable useful tool for determining the seriousness of an offense. If so, and if the Bloom Court was serious when it said that “criminal contempt is a crime in every fundamental respect” and that it should be treated like other crimes for purposes of the right to trial by jury, then that Court was remiss in failing to apply this test to the case before it, or at least, in failing to recognize that the “nature of the offense” standard could quite profitably be applied to criminal contempt cases. If the Court had taken such an approach, problems which have arisen in subsequent years due to the Court’s formulation of the “penalty actually imposed” test could have been greatly reduced.

The problem with the Court’s adoption in Bloom of the “penalty actually imposed” standard is that this test is only useful to an appellate court, which usually has the sentence before it when reviewing a case. It provides no guidelines to trial courts which must now guess, before the trial begins, at the penalty, if any, which might ultimately be imposed. There is no assurance that the judge will guess correctly and

67 Id. at 625.
68 “[T]his Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution.” Id. See also Schick v. United States, 195 U.S. 65, 67-68 (1904).
69 Duncan v. Louisiana, 391 U.S. 145, 149 (1968). “Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. . . .” (Emphasis added).
70 391 U.S. at 201.
72 “[T]o decide whether to proffer a jury trial, the judge must now look ahead to the sentence, which itself depends on the precise facts the trial is to reveal.” Cheff v. Schnackenberg, 384 U.S. 373, 382 (1966) (Harlan, J., concurring in part and dissenting in part). See also Comment, Invoking Criminal Contempt Procedures—Use or Abuse? United States v. Dellinger—The “Chicago Seven” Contempts [hereinafter cited as Comments, The “Chicago Seven” Contempts], 69 U. Mich. L. Rev. 1549, 1554 n.42 (1971); Note, The Power of the Judge to Command Order in the Courtroom: The Options of Illinois v. Allen [hereinafter cited as Note, Illinois v. Allen], 65 Nw. L. Rev. 671, 687 (1970); Note, Con-
this is especially true of indirect contempt cases in which he will have no knowledge, before the commencement of trial, of certain relevant facts bearing not only on the guilt or innocence of the defendant, but also on matters in extenuation or mitigation of the offense. A judge who miscalculates will find himself in the position either of having empanelled a jury unnecessarily in a case where the sentence imposed is less than six months, or of having to hold a new trial when, in a non-jury situation, it develops that a sentence greater than six months is warranted. The resultant wastefulness needs no comment. Moreover, a judge who wishes to avoid retrial before a jury is encouraged to limit the sentence he imposes to six months imprisonment regardless of the merits of a given case. He may wish to avoid the waste and expense of a time-consuming retrial, or he may fear that a retrial before a jury will lead to acquittal of the defendant. Whatever the reason, such a limitation provides a defendant whose conduct merits punishment in excess of six months imprisonment with an unjustified benefit. Moreover, the argument on which it is based reflects an attitude of substantial disrespect for the institution of trial by jury. Alternatively, judges who believe that a punishment in excess of six months imprisonment is warranted, but who are unwilling to have the case retried to a jury, will be encouraged to find in the defendant’s conduct more than one contempt and impose consecutive penalties for each one. As one commentator has described this practice, “[T]he alert judge would simply limit his contempt sentences to six months and perhaps string together several sentences of six months in an attempt to avoid the jury trial requirement.”

The problems presented by the “penalty actually imposed” standard now used in contempt of court cases can be resolved to a great extent by resort to well-established rules traditionally employed by the Court in determining whether ordinary crimes are serious or petty for jury trial purposes. For instance, while it may not be desirable to hold that in jurisdictions having no limits on punishment for contempt, a jury


73 See Note, Illinois v. Allen, note 72, supra, at 687.

74 In Green v. United States, Justice Black remarked that “[n]othing concrete is ever offered to support the innuendo that juries will not convict the same proportion of those guilty of contempt as would judges.” 356 U.S. at 214 (dissenting opinion).

75 This practice was employed in the following cases, but in each one the court on appeal found that only one contempt had been committed: Yates v. United States, 355 U.S. 66 (1957); Baker v. Eisenstadt, 456 F.2d 382 (1st Cir. 1972); United States v. Orman, 207 F.2d 148 (3d Cir. 1953); United States v. Costello, 196 F.2d 200 (2d Cir. 1952); United States v. Yukio Abe, 95 F. Supp. 991 (D. Hawaii 1950); People v. Riela, 7 N.Y.2d 571, 200 N.Y.S.2d 43, 166 N.E.2d 840 (1960).

76 Comment, The “Chicago Seven” Contempts, note 72, supra, at 1555 n.42.
trial should be required in all cases since the maximum potential penalty exceeds six months imprisonment, a test which looks to the maximum punishment authorized can, in certain instances, be used to great advantage. Where, for example, the contempt is also a violation of a criminal statute, and where, furthermore, the statute provides a maximum penalty in excess of six months imprisonment, the offense can, and should, be considered "serious" for purposes of trial by jury. In such instances the character and nature of the offense is not changed by the fortuitous circumstance that it is punished as a contempt and not as a violation of a criminal statute. In either case the conduct is the same. Moreover, where the legislature has imposed no limits on the punishment for contempt, but where it has made the same conduct a statutory crime punishable by more than six months imprisonment, it cannot be said that the legislature has failed to express a judgment as to the seriousness of the particular offense. Consequently, under the Court's apparent reasoning in Bloom that an offense must be considered serious where the legislature has expressed its belief that a penalty in excess of six months imprisonment is justified, the offense should be triable to a jury regardless of how it is punished.

The courts should also look to the "nature of the offense" to determine the seriousness of a contempt just as they do in cases involving other crimes. Under this standard, conduct of a grave character is "serious" for jury trial purposes. In this regard, the courts often ask whether the conduct was indictable at common law or whether it is today ind

77 This approach has been taken by the federal government as reflected in 18 U.S.C. §§402, 3691 (1970). Section 402 provides that except in cases of "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States . . . .", a jury trial is required in criminal contempt proceedings where the act in question constitutes a separate criminal offense under either state or federal law.

In Green v. United States, 356 U.S. 165 (1958), the contempt was the failure of petitioners to surrender themselves to federal authorities at the time prescribed by order of the court. This same conduct also violated a federal bail-jumping statute, 18 U.S.C. §3146, for which a maximum penalty of three years imprisonment could be imposed and for which the right to trial by jury was guaranteed. The Court there upheld the contempt convictions rendered without trial by jury, and the resulting sentences of three years imprisonment. Justice Black had this to say: "After surrendering the defendants were charged with fleeing from justice, convicted, and given lengthy prison sentences designed to punish them for their flight. Identical flight has now been made a statutory crime by the Congress with severe penalties. How can it possibly be any more of a crime to be convicted of disobeying a statute and sent to jail for three years than to be found guilty of violating a judicial decree forbidding precisely the same conduct and imprisoned for the same term?" Id. at 202 (dissenting opinion).

78 "Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense." (Emphasis added). District of Columbia v. Colts, 282 U.S. 63, 73 (1930).

79 See, e.g., Cheff v. Schnackenberg, 384 U.S. 373, 390 (1966) (Douglas, J.,
dictable as a felony. Such an offense is usually *malum in se* and not merely *malum prohibitum*, and convicting and sentencing one for this type of conduct—even for a period of time less than six months—will ordinarily stigmatize an individual in the eyes of the community. The resulting damage to the defendant's reputation may be irreparable and this, surely, is indicative of a "serious" offense. Where the particular offense has not been made a felony, but where it is, nevertheless, considered "an act of... obvious depravity," or one whose quality is morally offensive, it should likewise be considered serious in nature and the right to jury trial should be recognized.

By awarding the defendant a jury trial in contempt cases in which the offense is serious in nature and/or in cases in which the particular act constituting the contempt is also punishable as a statutory crime by more than six months imprisonment, courts will avoid much of the uncertainty and guesswork inherent in a standard which looks solely to the penalty actually imposed to determine whether a contempt is serious for jury trial purposes. A problem will still remain in cases in which the contempt is neither serious in nature, nor punishable as an ordinary crime by more than six months imprisonment. In most such cases, however, the courts will have no desire to confine the defendant for a period greater than six months. In the few such cases in which the sentence does exceed six months, the penalty imposed rule could be retained. These cases would be so infrequent that application of the rule would cease to portend the serious consequences of judicial inefficiency presently threatened by the broader application contemplated in *Bloom v. Illinois*.

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82 For an extreme example of a contempt case in which the defendants were tried without a jury and in which the offense itself was very grave in character (*malum in se*), see *United States v. Shipp*, 203 U.S. 563 (1906). There, pending appellate review of a criminal conviction of a Negro for rape of a white woman in Tennessee, a mob lynched the convict. The federal court had ordered his safe detention pending appeal. The Court, evidencing the ultimate sensitivity of its honor, decided that the lynching was done "with intent to show contempt for the order of this court". Id. at 572. The Court then ordered that the defendants be tried for the offense, but it made no provision for trial by jury.


III. MULTIPLE OFFENSES AND MULTIPLE PUNISHMENTS

The constitutional guarantee of trial by jury in criminal contempt cases as enunciated in *Bloom* does not extend to cases in which an offense is punished by less than six months imprisonment. The question arises whether a defendant found guilty of several different contempts can receive punishment of up to six months imprisonment for each one, sentences to run consecutively, without the right to trial by jury. As yet no statute or decision, either state or federal, expressly denies a trial court, acting without a jury, the power to aggregate sentences that individually do not exceed the six month limit in *Bloom* and *Baldwin*. Some cases have expressly held that such a practice is constitutionally permissible. Therefore, it is particularly important to ascertain whether there really are several distinct offenses or in fact only one. Among the considerations requiring this determination is the guarantee against double jeopardy provided in the Fifth Amendment and made applicable to the states through the Fourteenth Amendment, under which a defendant may not receive multiple punishment for the same offense. This applies in all cases regardless of the length of the sentence imposed.

There are basically two areas in which double jeopardy and right to trial by jury problems arise in regard to multiple punishments in contempt cases. One set of cases deals with refusals to testify and the other concerns in-court disturbances. Each grouping presents different problems and in each a different set of rules determines the precise number of contempts committed.

A. REFUSALS TO TESTIFY

Where the defendant’s contemptuous conduct consists of refusals to answer more than one question, either in a judicial proceeding or at a Congressional or other legislative hearing, the courts have used two

85 See *Comment, The “Chicago Seven” Contempts*, note 72, *supra*, at 1560.
87 The Fifth Amendment to the Constitution of the United States states in relevant part: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .”
89 “The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.” (Emphasis added). *Ex parte Lange*, 85 U.S. 163, 173 (1873). See also *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Benz*, 282 U.S. 304, 308 (1931); *Baker v. Eisenstadt*, 456 F.2d 382, 389 n.6 (1st Cir. 1972); *United States v. Adams*, 62 F.2d 210, 212 (6th Cir. 1966).
different approaches to determine the number of separate offenses committed. One asks whether the defendant has initially "carved out an area of refusal" to give testimony on a particular matter. If he has, then only one offense of contempt is cognizable—the original refusal either to give any testimony or to testify in a given area. All subsequent refusals to answer questions on the particular subject under inquiry, or in the particular area "carved out" by the defendant, partake of the original contempt and do not constitute separate offenses. The rationale underlying this approach is that the affront to the court's authority is total and complete at the very outset of questioning when the defendant refuses to give any testimony or to testify in the particular area. All later refusals are merely reiterations by the defendant of his intention to adhere to his earlier statement.

The other approach looks to the nature of the questions which the defendant has refused to answer to determine whether they are all designed to elicit a single fact or relate to a "single subject of inquiry." If so, again there is only one contempt no matter how many questions have been asked.

It is usually a fairly easy fact question whether the defendant has successfully carved out an area of refusal. Thus in United States v. Costello, the defendant, who had been called to testify before a Senate Committee on organized crime, flatly refused at the outset of his interrogation to give any testimony on the grounds that he was suffering from laryngitis. The Committee rejected the excuse and asked him several questions, all of which he refused to answer. The district court convicted the defendant of ten separate contempts; but the court of appeals reversed, holding that only one contempt was committed, namely, the original refusal to answer any questions. In so holding, the court said:

But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal


91 See, e.g., Baker, note 90, supra, at 391; Costello, note 82, supra, at 204.

92 See Yates, note 90, supra; Baker, note 90, supra; Costello, note 90, supra; United States v. Orman, 207 F.2d 148 (3d Cir. 1953); United States v. Emspak, 95 F. Supp. 1010 (D.D.C. 1951); United States v. Yukio Abe, 95 F. Supp. 991 (D. Hawaii 1950); Riela, note 90, supra.

93 While it is usually the case that where there is only one subject of inquiry, there has also been either an initial refusal to give any testimony or a "carving out" of an area of refusal, and vice versa, this need not be so for the court to find but one contempt. Where either test is met there is only one offense. See generally cases in notes 90 and 92.

94 Note 90, supra.
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to give any testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable.

The Supreme Court reached the same result on similar facts in Yates v. United States. In Yates, however, the defendant, unlike Costello, did not initially refuse to give any testimony. Nevertheless, when questioned about the Communist Party membership of certain of her friends and acquaintances, she refused to answer, saying: "However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it. . . ." The prosecution then asked the defendant eleven questions concerning her knowledge of such affiliations, all of which she refused to answer. She was found guilty of eleven different contempts and the court of appeals affirmed. The Supreme Court reversed, holding that the defendant had successfully delineated and defined the particular area in which she intended to remain silent and that her refusal to answer any questions in that area constituted a single contempt:

The Government admits, pursuant to the holding of United States v. Costello . . . that only one contempt would result if Mrs. Yates had flatly refused on June 26 to answer any questions and had maintained such a position. We deem it a fortiori true that where a witness draws the lines of refusal in less sweeping fashion by declining to answer questions within a generally defined area of interrogation, the prosecutor cannot multiply contempts by further questions within that area.

Similarly, in People v. Riela, the New York Court of Appeals found that when the defendant, erroneously relying on a claimed privilege against self-incrimination, initially refused to answer any questions concerning the so-called "Appalachian Meeting," his subsequent refusal to answer 17 questions relating to that meeting constituted only one contempt and not 17 contempts as the trial court had found. The same court reached a different result, however, in People v. Saperstein. There, the defendant was questioned as to the identity of the participants

95 Id. at 204.
97 Id. at 68.
98 Id. at 73. In addressing itself to the policy considerations surrounding its decision, the Court went on to add: "The policy of the law must be to encourage testimony; a witness willing to testify freely as to all areas of investigation but one, should not be subject to more numerous charges of contempt than a witness unwilling to give any testimony at all." Id.
99 Note 90, supra.
100 Id.
of five wire-tapped telephone conversations to which he had been a party. Although his other testimony had been for the most part freely given, he replied in each of these instances that he was uncertain as to who the other participants were or that he couldn't remember. The trial court found that he was lying and convicted him of five separate contempts. The New York Court of Appeals affirmed. Unlike Riela, defendant Saperstein had failed to carve out an area of refusal, and it was for this reason that he could not claim that his conduct constituted only one contempt. In distinguishing the two cases, the court in Riela observed that:

Each of the contempts [in Saperstein] was [not] based . . . upon a refusal grounded on any claim of privilege. . . . These refusals came at different points during the course of testimony which was otherwise freely given, and each refusal was unrelated to every other one. Under such circumstances, there could be no assurance, after the witness had refused to answer the question with respect to the first phone call, that he would likewise refuse to answer the later questions about the other conversations. It was not possible in Saperstein, as it was here, to predict or foresee the pattern of refusal which necessarily attends the assertion of a claim of privilege.101

Riela and Saperstein indicate that the test which has developed in this area is whether or not adequate notice has been given to the prosecutor that the defendant does not intend to testify on the particular subject or within the particular area of inquiry. This in turn will determine whether he is conducting a good-faith interrogation or whether, having ascertained that the defendant does not intend to answer his questions, he is merely trying to multiply offense.102 Relevant to this inquiry is the reason for the defendant's refusal to testify. Where, for instance, he refuses to answer questions due to a claimed privilege against self-incrimination, it is likely that he will decline to respond to further questioning within the same general area.103 This is especially true in

101 7 N.Y.2d at 578, 200 N.Y.S. 2d at 47, 166 N.E.2d at 843-44.
102 In further distinguishing the fact situation in its own case from that presented in Saperstein, the court in Riela commented as follows: "In the present case, the District Attorney necessarily knew ahead of time, that the claim of privilege first asserted would be repeated, while in Saperstein the prosecutor had to continue questioning to find the limits of the defendant's refusal to answer. In Saperstein, in other words, the District Attorney was engaged in bona fide interrogation, in the sense that he could reasonably have supposed that the witness would answer each of the questions asked, while here the District Attorney repeated 17 questions knowing full well from Riela's response to his first query that he would not answer any of them." 7 N.Y.2d at 578, 200 N.Y.S.2d at 47, 166 N.E.2d at 844. See also Yates, note 82, supra, at 73; Baker, note 90, supra, at 390 ("Courts are also wary lest prosecutors, by their sheer ingenuity in conceiving and stamina in asking multiple questions calling for slightly different answers, be able to proliferate offenses.").
103 See Baker, note 90, supra, at 391-92; Riela, note 90, supra, at 577, 200 N.Y.S.2d at 46, 166 N.E.2d at 843.
jurisdictions which deem any one answer in the chain of questioning to be a waiver of the privilege as to all subsequent questions.\textsuperscript{104} Thus the defendant must claim his privilege at the outset and, in order to retain it, must continue to assert it throughout the entire questioning. He cannot pick and choose which questions to answer.\textsuperscript{105}

Although the "carving out an area of refusal" approach has, in most cases, the salutary effect of limiting the number of contempts which a court can impose on an individual who refuses to testify, application of this standard can, in certain instances, lead to undesirable results. This is so in cases like Saperstein where the defendant, who wishes for the most part to cooperate with the court, fails initially to carve out an area of refusal and answers most, but not all, of the court's questions. The defendant here can, conceivably, be charged with several contempts and not just one. This is in marked contrast to the case presented by the individual who refuses at the outset to answer any questions. Such an individual is much less cooperative with the court than the defendant in the first case, and therefore, arguably, more culpable. Yet his conduct is limited to one contempt. The anomalous results reached by the courts in these two different situations are most inequitable.

Where the defendant has not initially carved out an area of refusal, his failure to answer several questions will still be considered only one contempt where those questions pertain to but a "single subject of inquiry."\textsuperscript{106} This particular standard can be easily applied, however, only

\textsuperscript{104} See Reila, note 90, supra, at 577, 200 N.Y.S.2d at 46, 166 N.E.2d at 843; Baker, note 90, supra, at 393. The purpose for a waiver rule was described in Baker: "The thought underlying the doctrine of waiver seems to be that when incriminating responses have already been made, the value to a witness of suppressing further incriminating answers may not be so great as to outweigh the prejudice to another involved person if the testimony is allowed to remain in its witness-selected posture, quite possibly one-sided and distorted." 456 F.2d at 393.

\textsuperscript{105} If every refusal to answer were considered a separate offense, in jurisdictions with such a waiver rule a witness would face the dilemma of either incurring multiple penalties for continued refusals to answer or of waiving his privilege by trying to keep his contempts at a minimum. Baker, note 90, supra, at 394. At the very least this would have a chilling effect on the exercise of the privilege against self-incrimination and should, therefore, be avoided.

\textsuperscript{106} See cases in note 92.

In applying the "single subject of inquiry" test, the courts in contempt cases concerning refusals to testify, have declined to follow the "same evidence" standard originally formulated in Blockburger v. United States, 284 U.S. 299 (1932). There the Court announced: "[T]he test to be applied to determine whether there are two offenses or only one, is whether each [charge] requires proof of a fact which the other does not." Id. at 304. Since each refusal to answer is a separate incident susceptible to proof by different facts, under the Blockburger rule each refusal would constitute a separate, different offense. In rejecting this standard in contempt cases in this area, the court in Riela commented that "the circumstance that no two questions could have been answered by a single response is beside the point. What is of significance is that . . . the questions, different though they were from one another, all related to . . . one subject." 7 N.Y.2d at 576, 200 N.Y.S.2d at 46, 166 N.E.2d at 842-43. Other cases have held that a Blockburger
in a relatively small number of cases in which the questions asked, though requiring slightly different answers, seek to elicit but a single fact or only one item of information. In United States v. Orman,\(^{107}\) for example, the defendant was convicted in the district court of two separate contempt for refusal to answer two different questions, each of which sought to determine from whom the defendant had borrowed $25,000. The court of appeals reversed, finding but one contempt and holding that "where separate questions seek to establish but a single fact, or relate to but a single subject of inquiry, only one penalty for contempt may be imposed."\(^{108}\)

In other cases, however, in which different but additionally relevant and interconnected facts are sought to be established, it is often difficult, if not impossible, to determine whether all the questions constitute a single subject of inquiry. A case in point is the aforementioned Saperstein. In handling the multiple contempt issue, the New York Court of Appeals stated: "As to appellant's assertion that he was guilty of one contempt only, not five contempts, it is a sufficient answer that his contumacious conduct had to do with five separate telephone talks."\(^{109}\) The court in Saperstein categorized the subjects of inquiry in terms of telephone conversations. However, all of these conversations related to the defendant's business dealings, which were the primary subject of the grand jury's investigation. The court could have as easily and as rationally found only one subject of inquiry, namely, the defendant's business activities in the insurance area; and since the questions concerning the five different telephone conversations all pertained to this single subject of inquiry, it could have held that the several refusals to answer constituted only one contempt. The decision could perhaps be rationalized on the ground that the grand jury was really interested in not only the defendant's business dealings, but also in the activities of the five other people with whom the defendant spoke on the phone; that these five people represented five separate subject matters; and that, therefore, five different contempts were made out. If this is true, however, then the finding of only one subject of inquiry in Riela is wrong, since in that case the grand jury was obviously interested not only in the de-

\(^{107}\) Orman, note 92, supra, at 160. See also Fawick Airflex Co. v. United Electrical Workers, 56 Ohio L. Abs. 419, 92 N.E.2d 431 (1950), in which the court held that the defendant's refusal to answer three different questions concerning his alleged membership in the Communist Party constituted only one contempt. The court explained that "[i]n fact the entire inquiry was directed toward the establishment of but one fact." Id. at 426, 92 N.E.2d at 436.

\(^{108}\) 2 N.Y.2d at 219, 159 N.Y.S.2d at 167, 140 N.E.2d at 257.
fendant's connection with the “Appalachian Meeting,” but also in the presence and activities of several individuals who also attended that meeting. ¹¹⁰ Using a Saperstein rationale, the court in Riela could have concluded that the number of different contempts was to be determined by the number of individuals who were the subject of the prosecutor's questions which Riela refused to answer. The problem in this area was well described in Baker v. Eisenstadt:¹¹¹

While such a conclusory formulation as “single subject” or “single line of inquiry”, or “same subject matter” may be sufficient to describe the disposition of cases in which a prosecutor has simply reframed in various forms a question addressed to whether the witness was a Communist, it is less helpful when different but additionally relevant and interconnected facts are sought to be elicited. The concept of a “single subject” is frustratingly open-ended, there being infinite ways of categorizing information in terms of time, place, incident, transaction, people, etc. Moreover, the use of such phrases as “single subject” as the basis for defining a contumacious refusal to testify involves the invocation of a wooden rubric devoid of any relation to policy.¹¹²

In employing the “carving out an area of refusal” approach, the courts often reach unjust results. Under this standard an uncooperative defendant who initially refuses to give any testimony can be found guilty of only one contempt; the defendant who wishes to help the court, however, and who for this reason fails to carve out an area of refusal, can be cited for several different contempts, the exact number depending on the number of questions he has declined to answer. It merely compounds the problem to say that since this is so, an intelligent defendant will automatically refuse at the outset to answer any questions. Nor will the inequities always be eradicated by giving the defendant an additional chance under the “single subject of inquiry” test, to show that his conduct constitutes only one contempt. This is unfortunately so since there are numerous ways of categorizing contempts as the Court in Baker aptly noted. The particular categorization used in any given case, which in turn will determine the number of separate offenses with which the defendant can be charged, is subject only to the whim of the court. Moreover, the lack of definite guidelines in this area prevents witnesses from determining in advance how certain contemplated action will be treated by the courts. Such uncertainty in the criminal law, it can be

¹¹⁰ Sixty individuals were reputed to have been present at the Appalachin Meeting. See Riela, note 90, infra, at 577, 200 N.Y.S.2d at 46, 166 N.E.2d at 843. The court did reach the correct result in Riela, however, regardless of how many subjects of inquiry it can be said there were, since the defendant had successfully “carved out” his area of refusal at the very outset of his questioning.

¹¹¹ Note 90, supra.

¹¹² Id. at 390-91.
argued, does not comport with the requirements of due process, and at the very least is an undesirable by-product of present contempt law.

It would seem then that the approach used by courts today to determine the number of contempts involved in refusals to answer more than one question, namely whether the defendant has “carved out an area of refusal” and/or whether the unanswered questions pertain to a “single subject of inquiry,” is most unsatisfactory. A better way of dealing with this problem, perhaps, would be to treat a refusal or refusals to answer any one question or any number of questions in a single judicial proceeding as only one contempt. The single contempt would be the defendant's obstruction of the administration of justice in the judicial proceeding in which he is called to testify. In each instance the particular facts of the case would determine whether the defendant's conduct constitutes a serious or a petty offense. Where the facts indicate that the affront to the court is minor, the offense could be considered petty and the court, acting without a jury, could impose a sentence appropriate for petty crimes in general. Such a case would be presented where the defendant for the most part cooperates with the court, but where he declines to answer certain questions on the mistaken but good-faith belief that he has a constitutional right to remain silent. Where the particular facts indicate that the defendant's actions are serious, such as where the defendant, without any pretense of reliance on an alleged Fifth Amendment privilege against self-incrimination, refuses to give any testimony in a proceeding of great public concern, the court could impanel a jury. If the defendant were found guilty the court could then impose a sentence in excess of six months imprisonment. Under such a system the courts could make the punishment fit the crime without resorting to the artificial distinctions inherent in the present laws.

B. IN-COURT DISTURBANCES

In Illinois v. Allen the Supreme Court held that there are at least three constitutionally permissible methods for dealing with disruption of a trial by an unruly defendant: (1) removal of the defendant from the courtroom until he promises to behave properly, (2) physical restraint and (3) citation of the defendant for contempt of court. Where the trial court judge chooses the contempt approach and the defendant is responsible for disrupting the trial on several different occasions during the course of the proceedings, the question is raised whether each incident of disturbance is a separate contempt, distinct and independent from all the others, or whether they are all but a part of one larger contempt, namely, the disruption of the trial proceedings. Until now the courts which have been faced with this problem have concluded that each disturbance constitutes a separate offense and that therefore,

they may all be punished either cumulatively, concurrently, or in a manner which reflects a combination of these approaches.\textsuperscript{115} Further, where consecutive penalties are imposed the courts have held that so long as each offense is punished by imprisonment for less than six months a jury trial is not constitutionally required no matter how long the aggregate sentence imposed.\textsuperscript{116} The only limitation on the court's power seems to be that imposed by the Eighth Amendment prohibition against cruel and unusual punishment.\textsuperscript{117} In this regard, an aggregate sentence could be attacked as cruel and unusual if it were disproportionate to the offenses committed.\textsuperscript{118} Such attacks, however, are rarely successful,\textsuperscript{119} and as yet no sentence for contempt of court has been set aside on Eighth Amendment grounds.

In concluding that different acts of disruption during the same proceedings constitute different contempts, punishable cumulatively, the courts, though not expressly so stating, rely on the traditional "same evidence" test propounded by the Court in Blockburger v. United States.\textsuperscript{120} There the Court held that "[t]he test to be applied to determine whether there are two offenses or only one, is whether each [charge] requires proof of a fact which the other does not."\textsuperscript{121}

In recent years, however, there have been challenges to the propriety and constitutionality of treating different disruptive acts as separate contempts, and of imposing aggregate sentences in excess of six months imprisonment without trial by jury. Where the defendant's acts indicate the same type of continual misbehavior, or where the different acts of disturbance and disruption are the result of but a single intent or purpose on the defendant's part, such as to show disapproval for the court's bias, it can be argued that these different incidents really constitute only


\textsuperscript{116} In Dellinger, five of the seven defendants, and both their counsel, were cited for several different acts of contempt, for which they each received an aggregate sentence in excess of six months imprisonment. See Comment, The "Chicago Seven" Contempts, note 72, supra, at 1557 n.55 (1971).

\textsuperscript{117} The Eighth Amendment to the Constitution of the United States provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

\textsuperscript{118} See Weems v. United States, 217 U.S. 349 (1910).


\textsuperscript{120} 284 U.S. 299 (1932).

\textsuperscript{121} Id. at 304. As we have seen, this standard has been rejected by the courts in contempt cases dealing with refusals to testify, in favor of standards formulated in terms of "subjects of inquiry" and "areas of refusal." These latter guidelines, however, would have no meaning if applied to in-court disturbance cases.
one continuing contempt, for which a maximum of six months imprisonment can be imposed by the court acting without a jury. This argument is based on the Court's holding in *Yates v. United States* that the defendant's eleven separate refusals to answer questions requesting her to identify others as communists constituted only one continuing contempt.

It is doubtful, however, whether this argument, and the analogy made between in-court disturbances and refusals to testify, will withstand scrutiny. For one thing, the Court in *Yates* found only one "continuing" contempt for the sole purpose of showing that the defendant, who had initially been cited only for civil contempt, could later be cited for criminal contempt as well. Furthermore, in those contempt cases dealing with refusals to testify, where the defendant originally carves out an area of refusal or initially refuses to give any testimony whatsoever, all damage is done at the outset of the questioning. The affront to the court's authority is total and complete at that point, and there is no reason at any time thereafter to continue that part of the proceeding relating to questioning of the defendant on the particular subject of inquiry. Consequently, further questioning in the same area, resulting in further refusals to answer, will bring about no more harm to the court than it has already suffered. This is not so where the contempt involves in-court disturbances. In these cases the defendant is usually on trial for some other crime and the proceedings cannot be terminated, either in whole or in part, at the first sign of the defendant's intent to disrupt the proceedings. Consequently, the first disruptive act does not make the contempt total and complete as does the first unanswered question in the refusal to testify cases. The proceedings must continue and the court—unless it either binds and gags the defendant, or bars him from the courtroom—must suffer each subsequent disruptive act which in turn heaps new injury on the court independent of and additional to the injury already inflicted by earlier disturbances. The analogy can be further

124 Id. at 74.
125 Id.
126 One author has distinguished the refusal to testify cases and the in-court disturbance cases in the following manner: "When the contempt consists of exactly the same type of act—refusing to answer a certain type of question—the court can guard against a continual threat to its authority by seeing that the question is not asked again. But in the [in-court disturbance cases], one cannot anticipate what form the defendant's conduct will take and thus cannot prevent its recurrence. It is impossible to predict when and how often the contemnor will curse the judge or ridicule his rulings." *Note, Illinois v. Allen*, note 72, *supra* at 690.

Perhaps it would be wiser in cases such as that presented by the trial of the "Chicago Seven" for the court to resort to the other choices mentioned in *Illinois v. Allen*. The courts have never held, however, that a judge is constitutionally required to either bind and gag a defendant or have him removed from
broken down when it is considered that in cases of refusals to testify the antagonistic force is the prosecutor, and not the defendant, whereas in the courtroom disturbance cases the defendant is the antagonistic force since it is he who makes the voluntary choice to multiply his offenses.\textsuperscript{127}

In addition, there is a very strong policy argument which requires that each separate disruptive act be treated as a different contempt. Without the right to treat each disturbance as a separate offense the court would have no power to deter others from committing any but the first contemptuous act. Only the first act could be punished and it would then offer immunity for all further violations.\textsuperscript{128}

There should be, however, an outer limit to the aggregate sentence which can be imposed for multiple contempts. Regardless of whether separate acts of courtroom disturbance are counted as one contempt or several different contempts, the court should not be allowed to impose an aggregate sentence in excess of six months imprisonment without first granting a jury trial. To do so would thwart the entire purpose of the constitutional limitations imposed by the Court in \textit{Bloom}. The theory behind this argument is that if the six-month rule established in \textit{Bloom} is held to be applicable only to each offense, it would not curtail the potential abuses of the contempt power at which the Court's decision in \textit{Bloom} was specifically aimed.\textsuperscript{129} As one author has suggested:

If harshness and abuse in the form of lengthy contempt sanctions are tolerated under the guise that they represent punishment for separate offenses, the entire purpose of the constitutional limitations imposed by \textit{Bloom}, \textit{Cheff}, and \textit{Baldwin} is frustrated.\textsuperscript{130}

As yet no court has favorably responded to this argument. To do so would involve a weakening of the courts' summary contempt power in an area in which this power has traditionally been considered essential. Even \textit{Bloom} recognized "the need to maintain order and a deliberative atmosphere in the courtroom,"\textsuperscript{131} the Court later adding that "[t]he power of a judge to quell disturbance cannot attend upon the impaneling of a jury."\textsuperscript{132} This being so it is at least doubtful that the Court will soon be moved to further liberalize the rules relating to jury trial in this particular area.

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the courtroom, as opposed to citing him for contempt, simply to protect a defendant from his own intentional, albeit foolish, actions.


\textsuperscript{129} "The court has long recognized the potential for abuse in exercising the summary power to imprison for contempt—it is an 'arbitrary' power which is 'liable to abuse.'" \textit{Bloom v. Illinois}, 391 U.S. 194, 202 (1968).

\textsuperscript{130} \textit{Comment, The "Chicago Seven" Contempts}, note 72, supra, at 1560.

\textsuperscript{131} \textit{Bloom v. Illinois}, note 129, supra, at 210.

\textsuperscript{132} Id.
§18.8. Statutory prohibition of promotional games in the retail fuel industry: Mobil Oil Corp. v. Attorney General. The Massachusetts Supreme Judicial Court upheld the constitutionality of Chapter 602 of the Acts of 1968 which prohibits motor vehicle fuel sellers or dealers from in any way using games of chance as promotions in connection with the sale of goods or services. The statute had been challenged by the Mobil Oil Corporation, Joseph G. Kulp (a Westfield, Massachusetts service station owner-operator) and Glendinning Companies (a company which plans and develops sales promotions). The plaintiffs argued that the act was violative of both the equal protection and due process clauses of the Massachusetts and federal constitutions, and also alleged that the federal government had pre-empted the field of promotional game regulations in the retail fuel industry. The Court held, inter alia, that the statute represented a reasonable classification and thus met the requirements of equal protection; that the statute was a valid exercise of the police power and did not violate due process of law; and that the federal government had not pre-empted the field and the statute merely imposed stricter supervision of the area in question. Justice Hennessey, joined by Chief Justice Tauro, filed a strong dissenting opinion on equal protection grounds.

Although the legislative background of the statute will be explored further in this casenote, a brief note at this point may be useful in elucidating the thrust of the regulatory enactment. The act apparently originated in response to general complaints voiced by service station proprietors and members of the public and directed at varying facets of the promotional operation. Proprietors complained of coercive tactics

2 Inserting §6C of G.L., c. 271: “No dealer or seller of motor vehicle fuel shall engage in, promote or in any way operate any contest or game by which a person may, as determined by chance, receive gifts, prizes or gratuities in connection with the sale of goods or services. This section shall apply to any such contest or game whether or not a purchase is required to participate therein.” The statute prescribes criminal sanctions by way of fine or imprisonment for violations.
3 The pertinent equal protection provisions are the Fourteenth Amendment to the United States Constitution and Articles 6 and 7 of the Declaration of Rights of Massachusetts. The pertinent due process provisions are the Fourteenth Amendment to the United States Constitution and Articles 1, 7, 10, and 12 of the Declaration of Rights of Massachusetts.
4 The Court also rejected the Attorney General’s assertion, brought by counterclaim, that the continued use of game promotions violated G.L., c. 271, §7, which penalizes the promotion of lotteries, and that the game pieces used in connection with game promotions were a common nuisance under G.L., c. 271, §20, which makes possession of lottery tickets unlawful.
5 There are no formal records of the legislative history of the statute, nor were formal legislative hearings held. The legislative background discussed in this casenote was reconstructed conversations with the chief architect of the legislation, Harry A. S. Read, then Representative from Barnstable, as well as two
employed by their wholesalers in forcing them to employ the games as a marketing device. However, the individual service station owner-operator had to purchase the game tickets and assume the added burden of dispensing these tickets to their customers. Members of the public also protested the use of the games as a nuisance and expressed doubts as to the honesty involved in the distribution of prizes. The legislative response to these complaints took the shape of the challenged statute.

In their challenge to the statute, plaintiffs argued that two aspects of Chapter 602 violated equal protection guarantees. The first of these equal protection arguments related to the overbreadth of the statutory restriction. The statutory ban on the use of promotional games was not limited to those operated in connection with the sale of fuel alone. Inasmuch as retail fuel dealers generally compete with other merchants in the marketing of automotive and non-automotive goods and services, plaintiffs argued that fuel dealers were unfairly restricted while competitors outside the retail fuel industry were free to utilize this promotional device, without similar restriction. The proprietor of a tire store, for example, may conduct promotional games to stimulate his business, while a fuel dealer who also markets tires on his premises is not afforded the opportunity to utilize such marketing aids. Thus, plaintiffs argued, the extent to which Chapter 602 regulated the business

other major sponsors of the bill, John A. S. McGleenon, then Representative from Concord, and Martin A. Linsky, then Representative from Brookline. Mr. Read also made available his extensive files compiled during the bill's progress through the legislature. Receipt of general complaints about the operation of the games prompted an investigation of the area.

Id. For the purposes of this casenote, the state and federal constitutional provisions will be treated as co-extensive.

"An over-inclusive classification includes not only those who are similarly situated with respect to the purpose [of the benefit or burden imposed by the statute] but others who are not so situated as well." Note, 82 Harv. L. Rev. 1065, 1086 (1969).

The pertinent part of the statute reads: "... in connection with the sale of goods or services." G.L., c. 271, §6C.

The interchangeable use of the terms "retail fuel dealer(s)," "gasoline dealer(s)," or "fuel dealer(s)" in this casenote is intended to apply to retail dealers in motor vehicle fuel, consistent with the terms of Chapter 602, and not to be confused with retail dealers in heating oil or other types of fuel.

As the record indicated, merchants who operate not only car washes, auto body shops, automobile repair garages, and automobile stores, but also department stores, discount stores, hardware stores, drug stores, variety stores, supermarkets, superettes, and grocery stores sell many of the same products and services sold by gasoline sellers. Record at 19-20. Mobil and Kulper competed with these other merchants in a wide variety of products. Their sale of products other than motor vehicle fuel constituted an important and substantial part of their overall business. Record at 19.
activities of service stations other than with regard to the sale of motor vehicle fuel made that statute suspect as an overly restrictive regulation.

The second argument in plaintiffs' equal protection challenge to Chapter 602 was that the legislature had imposed an arbitrary restriction on a particular class of merchants by singling out only the retail fuel industry for sanction in the use of promotional contests. If promotional games were indeed a proper object of legislative concern, then such action as the legislature deemed appropriate should apply to the operation of such games in all retail industries. Arguing that no rational basis existed for distinguishing the promotional contests in the retail fuel industry from those contests operated in other industries, plaintiffs assailed the restriction effected by Chapter 602 as an underinclusive classification. 13

The Court rejected both of these contentions, holding that the statute did not violate the equal protection sanctions, either by overbreadth or underinclusiveness. 14 By determining that the statute was not an irrational restriction on owners of dual or multiple businesses, the Court first dismissed the argument that the statute was overbroad. In defending the reasonableness of the classification, the Court stated that the statute was aimed at the business of selling motor vehicle fuel, and "[t]he extension to games 'in connection with' other goods and services when part of the business of selling motor vehicle fuel, if it is an extension, is reasonable in the interest of clarification and enforceability." 15

When a statute is challenged on equal protection grounds, the basic test by which it must be judged is that of reasonableness. 16 States are

13 "Under-inclusion occurs when a state benefits or burdens persons in a manner that furthers a legitimate public purpose but does not confer this same benefit or place this same burden on others who are similarly situated." Note, 82 Harv. L. Rev. 1065, 1084 (1969).

14 As the Court itself noted, a trial court in Maryland accepted these grounds for holding a similar statute unconstitutional. On appeal, the Maryland court indicated that the statute could be confined by construction to promotional games relating to the sale of motor vehicle fuels, refused to pass on the equal protection issue in the absence of an evidentiary hearing, and remanded the case for such a hearing. 1972 Mass. Adv. Sh. 561, 573, 280 N.E.2d 406, 416, citing State's Attorney for Charles County v. Triplett, 255 Md. 270, 285-288, 257 A.2d 748, 753-756 (1969).


16 In Lindley v. Natural Carbonic Gas Co., the Supreme Court stated: "The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. . . . A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." 220 U.S. 61, 78 (1911). See also Atchinson & Santa Fe Ry. v. Vosburg, 238 U.S. 56, 59 (1915) and Barrett v. Indiana, 229 U.S. 26, 30 (1912). On equal protection generally, see Note, 82 Harv. L. Rev. 1065 (1969).
The Court in Mobil asserted that its construction of Chapter 602 was not vastly different from that accorded a New Jersey statute prohibiting promotional games "in connection with the sale of motor fuels."\(^{20}\) A careful reading of that statute, however, reveals that its similarity to Chapter 602 is purely superficial. In framing the prohibition to cover promotional games "in connection with the sale of motor fuels," \(^{20}\) the New Jersey Legislature thereby left the door open for retail fuel dealers to operate promotional games in connection with the sale of other goods and services. The Massachusetts statute, by contrast, extends the prohibition to the use of such games "in connection with the sale of goods or services." \(^{20}\) This encompasses nonfuel goods and services as well, and it places the fuel retailer on an unequal commercial footing with his competitors. The very fact that the New Jersey statute is more specific than Chapter 602 distinguishes it and avoids the overbreadth argument raised by Chapter 602. Although the plaintiffs argued this distinction the Court was not persuaded. However, Justice Hennessey noted in his dissent that "in the sale of nonfuel products, gasoline sellers and others are similarly situated and form one class. That being so, the present statute treats members of the same class unequally."\(^{21}\) The Court confined its analysis to the question of the rational basis for Chapter 602, and gave no consideration to the end result of the statutory prohibition. Judge Hennessey's argument, therefore, remains unanswered.

In its analysis of the second equal protection argument, that the class was underinclusive, the Court considered precedent for regulating fuel dealers as a distinct class and the legislative motivation for enacting Chapter 602. Both of these bear analysis. The line of precedent related

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) "The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated." Tussman and tenBroek, The Equal Protection of the Laws, 37 Calif. Rev. 341, 344 (1949).


to price sign regulation, and it is therefore distinguishable from the situation in Mobil. In Slome v. Chief of Police of Fitchburg, the Court considered the validity of a statute which specified the size and location of signs which advertised the price of gasoline. The Court upheld the statute, but stressed that its decision in no way should be construed to interfere with the freedom of proprietors of filling stations to display any signs with prices of any products other than gasoline. Because "[a]ll persons engaged in the retail sale of motor fuel are affected alike in the uniform enforcement of the statute," there was no denial of equal protection. In Mobil gasoline sellers compete with other retail merchants but they are not affected alike in the enforcement of Chapter 602. The application of the statute in Slome was confined to a particular aspect of the marketing practices of retail fuel dealers, and it did not restrict the marketing freedom of the fuel dealers with respect to nonfuel products.

In discussing the possible legislative motivation, the Court noted the particular nature of filling stations, their easy accessibility and their vulnerability to destructive price wars and to unfair practices resulting from competitive pressures. The Court determined that the legislature could reasonably have believed that whatever problems promotional games present are more acute in the retail fuel industry than in other retail industries. This consideration alone would justify the legislative decision to prohibit promotional games in this particular industry, since the legislature may proceed one step at a time, addressing itself to that phase of a problem which seems most acute, and need not embrace every conceivable problem within that field. Since there was no invidious discrimination involved in the legislative classification and since a rational basis did in fact exist for affording the retail fuel industry


23 The Court's decisions in the price sign cases are also against the weight of authority in other jurisdictions. At least seven other states have passed legislation similar to the Massachusetts fuel price sign regulation statute, G.L., c. 94, §295C. Courts in six of those seven have struck down all or parts of those statutes. Connecticut (State v. Miller, 126 Conn. 373, 12 A.2d 192 (1940)); Delaware (State v. Hobson, 46 Del. 381, 83 A.2d 846 (1951)); Maine (State v. Union Oil Co. of Maine, 151 Me. 438, 120 A.2d 708 (1956)); Michigan (Levy v. City of Pontiac, 331 Mich. 100, 49 N.W.2d 80 (1951)); New Jersey (Regal Oil Co. v. State, 123 N.J.L. 456, 10 A.2d 495 (1939)); Pennsylvania (Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (1954)). Only New York has upheld such legislation. (People v. Arlen Serv. Stations, Inc., 284 N.Y. 340, 31 N.E.2d 184 (1940)).


25 Id. at 189, 23 N.E.2d at 135.

26 Id. at 192, 23 N.E.2d at 137.

special treatment, the Court concluded that the statute did not offend
the equal protection doctrine on grounds of underinclusiveness.

While legislative enactments are generally accorded a strong presump­tion of validity,\(^28\) that presumption may be rebutted by a strong showing of proof.\(^29\) In *Pinnick v. Cleary*,\(^30\) in which the Court upheld the no-fault insurance law, Chief Justice Tauro suggested the virtual impossibility of showing the unconstitutionality of a statute unless a complete factual foundation appears in the record.\(^31\) In *Mobil* plaintiffs offered extensive evidence to prove that promotional games were the same, whether used by fuel retailers or by merchants competing directly with such dealers with respect to products other than motor vehicle fuel, or by still other businessmen selling a broader variety of products.\(^32\) Curiously, the Court conceded:

> The record does not establish that the promotional games of gasoline dealers have distinctive misleading characteristics, that they adversely affect the retail price of gasoline, or that they involve the coercion of gasoline dealers by landlord-suppliers.\(^33\)

This statement undermines the Court's later position that such distinctive characteristics might have moved the legislature to adopt the statute:

> The Legislature could reasonably have thought, in 1968, that some or all of these features of the typical gasoline station made the problem of promotional games more pressing with respect to them than with respect to other retail merchants.\(^34\)

The statutory classification implies a general disapproval of the use of games in this particular industry. Justice Hennessey included in his dissent a detailed examination of the statute's classification scheme, and concluded that it

> ... is not one based on the type of product since it applies to all products sold by motor vehicle fuel sellers. The distinction seems to be solely one of person: he who sells motor vehicle fuel as a large or small part of his business activity has become so specially affected that his promotion of nonfuel products on the same premises is prohibited, whereas those in competition with him in the sale of nonfuel products who sell no motor vehicle fuel are exempted from the prohibition.\(^35\)


\(^{31}\) Id. at 1159, 271 N.E.2d at 612 (concurring opinion).

\(^{32}\) Id. at 575, 280 N.E.2d at 417.

\(^{33}\) Id. at 581, 280 N.E.2d at 420.
If, indeed, the legislature was motivated by a general disapproval of the games in the retail fuel industry, the restriction it fashioned in Chapter 602 would not be consonant with equal protection principles established in two earlier cases. In *Hall-Omar Baking Co. v. Commissioner of Labor & Industries*, the Court struck down a statute which required the driver-salesmen of all businesses to obtain peddler's licenses, with an exemption for the driver-salesmen of dairy products. Plaintiff, a bakery goods seller, argued that the classification was arbitrary. The Court agreed, holding that the statute was an "unequal application . . . which makes an arbitrary distinction between businesses which, so far as their attributes relevant to such classification are concerned, are alike." Similarly, in *Vigeant v. Postal Telegraph Cable Co.*, the Court invalidated a statutory provision imposing strict tort liability upon telegraph companies for any injuries caused by their poles, wires, and other equipment. The Court found no rational relation between the legislative purposes and the restricted class selected by the legislature and no reason to exempt telephone, electric, and other companies utilizing equipment similar to that of the telegraph companies.

In *Mobil*, the Court acceded to the classification on the premise that a legislative act need not embrace every conceivable problem within the regulated area as long as the area is a proper one for regulation: the regulatory scheme may thus be implemented one step at a time. The weakness in this approach was noted by Justice Hennessey: "To say that such unequal treatment is permissible because it is an initial step or one intended to be only partially remedial would do an injustice to the constitutional principle involved." In any case, there was no evidence that the legislature contemplated further action to regulate promotional games in other industries. If the prohibition effected by Chapter 602 seems both absolute in its intended coverage and isolated from any comprehensive legislative scheme, the one-step-at-a-time rationale should therefore not apply.

The second constitutional challenge to Chapter 602 was that the statute arbitrarily interfered with the right of service station operators to conduct and promote their business, thus depriving them of their property without due process of law. Plaintiffs argued that the games were a valuable merchandising tool and the statutory prohibition was unnecessarily restrictive since regulation of specific abuses was available as an alternative. However, the Court determined that the statute was a valid exercise of the police power which did not infringe the due process guarantee.

37 Id. at 707, 184 N.E.2d at 352.
39 Id. at 341, 157 N.E. at 654.
The test of a statute under due process is whether it "bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."\textsuperscript{42} The statute in \textit{Mobil} was designed to protect service station proprietors and consumers from abuses growing out of the operation of the games. In the Court's analysis, that design reflected a legislative determination that such games should play no part in the retail fuel sales process. Such a determination was not without reason, since "considerations of price, quality, versatility, and so forth are some of the many valid criteria to be employed in making intelligent consumer purchases, and the use of such criteria is to be encouraged."\textsuperscript{43} Thus, "the Legislature might rationally seek to discourage the real, though sometimes unconscious, attraction to one of several competing products, solely because a prize may be won, as not in the public interest."\textsuperscript{44}

When the due process test is applied to a statute, "[e]nforcement is qualified or restricted under the police power, the broad power, A corollary principle is that one cannot operate his business with complete freedom but is subject to reasonable regulations established to govern the operation and conduct of business.\textsuperscript{46}

[T]hat right [to conduct one's business], like many others, may be qualified or restricted under the police power,—the broad power, never precisely delimited, to take rational action for the protection of the public safety, health, morals, comfort, and good order.\textsuperscript{47}

The extent to which the state can arbitrarily interfere with the right to conduct and promote one's business has been the subject of much litigation in Massachusetts. While a state has broad latitude under the police power to regulate business activity, it is not without some limitation. In \textit{Sperry and Hutchinson Co. v. Director of the Div. on the Necessaries of Life},\textsuperscript{48} the Court struck down a provision which forbade gasoline sellers to use trading stamps in connection with their business, stating: "A State cannot, 'under guise of protecting the public, arbitrarily interfere with


\textsuperscript{44} Id. at 572-573, 280 N.E.2d at 415-416.


\textsuperscript{48} 307 Mass. 408, 30 N.E.2d 269 (1940).
private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'

49 Unless such regulations are reasonably related to a valid state objective, they cannot be upheld.

Similar standards have been applied in other states. In *People v. Victor*, the Michigan Supreme Court struck down a statute prohibiting the giving away of any premium or prize. In *People v. Gillson*, the New York Court of Appeals invalidated a statute which made it a misdemeanor for any person selling food to simultaneously give to the purchaser any gift, prize, premium or reward. The only distinction between promotional games and trading stamps and other prizes is the "gaming" or "chance" element. The *Mobil* Court rejected the Attorney General's contention that the promotional games constituted a lottery in violation of the law. Therefore, the distinction accorded the "gaming" or "chance" giveaway would seem to rest on an arbitrary moral foundation rather than a legal premise, and it is arguably on that basis alone that the promotional games in the retail industry have been banned while the other giveaways have not been disturbed.

In *Sperry* and *Slome*, the Court considered the constitutionality of different parts of the same statute. The section of the statute which merely regulated the size and location of price signs was upheld in *Slome*; the section whose effect was to prohibit use of trading stamps by retail fuel dealers was struck down in *Sperry*. The plaintiffs in *Mobil* argued that, while regulation was upheld as consonant with equal protection guidelines in the *Slome* case, the *Sperry* decision would impose a rigid test on any outright prohibition. Read together, *Sperry* and *Slome* arguably suggest that the Court would generally be more inclined to entertain the less restrictive alternative of regulation as opposed to complete prohibition of a marketing device. Even if the legislature did not exceed its authority under the police power in framing Chapter 602, it would have been on safer constitutional ground had it chosen to regulate the games instead of levying an absolute prohibition. In *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, the Court invalidated a statute proscribing the sale of a cream substitute under the due process clause of the Massachusetts Constitution, stating:

[A] less arbitrary approach to protect consumers from fraud and confusion, and a particularly obvious one, would be to penalize those who actually practice the deception rather than the guiltless

52 See note 4, supra.
53 Slome was concerned with G.L., c. 94, §295C ; Sperry with G.L., c. 94, §295E.
54 Brief for Plaintiffs at 54.
producer or distributor of Coffee-Rich and, indirectly, those consumers who want to purchase the product precisely because it is a nondairy product. 56

While there may indeed be instances where regulation might prove fruitless and prohibition would be a necessary remedy, no evidence was introduced in Mobil to suggest that such was the case, and the complete prohibition can be criticized as unduly severe.

The third constitutional issue in Mobil was whether the regulation of promotional games in the retail fuel industry was pre-empted by the federal government by virtue of alleged conflicts either with FTC rules 57 or with some exclusive federal interest under the supremacy clause. Pre-emption occurs only when the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," 58 or when the federal law manifests a clear intent to pre-empt the field. 59 The Court concluded that the federal rule enacted here was intended to establish minimum standards of regulation. Chapter 602 did not prohibit the intrastate or interstate advertising and sale of motor vehicle fuel, but only a particular type of promotional activity within the state. The interstate commerce clause "did not withdraw from the states the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it." 60 For that reason, the third argument was also dismissed.

Legislative intent was an essential factor in the equal protection and due process analyses. However, the Court's opinion largely ignores the legislative history of Chapter 602. General complaints about the operation of promotional games in the retail fuel industry prompted a group of state legislators to initiate corrective legislation in 1968. 61 A similar concern was evident at the same time in several other states and at the federal level. Maryland, which provided the model for the Massachusetts statute, 62 had prohibited the games earlier in 1968. New Jersey

56 Id. at 424-425, 204 N.E.2d at 288.
61 See note 5, supra.
62 The Maryland statute has since been amended to include a prohibition on
promulgated a similar law. Early in 1968, a trade newspaper noted dealer discontent in Ohio and Virginia. Michigan, Kentucky, and Wisconsin had prohibited the games under general lottery statutes.

At the federal level, a congressional subcommittee began investigating the games in mid-March of the same year and opened hearings in June. The Federal Trade Commission had a staff report under preparation at the same time. The subcommittee and the FTC both concluded that abuses existed in the operation of the games, although little evidence of overt coercion was reported. Regulation by the FTC followed shortly thereafter.

The Massachusetts Gasoline Dealers Association fully endorsed the Massachusetts bill, claiming that 90% of the retailers in the state supported the proposal. While there is no evidence of any effort on the part of retailers to oppose the measure, several of the major oil companies conducted extensive lobbying efforts in an attempt to defeat the bill. The inference to be drawn from this history is that the wholesalers, and not the retailers, were the ones who wanted to preserve the contests. While the crux of the plaintiffs' equal protection and due process arguments is that the individual retailer is hurt by his inability to conduct promotional games, the retailers, as a group, did not want the games. Thus, the argument for keeping the games, although cast on behalf of the retailer, would seem to serve the interest of the wholesalers instead.

The record in the Mobil case did not indicate extensive abuses in the operation of the games. However, it is apparent from the federal investigation of this area that irregularities were prevalent, and this conclu-
sion is supported by the position of the Massachusetts Gasoline Retailers Association. Even in the absence of overt coercion, fuel retailers were subject to pressures to stay abreast of their competitors by using the games. Thus, legislative intervention in this area was probably justified and timely. But regardless of the merit of Chapter 602, the Mobil decision must be criticized for its superficial treatment of the important constitutional arguments raised in the case.

The Mobil court applied the presumption of statutory validity, and confined its inquiry to a consideration of whether any rational basis existed for the promulgation of the statute. In so doing, the Court analyzed the purpose of Chapter 602 but seemingly ignored its effect. Even if the purpose of a challenged statute serves a valid state interest, it may nonetheless create a classification which denies equal protection. Had Chapter 602 limited its ban on the use of promotional games to games operated in connection with the sale of fuel alone, as the New Jersey statute had done, the problem of overbreadth would have been avoided. Yet, the Court failed to appreciate this distinction. Had Chapter 602 prohibited the games in all retail industries, as the Maryland statute now does,13 the problem of underinclusiveness would also be avoided. It is submitted that the Court’s analysis of Chapter 602 was not as complete or as probing as it should have been and this decision should not be accorded great weight as precedent in future constitutional decisions.

STEPHEN J. BUCHBINDER

STUDENT COMMENT

§18.9. Standing to assert third party rights: Eisenstadt v. Baird.1

William Baird, an advocate of birth control, lectured to an audience at Boston University on the subject of contraception. During the lecture he exhibited various contraceptive devices and at the conclusion of the lecture he was arrested after he had handed a young woman a package of vaginal foam. Baird was charged with two violations of G.L., c. 272, §§21 and 21A: giving away a certain medicine and article for the prevention of conception, and unlawfully exhibiting contraceptive articles. Section 21 generally prohibits the distribution and exhibition of birth control devices, while section 21A creates exceptions allowing registered physicians and pharmacists to furnish contraceptives to married persons.2

1 See note 68, supra.

2 G.L., c. 272, §21 provides: Except as provided in section twenty-one A whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article...
After finding Baird guilty on both charges, the superior court, pursuant to G.L., c. 278, §30, reported the case to the Supreme Judicial Court for a decision as to the constitutionality of sections 21 and 21A. In *Commonwealth v. Baird*, the Supreme Judicial Court overturned Baird's conviction for exhibiting the contraceptive devices, holding that, to the extent that section 21 prohibited exhibition it was unconstitutional as applied to Baird. The Court held that the exhibition was incidental to and part of the lecture itself and therefore protected speech under the First Amendment. However, by a 4-3 majority, the Court sustained Baird's conviction for distribution of a contraceptive on the ground that he was not a permissible distributor under section 21A. Baird's argument that distribution of the contraceptive was protected speech under the First Amendment was rejected on the ground that the act of distribution went beyond expression to prohibited conduct.

Section 21A embodies two distinct limitations on the distribution of contraceptives. The first restricts the class of permissible distributors to registered physicians and registered pharmacists who are actually engaged in pharmacy; the second restricts lawful distributees to married persons. The majority concluded that the restriction on permissible distributors was reasonably related to the protection of public health and thus not in violation of due process requirements:

The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences. . . .

Therefore, we do not declare that a statute preventing distribution by indiscriminate persons is beyond legislative power.

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4 Id. at 752, 247 N.E.2d at 578.
5 Id. at 753, 247 N.E.2d at 578.
6 Id.
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Since Baird was clearly not a permissible distributor within the meaning of the statute, the majority affirmed his conviction for unlawful distribution of a contraceptive. Justices Whittmore and Cutter, in dissent, argued that, notwithstanding the validity of the restriction of permissible distributors, the limitation on permissible distributees violated equal protection requirements: “If there is a need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons.” The majority, however, concluded that Baird was not a permissible distributor and did not reach the equal protection issue: “The legitimacy of the [legislative] purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient.” Thus, in effect, Baird was denied standing to assert the equal protection rights of unmarried persons.

Following the Supreme Judicial Court’s affirmation of his conviction, Baird was imprisoned for a term of three months. After his petition for certiorari to the United States Supreme Court was denied, Baird petitioned the United States District Court for the District of Massachusetts for a writ of habeas corpus. He argued, inter alia, that the statute infringed on his right of free speech, and that the statute lacked a legitimate legislative purpose. Agreeing with the Supreme Judicial Court, the federal district court held that by giving the contraceptive to the young woman Baird had engaged in prohibited conduct and not in symbolic speech. The court also held that the restriction on permissible distributors was reasonably related to the legitimate legislative purpose of protecting the public health. At the conclusion of its opinion, the court specifically held that Baird did not have standing to assert the rights of unmarried persons:

This Court, however, need not decide whether §§ 21 and 21A as construed by the Supreme Judicial Court violate some constitutional right of registered physicians in their professional relationship with unmarried patients, or of unmarried persons themselves. These questions are not presented by the facts in this case. The petitioner is not a physician and has no express or implied authority to act for physicians. It does not appear that he himself is an unmarried person or has any professional or other legally significant relationship to unmarried persons. Therefore he lacks standing to assert the constitutional rights of either group.

Baird appealed the decision of the federal district court to the Court of Appeals for the First Circuit. In Baird v. Eisenstadt, the First Cir-

7 Id. at 758, 247 N.E.2d at 581.
8 Id. at 753, 247 N.E.2d at 578.
11 310 F. Supp. at 957.
12 429 F.2d 1398 (1st Cir. 1970).
cuit, stating that "[p]etitioner's more substantive claims need considerable rephrasing," held that the real issue was "whether the statute 'bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.'" The court held that neither the public health argument (relied on in Commonwealth v. Baird and Baird v. Eisenstadt, supra) nor the morality argument (relied on in Sturgis v. Attorney General) could uphold the statute. Although the question of standing is ordinarily disposed of prior to any decision on the merits, the court first determined that the statute was entirely void, and then held that, because the statute was entirely void, Baird had standing to challenge the entire statute: "We, however, have held the statute itself void. Petitioner is being jailed for a direct violation of that statute; he must have as much standing to protest as anyone else."

Eisenstadt, the Sheriff of Suffolk County, appealed the decision of the First Circuit to the United States Supreme Court. Approaching the standing question in a significantly different manner than did the First Circuit, the majority of the Court held that Baird had standing to challenge the statutory limitation on lawful distributees because he was an advocate of the right of unmarried persons to obtain contraceptives. Justice Brennan, writing for the majority, agreed with the First Circuit's decision that the alleged dual objectives of regulating the distribution of potentially harmful articles and discouraging premarital sexual relations could not reasonably be regarded as the true legislative aims of sections 21 and 21A. The majority concluded the statute, viewed as a prohibition on contraception per se, violated the right of unmarried persons to equal protection of the laws under the Fourteenth Amendment. A concurring opinion by Justices White and Blackmun accepted the Supreme Judicial Court's determination that sections 21 and 21A served a valid public health purpose, but concluded that, since there was no proof either that the vaginal foam was dangerous or that the re-

13 Id. at 1400.
14 Id.
15 1970 Mass. Adv. Sh. 1139, 260 N.E.2d 687. In Sturgis two licensed gynecologists petitioned the Supreme Judicial Court for a declaratory judgment that section 21A was unconstitutional in that it prevented them from furnishing contraceptive assistance to their unmarried patients. Unlike Commonwealth v. Baird, Sturgis presented a situation which required the Court to decide the validity of the statutory distinction between married and unmarried persons. Although the Court stated that the distinction could be upheld on the basis of a public health argument similar to that relied on in Commonwealth v. Baird, the Court placed primary reliance on a morality argument. The Court upheld the restriction on permissible distributees as a valid exercise of the legitimate state objective of promoting morality by discouraging fornication. The theory of the argument appears to be that if unmarried persons are denied access to contraceptives, fear of pregnancy will deter them from extra-marital sexual activity.
16 429 F.2d at 1402.
18 Id. at 443.
recipient was unmarried, Baird's conviction could not stand.19 Justice Douglas also concurred in the result, but argued that the ground for the decision should be that Baird's distribution of the contraceptive was "a permissible adjunct of free speech."20 Chief Justice Burger, the sole dissenter, reasoned that the statute was a valid exercise of the police power to protect public health, and that Baird's status as layman came directly within the proscription of the statute.21 Chief Justice Burger further asserted that Baird had no standing to challenge that part of the statute which restricted the class of lawful distributees.22

It is readily apparent from the Baird cases that the question of what a particular petitioner can challenge and raise in his defense can mold the entire limits of his case. Frequently, the merits of a case are not reached at all because the petitioner simply does not have standing to raise certain issues.23 The fundamental requirement for standing in the federal courts is that there be a justiciable controversy, the "cases and controversies" requirement under Article III of the United States Constitution.24 The Supreme Court has held that a justiciable controversy does not exist when the parties are not genuinely antagonistic,25 and will therefore not grant standing when the case has become moot because of intervening circumstances,26 when the case calls for an advisory opinion,27 or when the case lacks immediacy or "ripeness."28

The question of standing presented by the Baird cases was not whether

19 Id. at 464-65.
20 Id. at 460.
21 Id. at 465-66.
22 Id. at 466.
23 See Massachusetts v. Mellon, 262 U.S. 447 (1923) (denial of standing to individual taxpayer suing to enjoin enforcement of allegedly unconstitutional federal appropriation statute).
26 Doremus v. Board of Education, 342 U.S. 429 (1952) (school prayer case in which petitioner's child had graduated by the time the case reached the Supreme Court); Local No. 8-6 Chemical and Atomic Workers International Union AFL-CIO v. Missouri, 361 U.S. 363 (1960) (strike ended before the case reached the Supreme Court).
28 Poe v. Ullman, 367 U.S. 497 (1961). The petitioners, a married couple, instituted proceedings in which they requested a judgment declaring unconstitutional a Connecticut criminal statute which forbade the use of contraceptive devices and giving medical advice in the use of such devices. It was held that the case was not justiciable at the time since there was no allegation that the prosecutor intended to prosecute the petitioners for infractions of the statute. Consequently there was a lack of immediate threat since there was a long history of non-prosecution under the 75-year-old statute and evidence showed birth control devices were in fact freely available in Connecticut.
Baird had standing at all, but rather whether he had standing to assert the rights of third parties. Baird had standing to challenge the statutory limitation on the class of lawful distributors and the statutory prohibition of all forms of contraceptives without regard to the relative safety or danger of the various types of contraceptives because these aspects of the statute related directly to his actions. Baird, however, wished to challenge the validity of the entire statute. From this point of view, the most significant standing issue was whether Baird, a married man and not a physician, had standing to challenge the distinction drawn in section 21A between married and unmarried persons by arguing that unmarried persons have as much right to and need for contraceptives as do married persons.

The First Circuit's decision implies a novel analysis of the standing issue: the mere fact of his conviction was held to confer upon Baird the standing to attack the Massachusetts statute on any constitutional ground. Since the court regarded the statutory restrictions on distributors and distributees as unseverable provisions, a constitutional infirmity in either one would void the entire statute. Baird was therefore allowed to argue that the restriction on distributees was not related to a proper legislative purpose, even though he himself had been convicted as a distributor. He was allowed to do so not for the purpose of asserting third party rights, but to obtain a reversal of his own conviction on the ground that the statute was unconstitutional. The effect of this decision, if it were widely followed, would be to eliminate the traditional concept of standing as a threshold question in criminal cases involving statutorily defined crimes.

The United States Supreme Court did not adopt the First Circuit's analysis of Baird's standing, but chose to view the issue in terms of standing to assert third party rights. Under the self-imposed rule of judicial restraint the Supreme Court will not ordinarily permit a defendant to assert the rights of others as a basis for a defense to an otherwise valid prosecution. This rule flows from the constitutional principle that the Court may not hear claims in which the parties are not adverse and therefore in which there may be no genuine case or controversy. To render a decision on the merits of such a claim would, in essence, require an advisory opinion. On several occasions the Court has relaxed its self-imposed rule against a defendant's assertion of third party rights.

29 Compare discussion in Note, 86 Harv. L. Rev. 116 (1972).
30 Professor Davis has developed a similar theory. He argues that a defendant cannot be convicted under an unconstitutional statute. Thus, in a proceeding already commenced, a defendant should be allowed to call to the court's attention any arguments which would tend to prevent the court from rendering an unconstitutional opinion. 3 Davis, Administrative Law §2207 (Supp. 1965).
32 For example, in Pierce v. Society of Sisters, 268 U.S. 510 (1925), private school owners were permitted to assert the rights of potential pupils and their parents. See also Barrows v. Jackson, 346 U.S. 249 (1953), discussed infra.
Professor Robert Sedler, in his thorough analysis of standing to assert third party rights, or *jus tertii*, designated four factors which he believes the Court takes into consideration in determining the scope of standing to assert *jus tertii*: (1) the interest of the party asserting third party rights; (2) the nature of the right asserted; (3) the relationship between the party asserting the right and the third party; and (4) the practicability of assertion of such rights by a third party in an independent action. The decision to grant standing in a given case depends on whether the cumulative significance of the various factors outweighs adherence to the Court's traditional rule of self-restraint. In analyzing the standing issue presented in the *Baird* cases it will be helpful to apply these factors.

The first factor, the interest of the party asserting third party rights, is basically a restatement of the fundamental requirement that there must be a justiciable controversy between the parties. This may be characterized as a jurisdictional prerequisite, precluding consideration of the remaining factors unless a sufficient interest is shown, that is, a case or controversy capable of adjudication. In *Baird* the Supreme Court expressly found that the defendant had a sufficient interest to satisfy the case or controversy requirement. Indeed, it should be apparent that in virtually every criminal prosecution, the interest factor would be satisfied.

Perhaps the interest factor is best illustrated by comparing *Griswold v. Connecticut* and *Tileston v. Ullman* with *Baird*. The petitioners in *Griswold*, the executive director of Planned Parenthood and a physician, were criminal defendants and, like Baird, had a vital, ascertainable interest in the outcome of the case. This interest distinguishes both *Baird* and *Griswold* from *Tileston*, a 1943 Supreme Court case challenging the validity of a Connecticut statute which prohibited both dissemination of contraceptive information and the use of contraceptives. In *Tileston* the physician-petitioner sought a declaratory judgment to have the statute declared unconstitutional inasmuch as the effect of the statute was to prevent his patients from using contraceptives, thus possibly endangering their lives without due process. The physician claimed no deprivation of his own rights. The Court held that the physician had no standing.

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33 Sedler, Standing to Assert Constitutional *Jus Tertii* in the Supreme Court, 71 Yale L. J. 599 (1962), hereinafter cited as Sedler.
34 Id. at 627.
35 405 U.S. at 443.
36 381 U.S. 479 (1965).
37 318 U.S. 44 (1943).
38 The question of standing in *Griswold* is intriguing. The Court held that *Griswold*, the executive director of Planned Parenthood and Buxton, a physician, had standing to raise the constitutional rights of those with whom they had a "professional relationship." However, the Court emphasized the physician-patient relationship, leaving the nature of *Griswold*'s "professional relationship" unclarified. Possibly *Griswold*'s status as executive director of Planned Parenthood either created an association-member relationship or created a cognizable professional relationship in itself.
to attack the statute because his arguments rested solely on the constitutional rights of his patients, who were fully capable of asserting their own rights. In both *Baird* and *Griswold* the criminal conviction assured the Court of a genuine interest in the litigation, whereas in *Tileston* the physician, by seeking a declaratory judgment, did not risk prosecution and thus could not show the same interest in the litigation shown in *Baird* and *Griswold*.

The second factor to be considered is the nature of the right asserted. As Sedler observed, "it takes no great imagination to realize that certain constitutional guarantees inspire greater sensitivity on the part of the Court than do others." He proposes five categories of rights: (1) expression; (2) life, liberty and privacy; (3) procedural rights; (4) property and contractual rights; and (5) equal protection. The third party right asserted in *Baird* is basically the right to equal protection for the unmarried when there is no rational basis for a discriminatory classification.40

The third factor to be considered is the relationship between the person seeking to assert third party rights and the person or persons whose rights are asserted. Sedler enumerates five types of relationships commonly found in *jus tertii* situations: "(1) professional relationships; (2) race or class relationships; (3) commercial relationships; (4) the relationship between a defendant and others affected by the statute or process under which he is made liable; and (5) the relationship between an association and its members."41

The federal district court in *Baird v. Eisenstadt*, denied Baird standing to assert *jus tertii* because that court could find no legally significant relationship between Baird and unmarried persons, either as a member of the class discriminated against (Baird was married) or as a professional (Baird was not a physician).42 Unlike the defendants in *Griswold*, Baird did not claim a physician-patient or association-member relationship with members of the class discriminated against. Nevertheless, the Supreme Court, however, granted Baird standing to assert the rights of unmarried persons, noting that "doctor-patient and accessory-principal relationships are not the only circumstances in which one person has been found to have standing to assert the rights of another." The Court then analogized to *Barrows v. Jackson*, a case in which a seller

39 Sedler at 627.
40 Reading *Baird* in light of *Griswold*, it would seem that the ultimate right implicit in *Baird*’s argument is the right to privacy, that is, freedom from unwarranted governmental intrusion. A discussion of this right is, however, beyond the scope of this article.
41 Sedler at 628. It should be noted that category (4) is really just a restatement of the problem of *jus tertii*, and appears to be a catch-all category.
42 310 F. Supp. at 957.
43 See NAACP v. Alabama, 357 U.S. 449 (1958) for a discussion of the association-member relationship in regard to the assertion of *jus tertii*.
44 405 U.S. at 445.
45 346 U.S. 249 (1953).
of land had violated a racially restricted covenant in a deed and was permitted to defend an action for damages for breach of covenant on the ground that the covenant violated the equal protection rights of Negro purchasers. No Negro was a party to the action. The Court stated that in *Barrows* the relationship between the defendant and the third party was not simply a fortuitous vendor-vendee relationship, but rather the

... relationship between one who acted to protect the rights of a minority and the minority itself ... And so here the relationship between Baird and those rights he seeks to assert is not simply distributor and potential distributees, but *that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so.*46 (Emphasis added).

In *Baird*, the Court gave *Barrows* an interpretation which appears to be broader than any interpretations in the past. *Barrows* had previously been read in the context of racial discrimination. The nature of the right asserted, the right of Negroes to equal protection of the laws, holds a high position in the hierarchy of constitutional values. Thus, permitting the defendant to assert the rights of Negroes who were denied equal protection by enforcement of the restrictive covenant was not an altogether surprising step for the Court to take. *Baird*, however, construed the significant relational interest in *Barrows* to be the relationship between an advocate of minority rights and the minority itself, not the contractual vendor-vendee relationship. Further, *Baird* extended the advocacy relationship beyond the racial discrimination situation. Finally, it should be noted that while the advocacy relationship in *Barrows* was, perhaps, supported by the underlying vendor-vendee relationship, Baird's only relationship to the unmarried persons was that of advocate.

An analysis of standing to advocate minority rights presents two immediate questions: first, who can be an advocate, and second, what constitutes a minority. Prior to his arrest Baird had achieved national prominence as an advocate of birth control. He was, in this sense, an *established* and *recognized* advocate of the rights of unmarried persons to obtain contraceptives. In contrast, the defendant in *Barrows* apparently had never been an advocate of the rights of Negroes prior to the breach of the restrictive covenant. Neither *Baird* nor *Barrows* establishes any guidelines for determining who can be an advocate in future litigation.

Determining the existence of a minority presents similar problems. The minority in *Baird* consisted of unmarried persons who were denied contraceptives under the statute. In *Barrows* the minority consisted of possible Negro purchasers. A principal question unanswered by *Baird* and *Barrows* is numerically how small the minority can be.

46 405 U.S. at 445.
47 Id.
The importance of the two questions raised above was diminished by the Court's conclusion that the impact of the litigation on third party interests was even more important than the relational interest between the party asserting *jus tertii* and the third party. This impact is, in essence, Sedler's fourth factor, the practicability of assertion of rights by the third party. Regarding this fourth factor Sedler stated:

Very often where assertion by the injured party is impractical or unlikely, a party adversely affected may assert the former's rights. Although an analysis of the cases reveals that this factor is not conclusive, it is probably the most significant of the four factors.48 Although the questions of who is a proper advocate and what is a minority will arise, they will only arise if the third party cannot practically assert his own rights.

The Court stated that the case for permitting Baird to assert *jus tertii* was more persuasive than that for allowing the defendants in *Griswold* to assert *jus tertii*. In *Griswold* the Connecticut statute prohibited the use of contraceptives as well as the dissemination of contraceptive information. There was nothing to prevent persons who wished to use contraceptives from challenging the law themselves by violating the statute. In contrast, the Massachusetts statute prohibited distribution rather than use: "unmarried persons denied access to contraceptives in Massachusetts, unlike users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights."49 The fact that the unmarried persons had no effective way to assert their own rights was probably the single most determinative factor in allowing Baird standing to assert *jus tertii*.

The Court in *Baird* extended the kinds of relational interests that are legally cognizable in the assertion of third party rights by interpreting the relationship in *Barrows* to be that between an advocate of minority rights and the minority. *Baird* emphasized, however, that this expansion of legally cognizable relationships will probably be limited to situations in which the assertion of rights by the third party itself is difficult or impossible. Therefore *Baird* should not be read as a dramatic expansion of standing to assert third party rights.

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48 Sedler at 628. It is important to note, however, that if the first factor is indeed a jurisdictional prerequisite, as suggested supra, the first factor would seem to be paramount. Of the remaining three factors perhaps Sedler's observation is justified.

49 405 U.S. at 446.