BASTARDY PROCEEDINGS—THE EXPANSION OF THE RIGHTS OF ILLEGITIMATES—*Franklin v. Julian*, 30 Ohio St. 2d 228, 283 N.E.2d 813 (1972).

I. ILLEGITIMATES' RIGHT TO SUPPORT

The Ohio supreme court in *Franklin v. Julian*[1] expanded the class of women who, pursuant to § 3111.01 of the Ohio Revised Code,[2] may bring a bastardy proceeding against the father of an illegitimate child to recover personal support, reimbursement for the expense of pregnancy and childbirth, and child support. Section 3111.01 begins: "When an unmarried woman, who has been delivered of, or is pregnant with, a bastard child, makes a complaint . . . ."[3] The statute does not indicate whether the availability of a bastardy proceeding is restricted to a woman unmarried *at the time of conception*, to a woman unmarried *at birth*, or merely requires that she be unmarried *when she files the complaint*.[4] For more than one hundred years, litigants in Ohio courts have disputed this statutory requirement of § 3111.01. Lower courts have frequently disagreed as to the relevant time period intended by the legislature when it used the word "unmarried." However, the decisions more often than not have construed the meaning of "unmarried" so as to narrow the class of women who are eligible to institute bastardy proceedings.[5]

In *Franklin*, the Ohio supreme court announced that "unmarried" refers only to the mother's marital status *when she files the complaint* and does not preclude bastardy actions on the part of women who were married at the time of conception or birth. Moreover, the court determined that despite the unavailability of bastardy proceedings to women married at the filing date, an illegitimate child of such a woman may bring an action in his own name to recover support from his father based on a common law duty of support.

The decision in *Franklin v. Julian* resulted from the consideration of two separate bastardy complaints.[6] The first case involved a woman, divorced at the time of filing, who had been married at conception and birth. The supreme court acknowledged that its prior rulings would deny such a woman any relief under § 3111.01, but found that nothing in the language of the statute permits such a result. The court attributed the previous restrictive reading of the word "unmarried" to centuries of prejudice against the adulterine bastard.[7]

In the second action, the unwed mother of two illegitimate children subsequently married a man other than the putative father and, while married, filed a complaint under § 3111.01. The court opined that such a woman may not benefit

---

[1] 30 Ohio St. 2d 228, 283 N.E.2d 813 (1972).

[2] OHIO REV. CODE ANN. § 3111.01 (Page 1972).

[3] *Id.*

[4] 37 U. CIN. L. REV. 594 (1968).

[5] *See, e.g.*, State *ex rel.* Hoerres v. Wilkoff, 157 Ohio St. 286, 105 N.E.2d 39 (1952); Miller v. Anderson, 43 Ohio St. 473, 3 N.E. 605 (1885); Haworth v. Gill, 30 Ohio St. 627 (1876); Beam v. Ray, 111 Ohio App. 341, 170 N.E.2d 844 (Montgomery County 1960); State *ex rel.* Fisher v. McKinney, 55 Ohio L. Abs. 190, 85 N.E.2d 562 (Ct. App. Montgomery County 1949); Sullivan v. Wilkoff, 63 Ohio App. 269, 26 N..E2d 460 (Mahoning County 1939); State *ex rel.* v. Cregar, 8 Ohio App. 138 (Clark County 1918). *But see*, Roth v. Jacobs, 21 Ohio St. 646 (1871); State *ex rel.* Sprungle v. Bard, 59 Ohio L. Abs. 129, 98 N.E.2d 63 (Ct. App. Cuyahoga County 1950); Kirkbride v. Eschbaugh, 77 Ohio L. Abs. 33, 147 N.E.2d 676 (Juv. Ct. Noble County 1957).

[6] Both cases were dismissed by the lower courts. On appeal the court of appeals affirmed in the first case and reversed and remanded for trial under the bastardy statute in the second case. 30 Ohio St. 2d at 229, 283 N.E.2d at 814 (1972).

[7] *Id.* at 230-31, 283 N.E.2d at 814-15.

from § 3111.01 inasmuch as the statute provides for support for the mother,[8] which support the married mother can obtain from her present husband. However, notwithstanding the unavailability of the statutory bastardy proceedings, the illegitimate child is not deprived of the right to claim support from his father.

In determining that the illegitimate has a right to support outside the Bastardy Act, the court directed its attention to the existence of various criminal statutes which provide for prosecution of a father who fails to support his child, whether the child be legitimate or illegitimate.[9] These criminal statutes are intended to compel the father to provide support and do not require that paternity be first established in a bastardy proceeding. Further, the court noted that it has had no difficulty awarding support for legitimate children without reference to explicit statutes, usually in the aftermath of a divorce or separation. If such a non-statutory right of support is available to the legitimate child, equal protection would require that it be available to the illegitimate as well.[10]

In granting to the illegitimate a non-statutory right to support, the court, in a footnote, overruled *Baston v. Sears*.[11] *Baston* had been decided only four years earlier and had established that an illegitimate child could *not* bring a declaratory judgment action to establish a right to receive support.[12] The *Baston* court, rejecting the application of equal protection arguments to such a claim, ruled that an illegitimate does not have a non-statutory right to support.

The holding in *Baston* was probably the result of an erroneous reading of *Levy v. Louisiana*,[13] a United States Supreme Court decision which antedated the *Baston* decision by only a few months.[14] The Supreme Court in *Levy* held that to bar an illegitimate from recovering for the wrongful death of his mother under Louisiana's wrongful death statute constituted discrimination forbidden to the states by the fourteenth amendment. The Court emphasized that an illegitimate should not be denied rights merely because of the accident of his birth; that the fact of illegitimacy has no bearing on the injury suffered by the illegitimate because of the death of his mother; and noted the significance of the mother-child relationship. The majority opinion in *Baston* concentrated on the latter aspect of the opinion and dismissed *Levy* in a footnote as inapplicable: "The rights announced in *Levy* were

---

[8] OHIO REV. CODE ANN. § 3111.17 (Page 1972).

[9] OHIO REV. CODE ANN. § 2151.42 (Page 1968); § 2903.08 (Page 1954); § 3113.01 (Page 1972).

[10] 30 Ohio St. 2d at 234-35, 283 N.E.2d at 816-17.

[11] *Id.* at 234 n.5, 283 N.E.2d at 817 n.5.

[12] 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968). In overruling *Baston* the *Franklin* court did not determine whether an illegitimate child may establish the right to support in a declaratory judgment proceeding. Two lower court decisions prior to *Baston* had permitted an illegitimate child to bring such an action. *See* Wilson v. Early, 23 Ohio Op. 2d 440, 192 N.E.2d 119 (C.P. Cuyahoga County 1963) and Maiden v. Maiden, 78 Ohio L. Abs. 551, 153 N.E.2d 460 (C.P. Montgomery County 1955); *Contra, In re* Paternity, 4 Ohio Misc. 193, 211 N.E.2d 894 (C.P. Hamilton County 1965). Following *Franklin's* recognition of a non-statutory right to support, the question of the availability of a declaratory judgment proceeding is probably of little practical significance.

[13] 391 U.S. 68 (1968).

[14] Justices O'Neill, Herbert and Schneider dissented in *Baston* on the basis of *Levy's* equal protection argument. Baston v. Sears, 15 Ohio St. 2d 166, 169-71, 239 N.E.2d 62, 64-65 (1968). Likewise several other courts which considered the rights of an illegitimate shortly after *Levy* concluded that the illegitimate child should be accorded the same rights as the legitimate child. *See*, H. KRAUSE, ILLEGITIMACY: LAW & SOCIAL POLICY 70-81 (1971).

based on the intimate, familial relationship which exists between a mother and her child, whether the child is legitimate or illegitimate."[15]

By 1972 the Supreme Court had made it abundantly clear that *Levy* must be given a very broad reading. In *Weber v. Aetna Casualty & Surety Co.*[16] the Supreme Court struck down a Louisiana statute which gave an unacknowledged illegitimate child rights inferior to those of a legitimate child under the state's workmen's compensation law. Inasmuch as a dependent illegitimate child might suffer as seriously as a legitimate child due to his father's death, the fact of illegitimacy alone was deemed to bear no substantial relationship to the purported purpose of the workmen's compensation law.

The Ohio supreme court in *Franklin* recognized that the *illegitimate child* must be accorded a right equal to that of the legitimate child to recover support from his father. However, as an aftermath to the court's decision, there remains a distinction *between classes of women* who bear illegitimate children. Only an *unmarried* woman may recover support for herself and the expenses of pregnancy and childbirth pursuant to § 3111.01. On the other hand, the woman who is married to one other than the putative father at the time of filing receives no such benefits from the putative father, notwithstanding that such a woman may have borne pregnancy and childbirth expenses entirely by herself.

The *Franklin* court justified its denial of any benefits to the married mother with the statement: "Having voluntarily abandoned the single state and chosen to marry one upon whom she may depend for maintenance other than the putative father of her children, her claim for *her own support* does not merit our further attention."[17] This statement disregards the fact that such a woman can look only to the putative father to recover pregnancy and childbirth expenses incurred before marriage; certainly her husband is not legally responsible for such expenses. By virtue of the court's interpretation of § 3111.01, a woman's recovery depends on the fortuitous circumstance of whether she does or does not file a bastardy action before marriage.

The United States Supreme Court has twice declared unconstitutional state laws which discriminated against the *parents* of illegitimate children. In *Glona v. American Guarantee & Liability Co.*,[18] the Court held that Louisiana could not deny a mother the right to recover for the death of her illegitimate child under Louisiana's wrongful death statute. Again in *Stanley v. Illinois*,[19] the Court struck down an Illinois law which automatically denied the father of an illegitimate child custody of the child unless he successfully maintained an adoption proceeding. The Court held that the father of an illegitimate child had the same right to custody as did the father of a legitimate child and, therefore, must be awarded custody unless he was legally determined to be an unfit parent. The equal protection clause, as construed in *Glona* and *Stanley*, mandates that state law extend the same rights and benefits to the parent of an illegitimate as to the parent of a legitimate child. The *Franklin* court's reading of § 3111.01, to the extent that it grants one class of women who bear an illegitimate child rights inferior to mothers of legitimate children, constitutes a denial of equal protection. The fact that the discrimination does not extend to all mothers of illegitimates, but only to one class, does not make the discrimination any less objectionable.

---

[15] Baston v. Sears, 15 Ohio St. 2d 166, 168 n., 239 N.E.2d 62, 63 n.

[16] 402 U.S. 164 (1972).

[17] 30 Ohio St. 2d at 232-33, 283 N.E.2d at 816 (emphasis supplied).

[18] 391 U.S. 73 (1968).

[19] 405 U.S. 645 (1972).

II. Other Rights of Illegitimates

Although *Franklin v. Julian* is not responsive to the potential problem of discrimination against the illegitimate's mother, it does provide the illegitimate child with a right to support against his father comparable to that possessed by the legitimate child. Other areas of Ohio law require reconsideration in light of recent United States Supreme Court rulings. Clearly the court's reading of the equal protection clause may not be limited to the support area. "[T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise."[20]

Three months after *Franklin* one Ohio appeals court concluded that the word "children" in a clause in an insurance contract providing for payment of its proceeds should be read to include illegitimate as well as legitimate children.[21] The Cuyahoga County Court of Appeals reasoned that an insurance policy essentially embodies a contractual arrangement; therefore the choice of a beneficiary, even when the beneficiary is unnamed, should not be controlled by the laws of descent and distribution. Rather, the court cited *Franklin* and *Weber* and announced:

> The significance of these decisions goes well beyond their narrow holdings. They articulate what should have been undisputed—that even illegitimate children are entitled to protection against those laws whose discriminatory purpose, or effect, is irrational and without significant relationship to a valid state interest.[22]

Equally vulnerable are Ohio's statutes pertaining to an illegitimate's right to recover under the state's workmen's compensation law.[23] The word "children" in § 4123.59, which enumerates the eligible beneficiaries of workmen's compensation, was twice interpreted by the Ohio supreme court (*Staker v. Industrial Commission of Ohio*[24] and *Miller v. Industrial Commission of Ohio*[25]) to refer to legitimate children only. The United States Supreme Court's decision in *Weber* prohibited such a construction of Louisiana's workmen's compensation law. Consequently, the Ohio courts should no longer interpret the workmen's compensation law on the basis of *Staker* and *Miller*.

Similarly, Ohio courts should not rely in the future on earlier decisions as to the right of an illegitimate child to recover under the state's wrongful death statute. The statute was construed in 1859 to permit an illegitimate child to recover for the death of its mother,[26] thus complying with *Levy*. However, Ohio courts have barred recovery to a child born out of wedlock for the wrongful death of his father,[27] a position which simply cannot be squared with the illegitimate child's right to demand support from his father.

Finally, Ohio's provisions for the determination of who shall have the custody of the illegitimate child are potentially vulnerable to constitutional attack. According to Ohio's statutes, the father and mother of a *legitimate* child have equal

---

[20] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 176 (1972).

[21] Butcher v. Pollard, 32 Ohio App. 2d 1, 288 N.E.2d 204 (Cuyahoga County 1972).

[22] *Id.* at 14, 288 N.E.2d at 212.

[23] Ohio Rev. Code Ann. § 4123.59 (Page 1965).

[24] 127 Ohio St. 13, 186 N.E. 616 (1933).

[25] 165 Ohio St. 584, 138 N.E.2d 672 (1956).

[26] Muhl's Adm'r v. Michigan So. R.R., 10 Ohio St. 272 (1859).

[27] Bonewit v. Weber, 95 Ohio App. 428, 120 N.E.2d 738 (Summit County 1952).

rights to his custody. And when a custody struggle develops, usually in the context of divorce, a court is supposed to determine custody on the basis of the best interests of the child.[28] Only the mother, on the other hand, is entitled to the custody of her illegitimate child,[29] absent a finding that she is an unfit mother or has neglected or abandoned her child.[30] It seems illogical that the determination of which parent is entitled to custody should not be made on the basis of the best interests of the child, regardless of whether or not the parents were married at the child's birth. The present treatment of illegitimates is potentially injurious both to the father who seeks custody and to the child who might be better off in his father's custody.

Admittedly it may ensue that only infrequently will the father of an illegitimate child actually seek custody, but the fact that the divorced father may not typically seek custody has not been considered a reason for denying him all rights to custody when the mother is a fit parent. Nor does it seem reasonable to support this discrimination against the illegitimate child and his father on the basis that the state has a proper interest in protecting and encouraging marriage and that, by requiring the father to marry the child's mother to obtain custody, marriage will be encouraged. It could as well be argued that by automatically denying the divorced father custody of his children, he will be less likely to seek divorce. Neither approach seems very likely to encourage marriage or to encourage the sort of social relationships which it is presumed the state would like to foster. Rather, the different procedures pertaining to custody of the legitimate and illegitimate child appear to constitute the sort of arbitrary discrimination which the Supreme Court in *Stanley* held to be a violation of equal protection.

A similar analysis of Ohio's intestacy statutes would divulge considerable discrimination against the illegitimate. However, in the area of intestacy law, the United States Supreme Court has upheld disparate treatment of illegitimates. In *Labine v. Vincent*[31] the Court in a five-to-four opinion upheld the constitutionality of Louisiana's intestacy statutes which prevented an acknowledged illegitimate child from sharing in his father's estate if the father died intestate. This rather startling departure from the general thrust of the Court's decisions expanding the rights of illegitimates does not seem to be attributable to any change in Court membership or reversal of direction, since it antedates *Weber* and *Stanley*. Perhaps the best explanation for *Labine* is that which was provided by Justice Powell in *Weber*: "*Labine* reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders."[32]

III. CONCLUSION

Franklin v. Julian heralds the realization by the Ohio supreme court of the import of the Supreme Court decisions expanding the rights of illegitimate children. The method adopted by the Ohio court to insure that the illegitimate child has a right to support from his father shows an unfortunate disregard of the rights of the illegitimate child's mother. Nevertheless, the language of the decision is

---

[28] OHIO REV. CODE ANN. § 2111.08 (Page 1968); § 3109.03 (Page 1972); and § 3109.04 (Page 1972).

[29] *In re* Gutman, 22 Ohio App. 2d 125, 259 N.E.2d 128 (Hamilton County 1969); *In re* Gary, 112 Ohio App. 331, 167 N.E.2d 509 (Cuyahoga County 1960).

[30] *In re* Tilton, 161 Ohio St. 571, 120 N.E.2d 445 (1954).

[31] 401 U.S. 532 (1971).

[32] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170 (1972).

such that it can be assumed that the Ohio supreme court is fully cognizant of the scope of the Supreme Court decisions and of their nearly total rejection of illegitimacy as a proper basis for discrimination. It should follow that the Ohio courts will be receptive to arguments seeking the elimination of the discrimination against the illegitimate child and against his parents which exists at present both in Ohio statutes and as a result of judicial construction.

*Nancy G. Brown**

PERPETUITIES—APPLICATION OF THE REVISED OHIO PERPETUITIES STATUTE—*Dollar Federal Savings Trust Co. v. First National Bank*, —— Ohio Misc. ——, 285 N.E.2d 768 (C.P., Probate Div., Mahoning Co. 1972).

In 1967 the Ohio legislature undertook a major revision of the Ohio perpetuities law. The result of this effort was a statute that incorporated the common law rule, supplemented by two key amendments.[1] Of principal significance, "the possibilities test for determining the validity of contingent future interests [was] abandoned, and an actualities or wait and see principle [was] adopted, together with a cy pres or reformation component."[2] Of course, the revisions raised questions that had to await judicial determination. To what interests would the revised statute apply? How would cy pres and "wait and see" be reconciled? Should "wait and see" be applied before cy pres? Finally, an important question was created by paragraph D of the new statute.[3] Under the traditional rule, "the validity of an appointment made by the exercise of a general testamentary or a special power is determined by reading back or interpolating the appointment into the instrument creating the power and comput-

---

* Editorial Associate, Richard W. Avery.

[1] OHIO REV. CODE § 2131.08 (Page Supp. 1967).

(A) No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. It is the intent by adoption of this section to make effective in Ohio what is generally known as the common law rule against perpetuities, except as set forth in paragraphs (B) and (C) of this section.

(B) For the purposes of this section, the time of the creation of an interest in real or personal property subject to a power reserved by the grantor to revoke or termintte such interest shall be the time at which such reserved power expires, either by reason of the death of the grantor or by release of the power or otherwise.

(C) Any interest in real or personal property which would violate the rule against perpetuities, under paragraph (A) hereof, shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate the rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events.

(D) Paragraphs (B) and (C) of this section shall be effective with respect to interests in real or personal property created by wills of decedents dying after December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed on or before December 31, 1967, which by reason of paragraph (B) of this section will be treated as interests created after December 31, 1967. An interest in real or personal property which comes into effect through the exercise of a power of appointment shall be regarded as having been created by the instrument exercising the power rather than the instrument which created the power.

[2] Lynn, *The Ohio Perpetuities Reform Statute*, 29 OHIO ST. L.J. 1 (1967) [hereinafter cited as *Perpetuities Reform*].

[3] OHIO REV. CODE § 431.08(D) (Page Supp. 1967).

ing the perpetuities period from the time the power is created."[4] Paragraph D made it at least arguable "that an interest arising under the exercise of a power of appointment is henceforth to be treated for perpetuities purposes as created by the instrument which exercises the power rather than the interest which creates the power."[5]

In *Dollar Savings and Trust Co. v. First National Bank*,[6] the first case litigated under the revised perpetuities statute, the court answered many of the questions raised by the revisions. The perpetuities issues in the case involved three separate documents: the will of Grace Tod Arrel, the will of her daughter, Frances Arrel Parson, and a trust indenture executed by Mrs. Parson.

Grace Tod Arrel died testate in 1921. Her will provided that one-fourth of her residuary estate was to be held in trust for the benefit of her daughter, Frances, and upon the death of Frances:

> [T]he principal of said Trust Fund shall be distributed among her legal heirs in such a manner as it would be distributable, had she at her death, been the absolute owner thereof, in her own right. It is hereby provided, however, that my said daughter shall have power to direct by her will, the manner in which said Trust Fund shall be distributed and the persons to whom the same shall go.[7]

Frances Arrel Parson died testate in 1969, but her will contained no specific reference to the power of appointment granted her by the above-quoted provision in her mother's will. Instead, the will contained the following general provision concerning powers of appointment:

> All the rest and residue of my property and estate of every kind and nature of which I shall die seized or possessed or . . . over which I may have any power of appointment at the time of my death, I devise and bequeath to the then Trustee or Trustees under a certain Indenture of Trust heretofore executed by me on the 7th day of September, 1967 . . . .[8]

According to the court in *Dollar Savings*,[9] the trust indenture executed by Frances Arrel Parson and referred to in her will made the following disposition of the trust assets:

> [a]fter the settlor's death, certain payments are to be made . . . and . . . the remainder of the trust property is to be held for the benefit of the settlor's children for their lives. Each child is given a testamentary power of appointment "to or among" his own issue. In default of such appointment by any child, his share is to be retained in trust for the benefit of his issue, or the issue of the settlor, by representation, until each of such issue reaches the age of 21 years, at which time he is to receive his share of the principal, but in no event later than 21 years after the death of the last to die of the settlor and all her issue living at the date of the execution of the trust indenture.[10]

The children of Mrs. Parson contended that they were entitled to the Arrel trust

---

[4] *Perpetuities Reform*, *supra* note 2, at 6.

[5] *Id.* at 1.

[6] —— Ohio Misc. ——, 285 N.E.2d 768 (C.P., Probate Div., Mahoning Co. 1972).

[7] *Id.* at ——, 285 N.E.2d at 770.

[8] *Id.* at ——, 285 N.E.2d at 771.

[9] The terms of the trust agreement were paraphrased by the court.

[10] —— Ohio Misc. at ——, 285 N.E.2d at 771.

assets outright,[11] and Dollar Savings and Trust Co., testamentary trustee of the trust, brought this action seeking a declaratory judgment and instructions concerning the will of Grade Tod Arrel. The arguments advanced by the children in support of their contention were: (1) their mother did not intend to exercise the Arrel power of appointment in favor of the trust she executed in 1967; and (2) even if she did intend to so exercise the Arrel power, such an exercise would be in violation of the perpetuities statute. The court in *Dollar Savings* rejected the argument that Mrs. Parsons did not intend to exercise the Arrel power of appointment in her will. The court then turned its attention to the proper interpretation of the revised perpetuities statute. However, to put the case in the proper perspective it is helpful to consider what the result in the case would have been prior to the statutory revisions.

Before the 1967 amendments, the validity of the exercise of a general testamentary power of appointment would have been measured as of the time of the creation of the power and would have been judged according to the *possibilities* existing at that time. In the principal case, the date of creation of the power was 1921, and in 1921 it was possible for Mrs. Parson to have more children; therefore, the exercise of the power of appointment might result in a gift to an unborn child of an unborn child and would be in violation of the perpetuities period of "lives in being plus 21 years." This would have been true even though at the time the power of appointment was exercised, 1969, it was certain that this possibility had not occurred. Before 1967 the *possibilities* as of the time of the creation of the power rather than the *actualities* as of the time of its exercise controlled the outcome. In contrast, the 1967 amendments made it possible for the court in *Dollar Savings* to hold that the power of appointment given Mrs. Parson could be reformed[12] to comply with the provisions of the Ohio perpetuities statute.[13]

The discussion of the perpetuities statute in *Dollar Savings* dealt primarily with whether the 1967 revisions applied even though the power of appointment was created in 1921, and, if so, in what manner the "wait and see" and cy pres provisions affected the validity of the exercise of the power of appointment. The court held the application of the 1967 amendments to the facts of the case "clear and unescapable" for two reasons. First, paragraph D of the revised statute specifically applies the amendments to interests created by wills of decedents dying after December 31, 1967.[14] Second, the Ohio constitutional prohibition against retroactive statutes does not bar the application of the amendments to a power of appointment created in 1921.

The retroactivity provision in the Ohio constitution does not appear to be a genuine problem with respect to perpetuities statutes; in fact, it is an issue which has rarely been raised.[15] Additionally, the perpetuities reform statute provides explicitly that the operation of the statute is prospective only, probably because the Ohio

---

[11] The assets that the children sought were those left in trust for their mother, Frances Arrel Parson, by her mother, Grace Tod Arrel, for life with a power of appointment.

[12] —— Ohio Misc. at ——, 285 N.E.2d at 779.

[13] The author assumes for purposes of this article that the Ohio rule of perpetuities is applicable. For a discussion of the conflict of laws problems involved in the principal case *see* —— Ohio Misc. at ——, 285 N.E.2d at 776-77 which discusses the issue in this case. J.H.C. MORRIS & W. B. LEACH, THE RULE AGAINST PERPETUITIES 20-26 (2d ed. 1962) discusses the problem and seems to agree with the court's conclusion.

[14] OHIO REV. CODE § 2131.08(D) (Page Supp. 1967).

[15] For a limited discussion of the problems involved, *see Perpetuities Reform*, *supra* note 1, at 7. *See also* Note, *The Rule Against Perpetuities—Statutory Reform*, 20 CASE WES. RES. L. REV. 295, 306 (1968) [hereinafter cited as *Statutory Reform*]; J. DUKEMINIER, JR., PERPETUITIES LAW IN ACTION 38-39 (1962).

constitution provides that "[t]he general assembly shall have no power to pass retroactive laws . . . ."[16] The prospectivity clause of this particular enactment may also have been included because it facilitates the interpretation of the perpetuities statute by freeing courts from wrestling with the problems of when a power of appointment should be considered to have been created.[17] Although it is not clear from the opinion, the argument was probably made in this case that application of the 1967 amended statute to a power of appointment created in 1921 prevented the children from taking the property outright by the rules of intestacy, since the rules of intestacy would have been applied if the exercise of the power of appointment had failed. However, the court noted that the general definition of a retrospective law is one which takes away or impairs *vested* rights acquired under existing laws, or one which creates a new obligation and imposes a new duty with respect to transactions already past.[18] Rights stemming from a power of appointment cannot vest until the power is exercised, and in this case it was the exercise of the power which was challenged. Judge Henderson accurately pointed out that a statute is not regarded as operating retroactively merely because it relates to antecedent events, or draws upon antecedent facts for its operation.[19] Rather, the relevant factor is the degree to which the statute changes the legal incidents or effects of a claim arising from a pre-statute event.[20] In the principal case the pre-statute event was the creation of a power of appointment by Grace Tod Arrel in 1921. If anything, the "wait and see" provision of the perpetuities statute relaxes the determination of whether the power has properly been exercised by allowing the court in most instances to determine whether or not a violation actually occurs. Application of the cy pres or reformation provision may save the power from being legally terminated. The retroactivity provision of the Ohio constitution has been held not to apply to legislative enactments which are remedial in nature because a statute which is remedial in its operation on existing rights, obligations, duties, or interests is not within the class of mischiefs the provision sought to prohibit.[21] In light of this interpretation, it is clear that the court was correct in holding that the 1967 amendments as applied in this case were not "retroactive legislation."

As noted above, the 1967 amendments were specifically made applicable to interests created by wills of decedents dying after December 31, 1967. An interest derived from a power of appointment is specifically declared by these amendments to have been created by the instrument exercising the power and not by the instrument creating the power for purposes of determining whether the statute applies.[22] However, this does not resolve the question of whether the substantive rule of the statute, "lives in being plus 21 years," is to be applied as of the time of creation or as of the time of exercise of a power of appointment. The common

---

[16] OHIO CONST. art. II, § 28. Note, *Retroactive Application of Ohio Statutes*, 30 OHIO ST. L.J. 401 (1969) [hereinafter cited as *Retroactive Application*].

[17] In *Statutory Reform*, *supra* note 15, at 306, the author suggests that in deciding cases not expressly covered by the new statute, courts should nonetheless adopt the new policy as a matter of common law.

[18] —— Ohio Misc. at ——, 285 N.E.2d at 777.

[19] *Id.*

[20] *See, e.g.*, *Retroactive Application*, *supra* note 16; Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); Note, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231 (1927).

[21] Smith v. New York C ral R.R., 122 Ohio St. 45, 48-49, 170 N.E. 637, 638 (1930).

[22] —— Ohio Misc. at — —, 285 N.E.2d at 778. Leach, *Perpetuities Reform by Legislation*, 70 L.Q. REV. 478, 490 (1954), criticizes such attempts to define the beginning of the perpetuity period because the resulting statutes are too lengthy and complex.

law rule against perpetuities measured the validity of the interests created by powers of appointment from the time of the creation of the power and not from its exercise.[23] The question was raised at the time the amendments were passed whether the last sentence of paragraph D, which specifically deals with powers of appointment, was intended to effect a change in the substantive law of Ohio which, prior to the 1967 amendments, was the same as the common law.[24] The court in *Dollar Savings* held that the last sentence of paragraph D was intended only to establish the effective date of the amendments in relationship to various interests and was not intended to effect any substantive changes in the law. The holding is based on the theory that paragraph A reaffirms the common law with the express exceptions of paragraphs B and C. The absence of the word "time" in the last sentence of paragraph D, plus the fact that the rest of the paragraph discusses the effective date of enforcement of the amendments, indicates a lack of legislative intent to change the common law rule as to the time of judging appointments made through the exercise of powers of appointment. The significance of this legislative drafting is especially marked when compared with the language of paragraph B which was in tended to clarify time with respect to revocable inter vivos trusts.[25]

It has been argued that the language of paragraph D should be broadly interpreted to make possible the creation of a family trust in perpetuity through a succession of powers of appointment,[26] but this would defeat the basic policy of the perpetuities statute by preventing free alienation of the property indefinitely.[27] Additionally, there are adverse tax consequences for the donee of a general testamentary power, who, in the exercise of the power, creates another power of appointment.[28] The interpretation given paragraph D by the court in *Dollar Savings* seems to be a reasonable one.

The relationship between the "wait and see" and cy pres amendments[29] was also considered in *Dollar Savings*. As at common law the rule against perpetuities applies to a power of appointment itself, as well as to an appointment made in exercise of the power. Under the present statutory provisions, the interest still must vest, if at all, within the period "lives in being plus 21 years." However the court has more time to determine whether or not vesting has in fact occurred.[30] For example, under the common law, the life in being in the principal case would have been that of the daughter, Frances Arrel Parson, because at the time of her mother's death it could not be said that the daughter would not have more children. However, it

---

[23] Cleveland Trust Co. v. McQuade, 106 Ohio App. 237, 142 N.E.2d 249 (Cuyahoga Co. 1957).

[24] *Perpetuities Reform*, *supra* note 2, at 2; *Statutory Reform*, *supra* note 15, at 304; Wachs, *New Perpetuities Legislation*, VI OHIO ST. BAR ASSOC. SERV. LETTER 4 (1967).

[25] —— Ohio Misc. at ——, 285 N.E.2d at 777.

[26] *Statutory Reform*, *supra* note 15, at 304.

[27] *See, e.g.*, Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41, 45 (1957) for a discussion of the alienability of property held by trust funds. Although the property in the principal case was not personalty, there still may be this problem. The money will be committed to conservative capital investments and may not tie in with the investment and consumption needs of the economy. However those who receive the money may continue these same conservative investments. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 724 (1955); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).

[28] *See Further Trends in Perpetuities*, REAL PROP. PROB. & TR. J. 333, 337 (Fall, 1970), for a discussion of the Wisconsin statute and the tax problem. *See also Statutory Reforms*, *supra* note 15, at 305 for a discussion of the Delaware statute and its tax consequences as reflected in INT. REV. CODE OF 1954, § 2041(b).

[29] OHIO REV. CODE § 2131.08 (Page Supp. 1967).

[30] Wachs, *New Perpetuities Legislation*, VI OHIO ST. BAR ASSOC. SERV. LETTER 4 (1967).

is now possible to "wait and see" if more children actually are born. Under the revised rule, the class in *Dollar Savings* was complete at Mrs. Parson's death and the lives of her children could be used as the lives in being.[31] The delay that may result in part from waiting to determine such actualities is ameliorated by the cy pres provision because it is probable that, if necessary, the gift can be reformed to meet the standards of the rule.[32]

"Wait and see" statutes, such as Ohio's, which do not suggest a means of determining the measuring lives to be used, have been criticized.[33] If the chosen measuring life or lives are longer than the life or lives permissible for demonstration purposes under the traditional rule,[34] the perpetuities period will be lengthened. When no rules are given to govern the selection, it becomes crucial that the court make a reasonable determination after viewing the situation in retrospect.[35] Some statutes have suggested a causal relationship defined in terms of lives which "play a part in the ultimate disposition of the property."[36] Examples given of such lives include the preceding life tenant, the takers of the interest, a person designated as a measuring life in the instrument, or some other person whose actions or death can expressly or by implication cause the interest to vest or fail.[37] A causal relationship test was applied in the principal case because the court used the lives of the takers of the interest as the lives in being.[38]

The *Dollar Savings* court first applied "wait and see" and only then turned to cy pres or reformation. This seems consistent with the amendment's justification—to carry out the intention of the grantor, unless he in fact violates the rule.[39] The reformation which may be required in *Dollar Savings* seems rather minor: the savings clause of the daughter's 1967 trust indenture which reads "twenty-one years after the last to die of the daughter and all her issue" may be revised so that issue is limited to the daughter's own children.[40] This would exclude the grandchildren for perpetuities purposes. Thus, reformation is only to occur when it becomes certain that under the terms of the instrument vesting will occur beyond the period of the rule. It seems to approximate most closely the intention of the creator of the interest.[41] No group is eliminated; only the measuring lives in the savings clause have been changed.

Dollar Savings has answered most of the questions raised by commentators following the revision of the Ohio perpetuities statute. The court rejected the assertions that the statute, as applied, had a retroactive effect and that the last sentence of paragraph D was intended to effect a change in the substantive law. The court's choice in selecting the measuring lives for perpetuities purposes shows that a causal

---

[31] —— Ohio Misc. at ——, 285 N.E.2d at 778.

[32] 84 HARV. L. REV. 738, 745 (1971) points out that even in applying the orthodox rule, courts frequently delay a decision on the validity of a remainder interest until the expiration of preceding estates. With a cy pres provision, the courts may reform violations which ultimately appear.

[33] *Id.* at 744.

[34] *Perpetuities Reform*, *supra* note 2, at 4.

[35] *Statutory Reform*, *supra* note 15, at 302.

[36] J. DUKEMINIER, JR., PERPETUITIES LAW IN ACTION 81 (1962).

[37] *Id.*

[38] —— Ohio Misc. at ——, 285 N.E.2d at 778.

[39] *Perpetuities Reform*, *supra* note 2, at 4.

[40] —— Ohio Misc. at ——, 285 N.E.2d at 779.

[41] *See, e.g.*, Lynn, *A Practical Guide to The Rule Against Perpetuities*, 1964 DUKE L.J. 207, 222 (1964); *Statutory Reform*, *supra* note 15, at 297.

relationship test was applied. Finally, the "wait and see" amendment was applied before the cy pres provision was considered. The resolution of these issues by the *Dollar Savings* court should be used as a guide by other Ohio courts confronted with perpetuities problems.

Elsie Hall
Bruce L. Downey

SECURITIES REGULATION—THE CONCEPT OF ACCESS IN THE PRIVATE OFFERING—*SEC v. Continental Tobacco Co.*, 463 F.2d 137 (5th Cir. 1972) and Proposed Rule 146.

In *SEC v. Continental Tobacco Co.*,[1] the Court of Appeals for the Fifth Circuit detailed access requirements needed to qualify for an exemption under § 4(2) of the Securities Act of 1933[2] when a private placement is attempted.[3] The case is important because it implicitly recognizes distinct groups of offerees eligible for the exemption, and because it can be used as a guide to interpret the term "access" as used in § (e) of Proposed Rule 146, of the Securities and Exchange Commission (SEC), which deals with access to information in a private offering.[4]

Continental Tobacco involved two unregistered offerings made at two different periods and under two different managements. In 1967, the SEC obtained a preliminary injunction against Continental for publicly offering unregistered securities. Subsequent to that order, the company was discharged in bankruptcy and came under the control of Contoba Management Corporation. Between the spring of 1969 and the fall of 1970, Contoba sought to refinance Continental, and an offering and attempted sale of 200,000 shares of common stock was undertaken. The offerees were a diverse group and included "dentists, physicians, housewives, and business men, who had no relationship with Continental other than that of shareholder."[5] The SEC challenged these activities and sought to have the 1967 injunction made permanent. The district court heard the case and granted Continental an exemp-

---

[42] *Statutory Reform*, *supra* note 15, at 299, notes that in order to save the gift to a class, a remote member may be excluded by reformation. 84 HARV. L. REV. 738, 743 (1971) points out that cy pres interjects uncertainty because there are several ways to reform an invalid will or trust instrument. In most cases the courts use traditional trust techniques to ascertain the testator's intent and then select the method of reform to carry out that intent.

[1] 463 F.2d 137 (5th Cir. 1972).

[2] 15 U.S.C. § 77d(2) (1970). This section appeared as § 4(1) of the 1933 Act, but was renumbered 4(2) by the Securities Acts Amendments of 1946, Pub. L. No. 88-467, 12, 78 Stat. 565, 580, *amending* 15 U.S.C. § 77d(1) (1958). The law now reads as follows: The Provisions of section 77e [barring unregistered securities from interstate commerce and the mails] shall not apply to . . . (2) transactions by an issuer not involving any public offering.

[3] In addition to the access requirement, the existence of the exemption also depends upon whether the purchaser's intent is to take for resale. The purchaser of a privately placed security must intend to hold it for investment rather than for resale. If he takes from the issuer for further sale, he becomes a statutory "underwriter" within the definition of § 2(11), 15 U.S.C. § 77b(11) (1970), in which case the offering becomes public. The purchaser's intent is a question of fact, SEC Securities Act Release No. 4248 ¶ 4 (1960) and his own statement is evidence on that intent. Therefore, prudent issuers request investment letters from the buyer. These letters should state negatively the language of § 2(11). 1 LOSS, SECURITIES REGULATION 665 (2d ed. 1961). Such letters were employed in *Continental Tobacco*, and the investment intent of the buyers was not a significant problem.

[4] Proposed Rule 146, 37 Fed. Reg. 26137, 26140-41 (1972).

[5] 463 F.2d at 158.

tion for the 1969-1970 activities.[6] That court felt the offerees involved were fully aware of the risks of their investment and did not need the protections afforded by a registration statement. Crucial to this determination was the fact that a brochure provided by the company contained the same kind of information required in a registration statement under the Securities Act of 1933.[7] However, the court of appeals did not feel this disclosure was sufficient. It reversed and held that "Continental failed to sustain its burden of affirmatively proving that all of the offerees of Continental enjoyed a relationship with Continental making registration unnecessary."[8]

Despite the fact that the private offering is one of the most significant classifications exempted from the registration requirements of the 1933 Act, the scope of the exemption is not defined in the legislation.[9] However, a judicial gloss has been placed on the statute by *SEC v. Ralston Purina Co.*[10] In that case the Supreme Court denied a claimed private offering exemption for Ralston Purina's unregistered offerings of stock to "key" employees.[11] The *Ralston Purina* Court noted that "[t]he natural way to interpret the private offering exemption is in light of the statutory purpose."[12] However, in giving content to that purpose, the Court went no further

---

[6] 326 F. Supp. 588 (S.D. Fla. 1971).

[7] One of the investors testified that the brochure which he received provided him access to information concerning the terms of the offering (total number of shares being offered, the offering price, and the part value per share); the speculative factors of his investment; the history of the defendant corporation, including its prior bankruptcy; the nature of the defendant corporation's business, including the product to be produced and the plan for its distribution; the authorized and outstanding debt and capital stock of the defendant, together with the options outstanding to purchase common stock; the intended use of proceeds from the sale of common stock; the management of the defendant corporation with their background; a complete discription of the capital stock of the defendant corporation, including dividend and voting rights of both defendant's common and preferred stock and the redemption, conversion and preference rights of the defendant's preferred stock; litigation to which the defendant was a party, including this injunction proceeding and the entry of the temporary injunction; an unaudited financial statement, including a balance sheet and an income and disbursement or "operating" statement.
Id. at 590.

[8] 463 F.2d at 161.

[9] The legislative history is of little help except insofar as it sets a general tone for the exemption. The House committee referred to this exemption as permitting "an issuer to make a specific or an isolated sale of its securities to a particular person" and to exemptions generally as intended for transactions "where there is no practical need for [the bill's] application or where the public benefits are too remote." H.R. REP. NO. 85, 73d Cong., 1st Sess. 5, 7, 15-16 (1933). For discussions of the exemption, *see generally*, 1 L. LOSS, *supra* note 3, at 653-96; S. GOLDBERG, PRIVATE PLACEMENTS AND RESTRICTED SECURITIES (1971); Israels, *Some Commercial Overtones of Private Placement*, 45 VA. L. REV. 851 (1959); Meer, *The Private Offering Exemption Under the Federal Securities Act—A Study in Administrative and Judicial Contraction*, 20 SW. L.J. 503 (1966); Patton, *The Private Offering: A Simplified Analysis of the Initial Placement*, 27 BUS. LAW. 1089 (1972); Sargent, *Private Offering Exemption*, 21 BUS. LAW. 118 (1965).

[10] 346 U.S. 119 (1953). *See* the following case notes for initial reactions to *Ralston*: 4 CATH. U.L. REV. 70 (1954); 52 MICH. L. REV. 298 (1953); 48 NW. U.L. REV. 771 (1954); 21 U. CHI. L. REV. 113 (1953); 3 UTAH L. REV. 519 (1953).

[11] Ralston Purina's management did not define "key" employee by position on the organization chart, but rather it spoke in terms of promotion potential, influence within the peer group, and sympathy to management. 346 U.S. 119, 121-22 (1952).

[12] *Id.* at 124-25.

than the cryptic phrase "those who are shown to be able to fend for themselves,"[13] and the equally mystifying concept of "access."[14]

Recent cases and SEC releases have attempted to hammer out the contours of the exemption.[15] The "fend for themselves" language has spawned the argument that if the offeree is a sophisticated investor, the requirements of the Act have been satisfied.[16] A variation of this argument is particularly persuasive when applied to the institutional investor which will have the necessary expertise and bargaining power to ensure that the issuer will divulge all the information required for an intelligent investment decision. The approach is useful because it pragmatically attempts to give content to "fend for themselves" and says the language ought not be limited to the inside executive group mentioned in *Ralston Purina. Value Line Fund, Inc. v. Marcus*[17] is an excellent example of the application of this rationale. Value Line Fund was a large mutual fund which suffered sharp losses and sought rescission of a purchase of unregistered stock. The Fund argued that it did not have sufficient access to the issuer's records to make an informed investment decision. The court, however, rebuffed this plea holding that "the offerees possessed enough sophistication to demand, and enough leverage at the bargaining table to receive"[18] the information it needed. The Fund's failure to make adequate investigation was distinguished from not having access to adequate information. However, while *Value Line* tackles the problem of sophistication, it does not deal with the problems of unsophisticated investors and the notion of access for that group.

Another interpretation of *Ralston Purina* has been the adoption of a conjunctive test requiring both sophistication and access. While some kind of conjunctive test is essential to ensure that offerees can "fend for themselves," the Tenth Circuit in *Lively v. Hirschfeld*[19] articulated an overly restrictive version of this approach which denies the exemption unless the offeree has both exceptional business experience and a position with the issuer which provides regular access to its busi-

---

[13] *Id.* at 125-26.

[14] The court stated that an offering to some employees, "*e.g.*, one made to executive personnel who because of their position have access to the same kind of information that the Act would make available in the form of a registration statement" may not constitute a public offering. *Id.*

[15] *See* SEC Securities Act Release No. 33-4552 (Nov. 6, 1962), 1 CCH FED. SEC. L. REP. ¶ 2770, for a discussion of the factors considered by the SEC in determining whether an offer meets the requirements for the exemption. *See also* Proposed Rule 146, 37 Fed. Reg. 26137 (1972) for the current view as to what the contours of the exemption should be. For a comprehensive discussion of the facts and holdings in five other leading post-*Ralston Purina* cases, *see* Shimer v. Webster, 225 A.2d 880, 882-85 (D.C. Dist. Ct. App. 1967).

[16] *See* Nicewarner v. Bleavins, 244 F. Supp. 261, 265 (D. Colo. 1965) (dicta) (emphasis supplied): "[T]he seller must show that all offerees are given the information which a registration statement would make available *or* that they did not need this protection." However, this "disjunctive" view of *Ralston Purina's* requirements does not seem to have been followed, and a majority of the decisions discussing the point require both access and sophistication. The problem should be framed in terms of what is meant by access for a particular class of offerees. *See, e.g.*, Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680 (5th Cir. 1971); Lively v. Hirschfeld, 440 F.2d 631 (10th Cir. 1971); United States v. Custer Channel Wing Corp., 376 F.2d 675 (4th Cir.), *cert. denied*, 389 U.S. 850 (1967); United States v. Hill, 298 F. Supp. 1221 (D. Conn. 1969). *See also*, 1 L. LOSS, *supra* note 3, at 664: "[T]he critical factor is not so much the sophistication of the offerees as their possession of (or at least access to) information regarding the issuer . . . ."

[17] Value Line Fund, Inc. v. Marcus, [1964-66 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,523 at 94,970 (S.D.N.Y. 1965). *See also* Fuller v. Dilbert, 244 F. Supp. 196 (S.D.N.Y.), *aff'd sub nom.*, Righter v. Dilbert, 358 F.2d 305 (2d Cir. 1966).

[18] [1964-66 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,523 at 94,970.

[19] 440 F.2d 631 (10th Cir. 1971).

ness records. Applied literally, the *Lively* standard has the effect of denying the exemption to all except *Ralston Purina's* inside executive group. The problem with *Lively* is not that it requires both access and sophistication, but that it is too inflexible and too narrowly constricts the availability of the exemption. However, if its tourniquet is loosened and its requirements modified, the case can be useful when applied to the problem of access for the unsophisticated investor.

Access has generally been dealt with as a function of the relationship between the parties, and the result has turned on whether the evidence indicated that the offeree had a reasonable opportunity to discover sufficient information about the issuer to permit an intelligent investment decision.[20] *Lively* addresses itself directly to the degree of access required by the unsophisticated investor and indicates specifically what it means by access. The issuer ought to be required to prove that all offerees lacked a need for the protection of the Securities Act. However, a court need not impose a requirement of regular access to company records through a position with the issuer to accomplish this end. The goal could be effectively served without unduly restricting the availability of the exemption by requiring issuers wishing to make private placements to unsophisticated offerees to prepare and submit to all offerees the kind of information which would have been made available in a registration statement.

A partial modification of the *Lively* rationale along the lines suggested above was undertaken in *Continental Tobacco*. While not speaking explicitly in terms of sophistication, the court implicitly adopts a highly pragmatic approach to the exemption and would allow private placement if the offeree has or is given the ability to extract the necessary information from the issuer. The court indicated that "if the offering is being made to a diverse and unrelated group, *i.e.* lawyers, grocers, plumbers, etc., then the offering would have the *appearance* of being a public offering."[21] The use of the word "appearance" in this sentence is important. It creates a presumption that such an offering would be public, but it does not preclude entirely the availability of an exemption. Through this language, *Continental Tobacco* recognizes the existence of an exemption for the unsophisticated investor and clearly treats the group before it as unsophisticated.[22]

Continental attempted to lay a comprehensive foundation for an exemption.[23]

---

[20] Garfield v. Strain, 320 F.2d 116, 119 (10th Cir. 1963) contains a detailed discussion of the factors tending to show a close relationship and, therefore, access to needed information. *Continental Tobacco* gives three factors which will suffice when dealing with an unsophisticated investor. 463 F.2d at 160.

[21] 463 F.2d at 159 (emphasis supplied). The court was quoting Hill York Corp. v. American Int'l Franchises, 448 F.2d 680, 688 (5th Cir. 1971).

[22] The concept of sophistication cannot be measured by concrete standards. The extremes are easy to categorize. The bake shop foreman and the clerical assistant in *Ralston Purina* would probably admit to classification as unsophisticated. The mutual fund in *Value Line* employs investment analysts who will garner all relevant information before approving the investment and is easily classified as sophisticated. However, the intermediate case is more difficult. The focus ought to be on whether the investor is financially sophisticated, not just whether he is, in general, well educated. Relevant factors include the offeree's education, prior investment experience, and reliance on independent investment advice. These factors should be considered in relation to the offeree's experience in financial matters. The inquiry is highly subjective, and it would seem prudent to resolve doubts in favor of "unsophistication."

[23] Continental's management prepared a detailed brochure on its prospects and operations. *See supra* note 7. All materials in this brochure, including unaudited financial statements, were updated as the company's circumstances changed during the period of the offer. The corporation also utilized a standard subscription agreement and investment letter, and contemplated that the investment letter would be executed by all investors. Indeed, the fact that "almost

However, the court of appeals found that "mere disclosure" to "almost all" investors was inadequate to establish the exemption.[24] Even though *Continental Tobacco* recognizes that an exemption may exist for the unsophisticated investor, the opinion severely restricts the opportunity to avoid registration when dealing with this class of offerees. The court did, however, detail three requisites[25] that would presumedly rebut the presumption of a public offer raised by the presence of the unsophisticated offeree when *all three* are met.

First, the issuer must affirmatively prove that all offerees received the kind of information contained in a registration statement. In setting forth this requirement the court made reference only to "written and oral information concerning Continental."[26] However, while that phrase is open to more than one interpretation, the tenor of the court's opinion suggests that a stringent reading of the language is justified. In the opinion, the court noted that the financial statements contained in the materials given to the offerees were uncertified. In view of the heavy reliance on *Hill York Corp. v. American International Franchises, Inc.*[27] and the emphasis there on the need for accurate data, the fact that the court even mentioned that the financials were uncertified becomes highly significant. In fact, the overall effect of this criterion may well be to require that the issuer make available some kind of "offering circular" containing the kinds of information found in the brochure provided by Continental—plus certified financials. This requirement of detailed written documentation for the offeree is justified. If only oral information or incomplete (or inaccurate) written information is required, an offeree will have a much more difficult task in proving a misrepresentation than he would if this "offering circular" requirement were to be imposed. In addition, such a requirement would give the issuer a more reliable guide as to how much disclosure he must make to qualify for the exemption. In any event, the court's point is clear: to avoid registration when dealing with the unsophisticated investor, disclosure must be accurate and extensive.

Second, the issuer must show that all offerees had access to any additional information which they might have required or requested. This requires that there be an actual opportunity offered to inspect records and to verify statements made to offerees as inducements for the purchases.[28]

Third, the issuer must prove that all offerees had personal contacts with the officers of the corporation. Even assuming that the issuer is willing to open its files to these offerees, this last requirement provides a major stumbling block to the availability of the exemption. In *Continental Tobacco*, the court found it crucial that

---

all" of the investors did execute the agreement impressed the district court. 326 F. Supp. 588, 589 (S.D. Fla. 1971).

[24] 463 F.2d 137, 160 (5th Cir. 1972).

[25] The exact language used by the court was as follows:

> Continental did not affirmatively prove that all offerees of its securities had received both written and oral information concerning Continental, that all offerees of its securities had access to any additional information which they might have required or requested, and that all offerees of its securities had personal contacts with the officers of Continental.

[26] *Id.*

[27] 448 F.2d 680, 690-91 (5th Cir. 1971).

[28] 463 F.2d at 158. This seems to incorporate much of the suggestion in 1 L. LOSS, *supra* note 3, at 664-65:

> [S]ome lawyers who handle "private placements" advise that each buyer receive a set of certified financial statements comparable to those called for in a statutory prospectus and be given an opportunity to examine the research memorandum prepared by the investment banker who arranged the placement.

two of the offerees, never had occasion, prior to their purchases, to meet with officers of Continental.[29] Furthermore, a single meeting with corporate officials would not satisfy the requirement. The court used the phrase "personal contact," which implies more than the formality of a meeting and suggests an on-going or long-standing relationship. The precise nature of the relationship will vary with the situation, and it must be such that it creates "special advantages" in the purchaser which make him substantially different from members of the general investment public.[30] However, it should be noted that the court spoke only of personal contact, not of *pre-existing* personal contact with corporation officials. Indeed, the relationship suggested by this language may often have its genesis in the attempt by the issuer to comply with the access requirements outlined by the court. This third criterion should not be read to require that the relationship between the issuer and the offeree antedate the issuer's efforts to make the placement. The "personal contact" requirement should not be interpreted to preclude the use of an investment representative. Such an exception would vicariously increase the level of sophistication of the offeree. The court's expressed disapproval of the promotional tactics used by Continental in attempting to find purchasers for its securities indicates that this criterion probably contemplates a situation similar to the "negotiated transaction" (as that term is used in Proposed Rule 146) and can be read to include a ban on the kinds of promotional activities used by Continental.[31]

If confined to the unsophisticated investor class, the stringency of the *Continental Tobacco* requirements is justified. Because of the low level of financial sophistication and the often-speculative nature of the venture at hand, private placements create an extremely high potential for abuse. Therefore, such offerings deserve the close scrutiny dictated by the decision in the principal case. However, at this point a limitation on the scope of *Continental Tobacco* should be recognized. While the opinion does set out specific and useful criteria for the private placement to the unsophisticated investor, those criteria are not designed to deal with the kinds of access which may be required for the sophisticated investor. Therefore, the case should not be read as an attempt by the court to define specific criteria for an exemption for the sophisticated as well as unsophisticated investor. That question was not before the court, and the opinion does not address itself to the special problems inherent in that kind of placement. An expansive reading of *Continental Tobacco* is not justified by the context in which the case arose or by the language used by the court. Such a reading would result in an unnecessary restriction on the private placement exemption.[32] Applied beyond its scope, the holding could preclude a private placement to the institutional investor. Such a result would be contrary to the *Ralston Purina* construction of § 4(2), which emphasized the need for the protections afforded by registration. As forcefully pointed out in *Value Line*, institutional investors should be considered to occupy a special position in regard to the private offering situation because they have the financial expertise and the

---

[29] 463 F.2d at 158.

[30] *Id.* at 159.

[31] *See* Proposed Rule 146(a)(3), 37 Fed. Reg. 26137 (1972). The ban on promotional activities would parallel § (c)(2)(i)-(iv) of the same rule. *Id.* at 26140.

[32] In addition to making venture capital financing harder to find, an extremely restrictive reading of § 4(2) could have other ramifications of concern to securities lawyers. A tightening of the exemption may encourage litigation by investors who have become disenchanted with operating results, and the issuer will more frequently be liable to a § 12(1) rescission or damage suit brought by purchasers. The issuer's attorney could also be liable if his conduct in relation to the offering amounted to a solicitation. *See* Katz v. Amos Treat & Co., 411 F.2d 1046, 1052-53 (2d Cir. 1969); Nicewarner v. Bleavins, 244 F. Supp. 261, 266 (D. Colo. 1965).

bargaining power to extract the needed information from the issuer. Indeed, recent public statements by members of the SEC indicate that this view is shared by the Commission.[33]

Reading *Continental Tobacco* in the manner suggested above allows private placement to the inside executive group, the institutional investor, and, assuming the three requisites are met, the unsophisticated group. However, the status of the sophisticated investor who is not an institutional investor and not a member of an inside group requires a more detailed analysis. In its general discussion of the class to which an unregistered offering can be made, *Continental Tobacco* relied heavily on *Hill York Corp. v. American International Franchises, Inc.*[34] which had concluded that the exemption was available if the placement was made to a "class of persons having such a privileged relationship with the issuer that their present knowledge and facilities for acquiring information about the issuer would make registration unnecessary for their protection."[35] Although the exemption was denied in *Hill York*, the opinion does not preclude an exclusion for a sophisticated investor group. However, if the issuer cannot show that all the offerees involved have the required level of sophistication and knowledge regarding the issuer, the criteria in *Continental Tobacco* would need to be applied even if "almost all" of the group did qualify. In *Hill York* the offering was limited to sophisticated businessmen and attorneys who planned to do business with the issuer. The court focused on the lack of actual possession or access to the information provided in a registration statement. It reasoned that without this information, the level of sophistication was irrelevant because the offerees "could not bring their sophisticated knowledge of business affairs to bear in deciding whether or not to invest."[36] This is clearly a rejection by the Fifth Circuit of the argument that sophistication without some kind of access can form the basis for an exemption. However, it does not follow from this conclusion that the three requisites detailed in *Continental Tobacco* must be applied to this class in every instance. The focus of the decision on the inability of the offerees to use their sophistication indicates that the major emphasis should be on the ability of the offeree to extract information from the issuer.[37] Such an approach is consistent with the *Value Line* rationale, which grants the issuer the exemption because the institutional investor has access to information due to its considerable bargaining power.

---

[33] SEC Chairman Casey suggested in a recent speech that he preferred institutional investors in private offerings. BNA SEC. REG. & L. REP. No. 140 at A-1 (Feb. 23, 1972). In a subsequent speech, Commissioner Owens stated that he would not support a reading of *Ralston Purina* which excluded the institutional investor. He also indicated that he did not believe that the position adopted by the Commission in *Continental Tobacco* was intended as a narrowing of the exemption which would make it difficult or impossible for an institutional investor to qualify. *Id.* No. 152 at G-2 (May 17, 1972).

[34] 448 F.2d 680 (5th Cir. 1971).

[35] *Id.* at 688 n.6.

[36] *Id.* at 690.

[37] This position by *Continental Tobacco* borders on, but does not quite adopt, the position articulated by the Commission in its brief, which called for a "tantamount-to-an-insider" test:

> Before the statutory protections may be safely eliminated in any case, the issuer must affirmatively demonstrate by "explicit, exact" evidence that *each* person to whom unregistered securities were offered was able to "fend" for himself—in other words, that each offeree had a relationship to the company tantamount to that of an "insider" in terms of his ability to know, to understand and to verify for himself all of the relevant facts about the company and its securities.

Brief for Appellant at 28, SEC v. Continental Tobacco Co., 463 F.2d 137 (5th Cir. 1972) (footnotes omitted). The modification introduced by giving the offeree the information when he does not have the ability to extract it himself is important.

The offeree's bargaining power with the issuer will be a function of the size of his potential capital contribution to the venture.[38] In most cases, the noninstitutional investor's capital contribution is less than that of the institutional investor; therefore, his relative bargaining power will also be less. To the extent this is true, the noninstitutional offeree will not always have the same power as the institutional investor to extract information from the issuer. However, *Hill York* and *Continental Tobacco* suggest that the exemption should be available even to the noninstitutional investor without compliance with the three requisites in *Continental Tobacco* if the offerees are a close-knit group of friends and acquaintances with an on-going relationship with the issuer of the kind that afforded the private offering exemption in *Woodward v. Wright*.[39] In *Woodward*, the court was concerned with an action to rescind a contract for the sale of an undivided interest in oil and gas rights and to recover the amount already paid on the contract.[40] The statement offering to sell the interest was addressed to one person (Woodward) and was signed by an agent of the sellers. The contract of sale which the statement induced was between the owners of the oil and gas lease and Woodward along with three other purchasers who were associated with him in the venture. The contract was entered into after face-to-face negotiation and on-the-ground inspection of the facilities involved. "The whole transaction was a closely knit arrangement among friends and *acquaintances*, and was conducted on a personal basis . . . [and] . . . [a]ll of the purchasers apparently entered into the transaction with sophisticated discernment."[41]

Therefore, if the facts indicate that the offeree has sufficient bargaining power to extract the necessary information from the issuer or that a *Woodward*-type situation exists, there is no need for the protections inherent in registration, and the exemption should be available. However, if neither of these situations exist, then the exemption should be denied unless the issuer has complied with the three requisites in *Continental Tobacco*. Such an approach is consonant with *Ralston Purina's* concepts of "fend for themselves" and "access." It also allows private placements with small groups of venture capitalists who are willing to invest in highly speculative enterprises, and gives such businesses access to external financing without the rigors of registration.[42]

If it is recognized that the essential element in *Continental Tobacco's* handling

---

[38] Proposed Rule 146(d) and (f) express the same idea. 37 Fed. Reg. 26137, 26140-41 (1972).

[39] 266 F.2d 108 (10th Cir. 1959). *See also* Campbell v. Degenther, 97 F. Supp. 975 (W.D. Penn. 1951). The *Hill York* opinion refers to both cases. 448 F.2d 680, 690 n.10 (5th Cir. 1971).

[40] The court found the transaction involved to be a sale of securities:

> [A] fractional undivided interest in oil and gas becomes a "security" when it is created out of the ownership of an interest in oil and gas or other mineral rights for the purpose of sale or offering for sale. Correlatively, the sale or offering for sale of an oil and gas lease, or an undivided interest therein, may be the sale of an "investment contract," hence a security, when the transaction carries with it something more than the assignment of a "naked lease-hold right," as where the purchasers look entirely to the efforts of other persons to make their investment a profitable venture.

Woodward v. Wright, 266 F.2d 108, 112 (10th Cir. 1959).

[41] *Id.* at 115.

[42] Registration can be unduly costly, time-consuming, and inflexible, and may interfere with the issuer's desire to keep information and plans confidential from all those who are not selected as offerees. See 1 L. LOSS, *supra* note 3, at 691-96. *See also*, PRACTICING LAW INSTITUTE, HOW TO DO A PRIVATE OFFERING—USING VENTURE CAPITAL, Course Handbook Series No. 53 (1970).

of the exemption is the offeree's ability to extract information from the issuer, then it becomes clear that the detailing of highly structured standards for giving the unsophisticated group the information is merely an application of this "extraction" principle to the particular class of offerees before the court. The goal is to give the offeree the ability to extract from the issuer the information needed for an intelligent investment decision, and the underlying philosophy is one of pragmatism. The approach allows standards of access to be dictated by the needs of the offeree and by his ability to get information from the issuer. Such an approach is sufficiently flexible to accommodate differences between classes of investors, while allowing the exemption only where the protections of the Act are not needed. Therefore, if kept within its proper limits and read in conjunction with *Hill York*, the decision can be used to delineate the access requirements for the private offering exemption.

This is particularly important at this date in view of the fact that the SEC has only recently promulgated Proposed Rule 146 dealing with issuer transactions not involving a public offering.[43] The Proposed Rule and the accompanying release outline criteria for an automatic exemption under § 4(2). It should be noted that the release states that the criteria are not exclusive and that "a claim for exemption could be established without complying with all the provisions of the rule" if the issuer can satisfy the requirements in relevant judicial and administrative interpretations of § 4(2) in effect at the time of the transaction.[44] To be exempted under this Rule, the securities must be offered and sold in a negotiated transaction. The Rule defines a negotiated transaction as one in which "the terms and arrangements relating to any sale of securities are arrived at through direct communication between the issuer or any person acting on its behalf and the purchaser or his investment representative."[45] The Rule further states that any seminar or promotional meeting or certain written communications made otherwise than in connection with a negotiated transaction will constitute general advertising and preclude a private offering.[46] As indicated above, these requirements would clearly prohibit an automatic exemption for the activities used by Contoba Management in *Continental Tobacco.*

However, the Rule is distressingly ambiguous as to the scope and content of § (e), which is entitled "Access to Information."[47] This section is written in the disjunctive and speaks of having "the same kind of information that the Act would make available in the form of a registration statement" or "access to such information." However, neither the Rule nor the release even attempts to define these concepts. Therefore, it is unclear which offerees have the requisite access, and as a result, issuers cannot tell when the requirement to provide information to the offerees becomes operative. Furthermore, the point at which the potential investor

---

[43] Proposed Rule 146, 37 Fed. Reg. 26137 (1972).

[44] SEC Securities Act Release No. 5336 (Nov. 28, 1972). 37 Fed. Reg. 26137 (1972).

[45] Proposed Rule 146(a)(3), 37 Fed. Reg. 26137 (1972).

[46] Proposed Rule 146(c) (2) (i)-(iv), *Id.* at 26140.

[47] Section (e) reads:

(e) *Access to Information.* Each offeree or his investment representative shall, during the course of the negotiated transaction:

(1) have the same kind of information that the Act would make available in the form of a registration statement, to the extent such information is available, or have access to such information; and

(2) have access to any additional information necessary to verify the accuracy of such information.

Id. at 26140-41.

will have the requisite information is obfuscated by the addition of the phrase "to the extent such information is available."[48] In short, this section is of no help in trying to establish objective criteria for access. Therefore, it is suggested that the essential pragmatism inherent in *Continental Tobacco* is an excellent vehicle for deciphering the vagaries which exist due to the terminology used by § (e). If *Continental Tobacco* is followed, the kinds of access required become a function of the class to which the particular offerees belong, and the issuer's duties vis-à-vis each class vary with the offeree's ability to extract information from the issuer. With an inside executive group, the company's duty of providing access is satisfied because the members of this class, due to their positions with the issuer, have the kind of information which would be made available through a registration statement. If the issuer is dealing with an institutional investor, the duty to provide information and access to records is minimal because such an offeree has sufficient bargaining power to get as much information as the SEC elicits through registration.[49] With such offerees, the issuer's duty should not entail detailed preparation of documents and the complete access required in *Continental Tobacco*. However, when a diverse and unsophisticated group is involved, the three criteria detailed by *Continental Tobacco* would become operative to determine the issuer's duty to provide access and the availability of the exemption. When dealing with the kind of group involved in *Hill York*, the availability of the exemption should turn on two factual inquiries. First, do all the offerees have the bargaining power to extract the necessary information from the issuer? Second, if not, is there a *Woodward*-type situation in which a close-knit group provides the needed access? If both questions are answered in the negative, then the issuer must comply with the requirements of *Continental Tobacco* or the exemption should be denied. Whatever the ultimate content of the rule adopted by the SEC, the decision in *Continental Tobacco* can be used to provide a valuable and flexible analytical tool for determining the access requirements of the private offering exemption. However, if *Continental Tobacco* is used, it is imperative that the limitations of the decision be recognized so that its specific requirements are not inflexibly applied outside the proper factual context.[50]

---

[48] *Id.*

[49] 1 L. LOSS, *supra* note 3, at 663 says: In the case of offerings to institutional investors . . . the larger insurance companies are not only "able to fend for themselves" [but] [s]ometimes they seem to elicit even more information than the SEC does. *See also* S. GOLDBERG, *supra* note 9, at § 4.2(c) and the authorities collected therein at note 85.

[50] The Court in *Ralston Purina* indicated that any arbitrary numerical limitation on the availability of the exemption was not in keeping with the statutory purpose: "[T]here is no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation." 346 U.S. 119, 125 (1953). However, the Court also indicated that "nothing prevents the commission, in enforcing the statute, from using some kind of numerical test in deciding when to investigate particular exemption claims." *Id.* The use of a numerical rule of thumb has appeal, however, in attempting to find objective standards for the private offering exemption. Proposed Rule 146(f) limits the exemption to purchases by not more than 35 persons in any consecutive 12-month period. However, the Rule then provides an exemption from this requirement for purchasers buying more than $250,000 worth of securities for cash. 37 Fed. Reg. 26137, 26141 (1972). This "quantity limitation" in § (f) might raise the question of whether the rule is inconsistent with *Ralston Purina* and, if so, whether that opinion represents a limitation on the permissible rule-making authority of the SEC in this area. However, the requirements of the Rule need not and should not be read as inconsistent with the Court's opinion in *Ralston Purina*. There the Court disapproved a "quantity limitation" in terms of offerees, not purchasers, and the Proposed Rule leaves the number of offerees unlimited. Such a distinction is more than a matter of semantics, and it should be sufficient to make the limitations a permissible administrative device. The proposed Federal Securities Code adopts a similar limitation for buyers of secu-

In addition to filling a void in Proposed Rule 146, *Continental Tobacco's* approach to access for the unsophisticated offeree is also to be preferred to the approach adopted by the proposed Federal Securities Code.[51] The Code's analogue to the private placement is the "limited offering."[52] Under the Code, a "limited offering" may be made to an unlimited number of institutional investors *and* to not more than 35 other purchasers of securities.[53] This makes it possible for an unlimited number of institutional investors to combine with the limited number of noninstitutional investors to purchase securities in a particular offering. To the extent the definition of the institutional investor keeps that class within its proper bounds,[54] the Code's treatment of the institutional investor has great merit in view of the demonstrated ability of these investors to "fend for themselves." However, while the treatment of the institutional investor obviates the danger of extending *Continental Tobacco* beyond its proper scope, the Code's handling of the noninstitutional investor sacrifices too much in the form of investor protection and full disclosure to the vagaries of the antifraud remedies. The Code's approach would allow an issuer to contact an unlimited number of offerees and to form a group of 35 naive purchasers who would be willing to purchase securities when it would be clear to a sophisticated investor that there is little or no chance that the transaction will be profitable. Therefore, when dealing with the noninstitutional investor in general and the unsophisticated investor in particular, *Continental Tobacco's* analysis of the problem seems better suited to provide clear standards, adequate investor protection and reasonably limited interference with the operation of the private placement as a device for raising needed capital.

*James R. King**

---

rities. The Reporter's Comment justifies the approach by stating that the Tentative Draft "goes over to the number of *buyers*, leaving the number of offerees unlimited, for two reasons: because the breadth of the definition of 'offer' makes it difficult to count offerees, and because it is difficult to see how an offeree who does not buy is hurt." ALI FED. SEC. CODE § 227(b)(1)(A), Comment (2)(b) (Tent. Draft No. 1, 1972). The rationale would apply with equal force to Proposed Rule 146.

[51] ALI FED. SEC. CODE (Tent. Draft No. 1, 1972).

[52] *Id.* § 227(b).

[53] *Id.* § 227(b)(1)(A).

[54] The Code's definition of the institutional investor is as follows:

> (a) a bank, insurance company, or registered investment company, or a parent of any such person, except to the extent that the Commission provides otherwise by rule with respect to any such class of persons on the basis of such factors as financial sophistication, net worth, and the amount of assets under investment management, or (b) any other person of a class that the Commission designates by rule on the basis of such factors.

Id. § 242(a). The Reporter's Comment notes that the necessary flexibility in the definition cannot be obtained entirely through the statute. It further states that the definition in § 242(a) "is premised on the assumption that the Commission will make any ungrudging use of its rulemaking authority" to add or delete from the groups which comprise the institutional investor category in the Code's definition. *Id.* § 242, Comment 2.

* Editorial Associate, Eugene H. Nemitz, Jr.

CONSTITUTIONAL LAW—FOURTH AMENDMENT—FEDERAL GRAND JURY WITNESS WHO HAS BEEN GRANTED TRANSACTIONAL IMMUNITY CAN MOVE TO SUPPRESS EVIDENCE SEIZED FROM HIM IN VIOLATION OF THE FOURTH AMENDMENT—*United States v. Calandra*, 465 F.2d 1218 (6th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3441 (U.S. Feb. 20, 1973).

On December 15, 1970, federal agents conducted a search of John Calandra's place of business, the Royal Machine and Tool Company, pursuant to a warrant issued that same day authorizing the seizure of bookmaking records and gambling paraphernalia. The premises were subjected to an extensive search lasting four hours, including a meticulous examination of virtually every document found in Calandra's office. No gambling paraphernalia was detected during this search; however, one of the agents discovered what he believed to be "loansharking" records. Various items were then seized including books and records of the company, stock certificates, and address books.[1]

On August 17, 1971, Calandra was summoned to testify before a special federal grand jury investigating "loansharking" practices. Calandra refused to testify on the basis of his fifth amendment privilege. Since he was not the target of the investigation, the government requested that the district court grant Calandra transactional immunity.[2] In response to the government's request, Calandra, after stipulating that he would continue to refuse to testify, moved for suppression and return of the evidence seized on December 15, 1970.[3] The district court ordered the items seized from his place of business suppressed, directed their return, and specified that Calandra need not answer any questions based upon the suppressed evidence.[4] The district court grounded its order on findings that (1) due process "allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him . . . has been obtained in a way which violates the constitutional protection against unlawful search and seizure";[5] (2) the affidavit was insufficient to establish probable cause to search Royal Machine and Tool Company for gambling paraphernalia;[6] (3) the evidence seized was not within the immediate "plain view" of the officers;[7] and (4) the search was invalid because it was a "general search," going beyond the scope of the warrant and the permissible limits of the fourth amendment.[8]

On appeal, the Sixth Circuit affirmed the district court's order. The court rejected the government's contention that Calandra lacked standing to move for pre-

---

[1] The exact nature of the materials was apparently undetermined. United States v. Calandra, 465 F.2d 1218, 1221 (6th Cir. 1972).

[2] The government sought immunity for Calandra pursuant to 18 U.S.C. § 2514 (1970):

> Whenever in the judgment of a United States attorney the testimony of any witness . . . in any . . . proceeding before any grand jury or court of the United States involving any violation of this chapter . . . is necessary to the public interest, such . . . attorney . . . shall make application to the court that the witness shall be instructed to testify . . . and upon order of the court such witness shall not be excused from testifying . . . on the ground that the testimony . . . may tend to incriminate him. . . . No such witness shall be prosecuted . . . for . . . any transaction . . . concerning which he is compelled to testify. . . .

[3] The government conceded that the questions to be asked Calandra were to be based upon the evidence seized in this search. 465 F.2d at 1221.

[4] *In re* Calandra, 332 F. Supp. 737, 746 (N.D. Ohio 1971).

[5] *Id.* at 742.

[6] *Id.* at 742-44.

[7] *Id.* at 744-45.

[8] *Id.* at 745-46.

indictment suppression of evidence and found Calandra to be a "person aggrieved"[9] under Rule 41(e) of the Federal Rules of Criminal Procedure.[10] Labeling as irrelevant the fact that Calandra would be granted immunity, the court declared that Rule 41(e) and the exclusionary rule are properly addressed to "the provision of redress for constitutional violations that have already occurred."[11] Placing emphasis on the deterrent purpose of that redress, Judge Miller suggested that a "person aggrieved" who is a "stranger" to criminal proceedings ought to have enhanced standing under Rule 41(e). Finally, the court considered whether the fact that one has been called as a witness before a grand jury should impede his recourse to a suppression motion. After weighing the competing concerns, the court decided the "interests of citizens to have access to the motion to suppress in circumstances such as these"[12] outweighed any adverse impact the procedure might have on the interests of orderly and efficient judicial administration.

In *Calandra*, the Sixth Circuit extended the exclusionary rule beyond traditional limits. Because any application of the exclusionary rule in a fourth amendment context results in social costs,[13] which in the instant case are imposed by limiting, at least arguably, the effectiveness of the grand jury, such an extension of the rule was vigorously contested by the government. This discussion examines the Sixth Circuit's analysis of the issues presented in the case, considering (1) the nature of the rights secured by the fourth amendment; (2) the logic and limits of a standing requirement vis à vis an exclusionary rule created to maintain those rights; and (3) the limitations, if any, that should pertain when the exclusionary rule is applied to the grand jury. It is concluded that the *Calandra* court has reached a defensible result and that the citizens' right to privacy, embodied in the fourth amendment, compels acceptance of the suppression motion by a grand jury witness who seeks to vindicate the violation of his fourth amendment rights. A final resolution of these issues will ultimately focus on the appropriate parameters of the exclusionary rule; it is therefore necessary, before discussing the specific questions in the case, to briefly review the development of the rule in order to determine its extant rationale and whether the rule is constitutionally based. Moreover, such an outline is needed to establish the historical context in which the *Calandra* facts must be evaluated and to determine what disposition of the case will be made on review by the Supreme Court.

The exclusionary rule was first applied in *Weeks v. United States*[14] as a means of effecting the guarantee of privacy articulated in the fourth amendment. Utilization of the rule in a grand jury proceeding was sustained in *Silverthorne Lumber Co. v. United States*,[15] a case in which the Court also declared that a rule sufficiently broad to exclude the use of the "fruits" of an illegal search is requisite to fourth

---

[9] The Sixth Circuit agreed with the district court's determination that the search did violate fourth amendment standards. 465 F.2d at 1226 n.5.

[10] The relevant provision of Rule 41(e) reads: "A person aggrieved by an unlawful search and seizure may move . . . for the return of the property. . . . [T]he property shall be restored and it shall not be admissible in evidence at any hearing or trial."

[11] 465 F.2d at 1223-24.

[12] *Id.* at 1227.

[13] These costs have been characterized by (then) Judge Cardozo: "The criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[14] 232 U.S. 383 (1914).

[15] 251 U.S. 385 (1920).

amendment protection.[16] Throughout the early development of the rule, the Supreme Court made no reference to any underlying rationale for exclusion except the "duty of the federal judiciary not to sanction official disregard of the prohibition of unreasonable searches and seizures."[17]

The exclusionary rule was further expanded in *Elkins v. United States*[18] when the Supreme Court, rejecting the then prevailing "silver-platter doctrine,"[19] characterized the basic postulate of the rule as prevention, not repair.[20] Although *Elkins* has been cited frequently as exemplifying a shift in the Supreme Court's justification for the rule,[21] Justice Stewart also considered, at length, the "imperative of judicial integrity"[22] and made it clear that the exclusionary rule is intended to preclude the courts from becoming "accomplices in the willful disobedience" of law.[23]

In *Mapp v. Ohio*,[24] the Supreme Court declared that "the *Weeks* rule is of constitutional origin"[25] and imposed the exclusionary rule on the states.[26] Shortly thereafter, in *Linkletter v. Walker*,[27] the exclusionary rule was premised almost exclusively upon deterrence. This commitment to the deterrence rationale should be read cautiously, however, since the Court's consideration of the scope of the rule was veiled by the issue of retroactivity.[28] Yet at least one commentator has argued

---

[16] The Court concluded that the demand of the fourth amendment was not simply that illegal evidence "shall not be used before the Court but that it shall not be used at all." *Id.* at 392.

[17] The Sixth Circuit characterized the *Weeks* rationale with this language, 465 F.2d at 1222, but this characterization may be only partially valid since the *Weeks* court placed emphasis on Boyd v. United States, 116 U.S. 616, 633 (1886). It was in *Boyd* that the Court first pointed to the close ties between the fourth and fifth amendments.

[18] 364 U.S. 206 (1960).

[19] The silver-platter doctrine evolved when evidence, which had been obtained as the result of an unreasonable search and seizure by state officials, was used in a trial in federal court. The evidence was said to have been handed to the federal prosecutor on a "silver platter."

[20] Mr. Justice Stewart stated that "its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." 364 U.S. 206, 217 (1960).

[21] *See, e.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as Oaks].

[22] Elkins v. United States, 364 U.S. 206, 222 (1960).

[23] *Id.* at 223. Justice Stewart relied on Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928):

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

[24] 367 U.S. 643 (1961).

[25] *Id.* at 649.

[26] The *Mapp* plurality recognized the deterrent value of the rule but also noted:

> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

Id. at 659.

[27] 381 U.S. 618 (1964).

[28] The petitioner in *Linkletter* had been convicted in a Louisiana court on the basis of evidence obtained by an unreasonable search and seizure two years before *Mapp*. Linkletter brought a habeas corpus petition seeking retroactive effect for *Mapp*.

that the "rather unguarded" language used in *Linkletter* is indicative of real reliance on deterrence as the dominant rationale for the exclusionary rule.[29]

This brief review of the evolution of the exclusionary rule demonstrates that, in *Calandra*, the Sixth Circuit was confronted with a history of interpretation encompassing diverse application and justification for the rule. It is important to recognize that although in its recent decisions the Supreme Court has placed increasing emphasis on the deterrent value of exclusion, the Court has also continued to be concerned with the maintenance of the normative rationale.[30] The Sixth Circuit's decision to extend the availability of the rule to a grand jury witness who had been granted transactional immunity must be considered in light of this development as well as within the framework of the competing interests involved—the efficient operation of the grand jury system and the right to privacy[31] incorporated in the fourth amendment. However, any effective balancing of these values must necessarily focus on the exclusionary rule and its proper role in the protection of fourth amendment rights. Moreover, an understanding of the development of the rule is required when one recognizes that the exclusionary rule has recently been the target for severe attack.[32] The chief thrust of such attacks has been the assertion that exclusion has failed to achieve its assumed purpose—the deterrence of unlawful police conduct.

An evaluation of the actual deterrent effects of the exclusionary rule is beyond the scope of this discussion; however, some of the available data tend to demonstrate a limit to the effectiveness of exclusion as a deterrent to unlawful searches.[33] The extent of any such limit is unclear, though, since the evidence is contradictory.[34] Equally important are the acknowledgement that there is currently no effective alternative to exclusion[35] and the recognition that deterrence is not the only viable rationale for the rule; as the cases above indicate, the Court displays significant concern with "the imperative of judicial integrity."[36] Moreover, one of the material advantages of the exclusionary rule is that it provides, through the utilization of the frequently recurring forum of the criminal trial, for the development of fourth amendment doctrine. Without the exclusionary rule, litigation would be substantially reduced and this development would be curtailed.[37]

It is within these limits of the exclusionary rule that the *Calandra* case must be evaluated. When the exclusionary rule is envisioned as existing *either* to deter

[29] Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 353-54 (1967).

[30] "Normative" is the label that has been applied to the justification for the exclusionary rule which concerns the evil of government participation in illegal conduct. *See* Oaks, *supra* note 21, at 668.

[31] Use of the term "right to privacy" refers to the right to be free from unreasonable government intrusion. The right to privacy emanates from the first and fifth amendments, as well as the fourth amendment, and embodies the individual's right to personal security. *See, e.g.*, Katz v. United States, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring); United States v. White, 401 U.S. 745, 768-95 (1971) (Harlan, J., dissenting).

[32] *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[33] *See, e.g.*, Oaks, *supra* note 21, at 720-36.

[34] *Id.* at 683-87.

[35] *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

[36] See discussion accompanying footnotes 14 to 29, *supra.*

[37] *See, e.g.*., Comment, *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 J. CRIM. L. C. & P.S. 256, 257 (1972).

unlawful searches, or to maintain the integrity of the judicial system by avoiding judicial complicity in unlawful conduct, it is extremely difficult to comprehend the existence of a requirement of standing to assert a motion to suppress. This was, however, the government's position in the *Calandra* case: that an immunized grand jury witness lacked standing to assert the violation of his fourth amendment rights through a motion to suppress. The government contended that standing to suppress the fruits of an illegal search has been limited to an individual who is (1) the subject of the illegal search and (2) the person against whom the evidence is sought to be admitted. The government cited *Alderman v. United States*[38] to support its position. In *Alderman* the Supreme Court held that a defendant in a criminal action has no standing to vicariously assert the violation of a third party's fourth amendment rights.

In *Calandra* Judge Miller acknowledged the existing controversy with regard to whether "one whose fourth amendment right to privacy has been violated . . . and is therefore . . . aggrieved in the *Alderman* sense may assert such right . . . as a witness before the grand jury."[39] He then agreed that the *Alderman* rule—suppression can be urged only by those whose rights were violated by the search itself—is consistent with the general rule of constitutional standing as enunciated in *Association of Data Processing Services Organizations, Inc. v. Camp*.[40] Judge Miller, noting that Calandra's motion had been filed pursuant to Rule 41(e), reiterated the Supreme Court's holdings in *Alderman* and *Jones v. United States*[41] that the requirement of standing to assert the exclusionary rule is expressed in the "person aggrieved" language of the rule.

This would seem to be all the discussion that was necessary, and thus, that standing was really a "non issue."[42] However, although it is true that, in *Jones*, the Court indicated that qualification as a "person aggrieved" depends upon one's having been a victim of a search or seizure, it is not entirely clear, after *Alderman*, that the government's contention in the instant case is without merit. In *Alderman* the Court stated that "*Jones* thus makes clear that Rule 41 conforms to the general standard and is no broader than the Constitutional rule."[43] However, the *Alderman* Court framed the purpose of exclusion with the following language:

> But we think there is a substantial difference for constitutional purposes between *preventing the incrimination of a defendant* through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion.[44]

The *Alderman* court did limit its references to "the necessary predicate," but the language chosen by the Court arguably supports the position that the exclusionary rule is to be applied only when evidence obtained by violation of the fourth amend-

---

[38] 394 U.S. 165 (1969).

[39] 465 F.2d at 1222 (citations omitted).

[40] Standing concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected . . . is arguably within the zone of interest . . . regulated by the . . . constitutional guarantee in question.
397 U.S. 150, 153 (1970).

[41] 362 U.S. 257 (1960).

[42] The district court did, in fact, see standing as a "non-issue." *In re* Calandra, 332 F. Supp. 737, 739, (N.D. Ohio 1971).

[43] 394 U.S. 165, 173 n.6 (1969).

[44] *Id.* at 174 (emphasis supplied).

ment is also used to violate fifth amendment rights—thus making status as a defendant necessary in order to have standing for a suppression motion.[45]

The *Calandra* court did not explicitly acknowledge this possible reading of *Alderman* and, therefore, did not speak directly to the inconsistent conclusions inherent in the government position. Judge Miller did, however, refer at length to *In re Fried*[46] and *Centracchio v. Garrity*,[47] both of which noted that pre-indictment motions to suppress are cognizable. After recognizing that the pre-indictment motion to suppress is asserted as lying "in the inherent disciplinary power" of the court,[48] the *Calandra* court clarified the nature of the fourth amendment violation when Judge Miller rejected the government contention that the grant of immunity to Calandra should determine his standing:

> The Government's position is a distortion of the nature of the rule announced in *Weeks v. United States* . . . giving effect to the prohibitions of the Fourth Amendment. While evidence is excluded under the Fifth Amendment to prevent the abridgment of one's rights in the criminal process, the Fourth Amendment, in contrast, was not intended *to protect the rights of a defendant once involved in the process.* Rule 41(e) and the exclusionary rule generally are addressed . . . to the provision of redress for the constitutional violations that have already occurred.[49]

Judge Miller emphasized the deterrent rationale for exclusion but also considered suppression to be the vindication of rights already infringed. He finally argued that the grand jury witness who is a "stranger" to criminal proceedings ought to have enhanced standing to seek redress. Such a position is consistent with the purpose underlying exclusion whether it be deterrence, judicial integrity, or both. Moreover, although vicarious assertion of fourth amendment violations is equally consistent with these goals,[50] the standing of Calandra does not appear to have suffered

---

[45] *Alderman* can thus be read as a compromising of the Court's reliance on the exclusionary rule and as a retreat by the Court to the personal incrimination theory as the rationale for the rule. For a discussion of the court's pre-*Alderman* rejection of personal incrimination as a basis for exclusion, see Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 347-49 (1967). For analysis of the incrimination theory post-*Alderman*, see 33 OHIO ST. L.J. 181, 197-205 (1972).

[46] 161 F.2d 453 (2d Cir. 1947). The case concerned the possession of, among other things, 256 bales of crude rubber, believed to have been stolen from a foreign shipment. Defendant's place of business was searched at the time of his arrest. The court recognized the validity of pre-indictment suppression but found the searches in this case to have been lawful due to effective consents by one of the defendants.

[47] 198 F.2d 382 (1st Cir. 1952). Centracchio had voluntarily given the evidence in question to agents of the Internal Revenue Service after a purported promise that he would not be prosecuted. Again the court recognized the validity of the procedure urged by the parties but found that there had been no fourth amendment violation.

[48] 465 F.2d at 1223. The court relied on Go-Bart Importing Co. v. United States, 282 U.S. 344, 355 (1931):

> The United States attorney and the special agent in charge, as officers authorized to conduct such prosecution and having control and custody of the papers for that purpose, are, in respect of the acts relating to such prosecution, alike subject to the proper exertion of the disciplinary powers of the court. And on the facts here shown it is plain that the district court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioners.

One commentator has argued that reliance on the court's disciplinary powers requires a distinction between the witness' standing to assert his right not to testify and his standing to seek return of his property. 46 N.Y.U. L. REV. 1193, 1203 (1971).

[49] 465 F.2d at 1223 (emphasis original).

[50] *See, e.g.*, Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 359-62 (1967); 24 STAN. L. REV. 947 (1972).

from inconsistency with general concepts of constitutional standing, as would the "standing" of a defendant whose personal rights had not been violated.[51]

On the other hand it has been argued that one in Calandra's position, while concededly having "specific standing" under Rule 41(e), lacks "general standing" to suppress evidence and refuse to testify before a grand jury.[52] This argument is apparently based upon (1) a belief that the witness who has been granted immunity is not "harmed" by testifying, and (2) the holdings of many courts that grand jury witnesses lack standing to question evidence generally.[53] As to the question of harm, it is not at all clear that a grant of immunity removes the possibility of damage to the individual.[54] Moreover, the right to privacy is a constitutionally protected right emanating from at least the first, fourth and fifth amendments.[55] Removing the possibility of fifth amendment violations does not mean that the right to privacy has been destroyed. It is the protection of privacy that is the principle object of fourth amendment prohibitions. The personal security of the individual is to be protected from intrusion by agents of the public unless such intrusions comply with the standards of the fourth amendment.

One's personal security includes the right to remain anonymous. That anonymity deserves protection by the fourth amendment as much if not more than any other part of individual privacy is particularly true in view of the fact that the fourth amendment does not create an absolute barrier to governmental action. As long as the government acts consistently with the standards incorporated in the fourth amendment, there should be no question about Calandra's need to testify. On the other hand, the amendment reflects the judgment that the individual's interest in his own personal privacy is sufficient to require governmental compliance with its dictates *before* that individual's privacy can be invaded for any reason. The exclusionary rule arguably enables one to salvage at least a part of this privacy right by suppressing the illegally obtained evidence and maintaining as much anonymity as possible. To argue that Calandra has not been harmed reflects both a misunderstanding of the rights protected by the fourth amendment and a misconception of the nature of the grand jury appearance.

The second basis for this general standing argument incorporates, to a significant extent, the very real concern whether there is anything inherent in the grand

---

[51] Moreover, the assertion of another's constitutional rights raises the possibility that problems of waiver would be an issue. *See* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 361 (1967).

[52] The categories of "specific" and "general" standing are explained more fully in 46 N.Y.U. L. REV. 1193, 1201 (1971). The author discusses many of the issues presented in *Calandra* from the point of view of this distinction.

[53] *See, e.g.*, United States *ex rel.* Rosado v. Flood, 394 F.2d 139 (2d Cir. 1968); Carter v. United States, 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970).

[54] In the words of Justice Marshall in United States v. Dionisio, 41 U.S.L.W. 4180, 4192 (U.S. Jan. 22, 1973) (Marshall, J., dissenting):

> [S]ubstantial stigma . . . may result from a grand jury appearance. . . . Public knowledge that a man has been summoned by a federal grand jury investigating, for instance, organized criminal activity can mean loss of friends, irreparable injury to business, and tremendous pressures on one's family life. Whatever nice legal distinctions may be drawn between police and prosecutor, on the one hand, and the grand jury, on the other, the public often treats an appearance before a grand jury as tantamount to a visit to the station house. Indeed, the former is frequently more damaging than the latter, for a grand jury appearance has an air of far greater gravity than a brief visit "downtown" for a "talk." The Fourth Amendment was placed in our Bill of Rights to protect the individual citizen from such potentially disruptive governmental intrusion into his private life unless conducted reasonably and with sufficient cause.

[55] *See supra* note 31.

jury process to override a witness' assertion of fourth amendment rights. The argument embodies the basic thrust of the government's second contention in the principal case—that a grant of the suppression motion will unduly burden and delay the grand jury proceeding. To support this stand, the government relied, in part, on *Blair v. United States*.[56] In *Blair* the Supreme Court held that a grand jury witness had no standing to question congressional power to regulate primary elections for the office of United States Senator. Neither the fifth nor the fourth amendments were relied upon by the witnesses, who based their refusal to testify on an attack upon the power and jurisdiction of the grand jury to investigate violation of what the witnesses asserted was an unconstitutional statute. The *Blair* Court stated that:

> [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned. . . . The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.[57]

Judge Miller conceded the abstract validity of these enunciations in *Blair*; he also acknowledged an assertion by the Second Circuit that "a witness usually cannot impede collection of evidence . . . even though the issues he seeks to raise could later be litigated . . . by an indicted defendant."[58] Nevertheless, Judge Miller correctly pointed out that the holding in *Blair* was equivocal in that the *Blair* Court made clear that the articulated policy was subject to exceptions and qualification—specifically the fifth amendment, "confidential matters," and other "special reasons."[59] It is at least arguable that "confidential matters" include the privacy and anonymity secured by the fourth amendment. In addition, the *Calandra* court was cognizant that the Supreme Court has not, since *Blair*, had occasion to consider the specific question presented in the instant case.[60]

Judge Miller, after acknowledging the government's cited authority in support of the position that the investigative process of the grand jury should not be disturbed in order to vindicate the interests secured by the fourth amendment and the exclusionary rule, attempted to distinguish all of the cases by pointing out that none of the decisions cited dealt with the general standing of a "person aggrieved" to vindicate fourth amendment rights.[61] With one exception Judge Miller's dismissal of the contrary authority is justified. That exception is *Gelbard v. United States*.[62] In *Gelbard* the Supreme Court interpreted the 1968 Omnibus Crime Control and Safe Streets Act to preclude contempt findings against grand jury witnesses who

---

[56] 250 U.S. 273 (1919).

[57] *Id.* at 281.

[58] United States *ex rel.* Rosado v. Flood, 394 F.2d 139, 141 (2d Cir. 1968).

[59] 250 U.S. 273, 281 (1919).

[60] In Lanza v. New York, 370 U.S. 139 (1962), the Court had the opportunity to decide the issue in a closely related context. Lanza was convicted for refusing to testify before a committee of the New York Legislature after having been immunized from prosecution. His ground for the refusal to testify was that the questions that were to be asked by the committee were based upon unlawful electronic interception of his conversations. The Court, however, found that at least two proffered questions were not so based and upheld the conviction upon an independent state ground, thus never directly considering the constitutional claim.

[61] The cases cited by the government were United States *ex rel.* Rosado v. Flood, 394 F.2d 139 (2d Cir. 1968); Carter v. United States, 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970); Application of United States, 427 F.2d 1140 (5th Cir. 1970); Gelbard v. United States, 408 U.S. 41 (1972).

[62] 408 U.S. 41 (1972).

had been granted immunity and who nevertheless refused to testify in response to questions the witnesses believed to be based upon information obtained by illegal wiretapping of their conversations. While Judge Miller's holding in *Calandra* appears on its face to be consistent with *Gelbard*, there are indications that a majority of the Supreme Court would disagree with the Sixth Circuit's resolution of the *Calandra* case. The plurality in *Gelbard* left open the precise question presented in *Calandra*.[63] However, the four dissenters and Justice White, in concurrence, indicated they would not be patient with what Justice White labeled as "protracted interruption of grand jury proceedings":

> I agree with the Court, however, that at least where the United States has intercepted communications without a warrant in circumstances where court approval was required, it is appropriate in construing and applying 28 U.S.C. § 1826 not to require the grand jury witness to answer and hence further the plain policy of the wiretap statute. *This unquestionably works a change in the law with respect to the rights of a grand jury witness, but it is a change rooted in a complex statute. . . .*
>
> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best. It is well, therefore, that the Court has left this issue open for consideration by the District Court on remand.[64]

Three days after *Gelbard* was decided, these same five Justices again indicated their reluctance to create even constitutionally based privileges that allow a grand jury witness to refuse to testify. In *Branzburg v. Hayes*[65] the Court refused to grant grand jury witnesses the right to refuse to reveal sources from which the witnesses had derived news stories. The parties had urged that the first amendment precluded the necessity of their divulging confidential sources and argued that forced disclosure of the sources would unduly infringe upon their own and the public's first amendment right to unfettered news reporting. In refusing to recognize such a privilege, the Court stated:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process.[66]

The court stated that on the record presented to it, no basis existed to find the public interest in law enforcement and efficient grand jury operation inadequate to

---

[63] *Id.* at 61 n.22.

[64] *Id.* at 70 (emphasis supplied).

[65] 408 U.S. 665 (1972).

[66] *Id.* at 689-90.

override "the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters . . . respond to the relevant questions . . . in the course of a valid grand jury investigation or criminal trial."[67]

Judge Miller confronted the positions articulated in *Gelbard* and *Branzburg* without explicit reference to either case.[68] Referring again to *Blair*, he fairly identified the interest to be balanced against the exclusion of evidence in the grand jury —a grand jury free to determine the truth through unencumbered inquiry. The grand jury is to be "a grand inquest . . . whose inquiries . . . [are] . . . not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation."[69] After so characterizing the grand jury, Judge Miller nevertheless proceeded to the conclusion that "it is not at all clear that the procedure approved by [the district court] would unduly burden the functioning of the grand jury."[70]

Perhaps one reason why the Sixth Circuit did not concern itself in depth with the *Gelbard* position or with its concommitant concern, delay, is the able discussion that District Judge Battisti proffered in response to the government's original case.[71] Judge Battisti characterized delay as avoidable delay and stated that "time properly consumed in . . . holding a hearing to examine whether one's constitutionally protected rights have been violated is not delay . . . ."[72] Both the district court and the Sixth Circuit concluded that a proper balancing of the interests involved compelled the sustaining of Calandra's standing to assert his fourth amendment rights. Judge Miller conceded that it is impossible to empirically verify the effectiveness of suppression in discouraging unlawful invasion of privacy, but he also correctly concluded that the deterrence mechanism operates to achieve positive effects only when deterrence is accomplished by the removal of incentives.[73] Judge Miller then took cognizance of today's prevalent concern with law enforcement's campaign against organized crime and the very real incentive which therefore exists to violate the rights of the "small fry" in order to reach "key figures."[74] The court concluded:

> The importance of suppression as a device is directly proportional to the incentive that exists to violate the right. Where, as here, the incentive is greatest, access to the motion to suppress attains maximum importance. . . .
>
> Absent the opportunity to raise the claim at this stage in the proceedings, Calandra's opportunity for redress is severely limited and at the same

---

[67] *Id.* at 690-91.

[68] The reason that the Sixth Circuit did not directly acknowledge the impact of *Gelbard* is unclear since the government argued its relevance forcefully. *See* Supplemental Memorandum for Appellant, United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972).

[69] Blair v. United States, 250 U.S. 273, 282 (1919).

[70] 465 F.2d at 1225.

[71] Judge Battisti dealt at length with the dissenting opinion of Circuit Judge Gibbons in *In re* Egan, 450 F.2d 199 (3rd Cir. 1971), *aff'd sub nom.*, Gelbard v. United States, 408 U.S. 41 (1972). Judge Battisti rejected the assertion that the public interest in efficient judicial administration is paramount:

> The judicial system is designed to protect the Bill of Rights, not to cast it aside in a mad rush toward the goal of judicial efficiency. Any examination of a potential infringement of those rights can, under no circumstances, be considered avoidable delay. The reports cite numerous examples where courts have "delayed" the ultimate resolution of a case so that constitutional objections could be heard at a fair hearing and a reliable determination could be reached.

In re Calandra, 332 F. Supp. 739, 741 (N.D. Ohio 1971) (citations omitted).

[72] *Id.*

[73] *See* Comment, *Standing To Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 356-57 (1967) for elaboration on this point.

[74] 465 F.2d at 1226.

> time the very substantial incentive for law enforcement officials to combine the illegal search with a grant of immunity at the grand jury stage is unrestrained.[75]

The Sixth Circuit has reached a defensible balance[76] of the competing interests present in the *Calandra* case. The recent Supreme Court decision in *United States v. Dionisio*,[77] however, may prove to be a further indication that the Court will not accept the assertion of fourth amendment rights in the context of the grand jury proceeding. In *Dionisio* the Court held that the grand jury could compel the giving of voice exemplars by approximately 20 persons,[78] including Dionisio, for comparison with recorded conversations that had been received in evidence. In responding to Dionisio's contention that the procedure was a violation of his fourth amendment rights, the Court stated that "a grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection once the Fifth Amendment is satisfied."[79]

Dionisio is distinguishable from *Calandra* in that Dionisio contended that the grand jury subpoena and his forced compliance were the governmental acts that violated his rights;[80] Calandra sought suppression of evidence after the violation

---

[75] *Id.* at 1226-27. At this point one may question why the *Calandra* court did not consider the issue whether Calandra should have asserted his rights only by an action for damages as established in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In fact the government did not argue this point which may again have resulted from the district court's able discussion:

> In *Bivens*, the Supreme Court held that the mere suppression of evidence is not sufficent to correct the violation of one's privacy by agents performing a warrantless search. It held that the Fourth Amendment also authorizes a suit for damages recoverable upon proof of injuries resulting from federal agents' violation of that Amendment. If suppression alone is not sufficient then how could money alone be an adequate remedy? Therefore, neither the motion to return nor a suit for damages can be held to be an adequate protection of one's Fourth Amendment rights. It is just as inadequate to be informed that one will not be prosecuted for governmental misconduct as it is to say that years later the United States may monetarily reimburse one for its violations of his privacy. Money damages do not constitute complete restitution for the infringement of constitutional rights.

In re Calandra, 332 F. Supp. 737, 741 (N.D. Ohio 1971).

A second question also arises at this juncture, whether Calandra, under current law, would be able to assert his fourth amendment rights if called as a witness at trial rather than at a grand jury proceeding. No court has, before *Calandra*, directly addressed the right of a witness to assert his fourth amendment rights in any context. *See* Comment, *Electronic Surveillance of the Grand Jury Witness: Deterring Fourth Amendment Violations Intended to Produce Conviction of Someone Other Than the Victim*, 120 U. PA. L. REV. 546, 567 (1972); Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314 (1967). Logically there is no reason to limit the privilege extended to Calandra to the grand jury. Moreover, if the rights protected by the *Calandra* result are to retain vitality, the privilege must be extended.

[76] The *Calandra* court approaches the task of balancing from the traditional standpoint of weighing the interests of society against unlawful search on the one hand and the interest in effective grand jury investigation on the other. It has been argued that the proper fulcrum, for any judicial balancing in the fourth amendment context, should be the "reasonableness" of particular searches and seizures. *See* 33 OHIO ST. L.J. 181, 201-05 (1972).

[77] 41 U.S.L.W. 4180 (U.S. Jan. 22, 1973).

[78] Each witness was advised that he was a potential defendant in a criminal prosecution. All were asked to examine a transcript of an intercepted conversation and to go to a nearby office of the United States attorney to read the transcript into a recording device. The witnesses were advised that they would be allowed to have their attorneys present when they read the transcripts. *Id.*

[79] *Id.* at 4183.

[80] At the appellate level in *Dionisio*, 442 F.2d 276 (7th Cir. 1971), the court relied on Davis

of his rights had occurred. The *Dionisio* holding, however, arguably undercuts at least one justification for the result in *Calandra*. The granting of Calandra's motion to suppress was based almost exclusively upon the deterrence rationale for the exclusionary rule. Such a basis is logically consistent with concepts of standing and effective use of the exclusionary rule. However, as was noted at the outset, the deterrent aspects of exclusion have been seriously questioned.[81] Prior to the *Dionisio* decision, the *Calandra* result could be justified by independent reliance upon the argument that compelling testimony based upon illegal evidence is the equivalent of compelling the witness to further the violation of his own rights.[82] Such forced violation arguably involves the courts not in the sanctioning of unlawful conduct but in the perpetrating thereof, and such conduct should therefore be precluded. Although the concept of the grand jury is apparently in a transitional stage,[83] at least one of the functions of the grand jury has, historically, been the protection of people from unwarranted "harassment and unfounded prosecution."[84] It ought to follow that the grand jury should be precluded from compelling a witness to further the violation of his own rights; however, the *Dionisio* holding is an indication that the court would be reluctant to accept this position.

Grounded upon existing conceptions of the fourth amendment's guarantee against the invasion of privacy and the nature of the needs of an efficiently operating grand jury system, the Sixth Circuit has reached a defensible result in *Calandra*. Recent decisions of the Supreme Court foreshadow the possibility that the Supreme Court will be reluctant to uphold the decision. These enunciations reaffirm the present Court's belief in an unencumbered grand jury and its disenchantment with the exclusionary rule. It is suggested that a principled evaluation of the long-standing content of the fourth amendment should demonstrate the overriding value in protecting the right of privacy at the cost of some burden on grand jury proceedings. Furthermore, a serious consideration of the exclusionary rule should indicate its continuing viability. The rule has been criticized as ineffective,

---

v. Mississippi, 394 U.S. 721 (1969). The *Davis* Court held that it was error to admit the petitioner's fingerprints into evidence at his trial for rape because they had been obtained during a police detention following a roundup of Davis and more than twenty other persons. The Seventh Circuit reasoned that "[t]he dragnet effect here, where approximately 20 persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*." 442 F.2d at 281.

[81] See discussion accompanying footnotes 33-37, *supra*.

[82] This argument is based upon analogy to Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). *See, e.g.*, 46 N.Y.U.L. REV. 1193, 1204 (1971); 10 AM. CRIM. L. REV. 881, 901 (1972). The argument takes on added dimension when the Supreme Court's decision in Kastigar v. United States, 406 U.S. 441 (1972), is considered. In this case the Court held a grant of "use" immunity sufficient to compel testimony from a witness who asserts fifth amendment privileges. Transactional immunity was said to afford broader protection than the fifth amendment privilege and therefore was not constitutionally required. Although in *Calandra* the government did seek transactional immunity, *Kastigar* indicates that this would not have been necessary. If a witness who is granted only use immunity is compelled to testify with regard to evidence illegally seized from him and if the government thereby subsequently discovers sufficient independent evidence to prosecute the witness, it is at least arguable that the compelled testimony has violated that witness' fifth amendment rights as well as his fourth amendment rights.

[83] *See* Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 596-97 (1961).

[84] *See* United States v. Dionisio, 41 U.S.L.W. 4180, 4193 (U.S. Jan. 22, 1973) (Marshall, J., dissenting). The placement of the grand jury guarantee in the Bill of Rights is indicative of the dominant character of the protective role. *See also* footnote 54, *supra*, which demonstrates doubt about the assumption that testimony before a grand jury produces no harmful effects upon the witness.

and legislative alternatives have been suggested.[85] However, this criticism ignores all implications of the rule except deterrence. To suggest that a damage remedy can effectively secure the public's right to be free from unlawful search is to strike a balance that conceivably could produce even greater confusion with regard to fourth amendment rights, without a corresponding increase in police effectiveness. Deterrence can be effective only when the incentive to violate the individual's rights is removed. A damage remedy would arguably fail to remove incentives for two reasons. First is the likelihood that governments will accept the opportunity to "buy" the right to breach fourth amendment prohibitions; second, a damage remedy to be effective would necessarily have to be significant in amount and enforceable against individual government personnel—creating the possibility of chilling good faith law enforcement efforts. The exclusionary rule, on the other hand, is an adequate mechanism to protect the fourth amendment by removing much of the incentive for unlawful conduct. Moreover, in spite of the social costs involved in applying the rule, it is submitted that exclusion is the only viable instrument to secure the fourth amendment against violations, which precludes judicial complicity in constitutional invasions. In a system based upon respect for constitutional guarantees, such an ethical stance is compelled.

*Hugh R. Whiting**

[85] *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting); Oaks, *supra*, note 21. For a complete discussion of the judiciary's power to create remedies, as well as the argument that legislative supplanting of the exclusionary rule may be unconstitutional, see Dellinger, *Of Rights and Remedies: The Constitution As A Sword*, 85 HARV. L. REV. 1532 (1972).

* Editorial Associate, Curtis A. Loveland.