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RECENT CASES

Civil Rights—Private Education—Racially Discriminatory Admissions Policies Violate Right to Contract Provision of 42 U.S.C. § 1981

Plaintiffs,[1] blacks who had been denied admission[2] solely on the basis of their race[3] to two all-white private schools that received no state aid,[4] sought damages and injunctive relief in federal district court contending that these rejections violated section 1981 of 42 U.S.C.[5] by denying them the same right to contract as enjoyed by white citizens. Arguing that private discrimination is an exercise of freedom of association protected by the first amendment, defendants[6] insisted that section 1981 could not reach the purely private discrimination evidenced by the schools' racially motivated admissions policies. In the United States District Court for the Eastern District of Virginia, *held*, judgment[7] for plaintiffs. A private school's

1. In the first action of the 2 consolidated here, Colin Gonzales sued Fairfax-Brewster on his behalf. In the second, Gonzales joined Michael McCrary and McCrary's parents in their suit against Bobbe's School.

2. Mr. and Mrs. Gonzales, black parents of Colin, submitted an application to Fairfax-Brewster School for their son's admission to the school-operated day camp. The application was rejected, and upon further inquiry, the Gonzales were informed that the school was not integrated. Later, Mr. Gonzales phoned Bobbe's School and was told that admission was limited to whites. Mrs. McCrary, black parent of Michael, called Bobbe's School with the intent of enrolling her son in the school's nursery program, but she was informed that the school accepted no black children.

3. Although both schools denied that refusal was solely because plaintiffs were black, the court made a contrary finding of fact.

4. Neither Fairfax-Brewster nor Bobbe's School receives any assistance, financial or otherwise, from any federal, state, or local agency. Both rely solely on funds derived from tuition to finance their operations.

5. This section provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1970).

6. Asserting that it represented "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents," the Southern Independent School Association as intervenor-defendant joined Bobbe's School in this suit. While Fairfax-Brewster and Bobbe's contended they did not discriminate on the basis of race, intervenor-defendant conceded that race was a factor in its policies of exclusiveness but challenged the use of § 1981 to force alteration of such admission policies.

7. The court granted a permanent injunction against defendants and intervenor-

refusal to admit black applicants solely on the basis of race violates the right to contract guaranteed non-white minorities by 42 U.S.C. § 1981. *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973).

In an attempt to guarantee blacks equal rights following the Civil War,[8] Congress, pursuant to the thirteenth amendment,[9] enacted the Civil Rights Act of 1866.[10] That act served as the source for sections 1981[11] and 1982[12] of 42 U.S.C.—statutes that were potential vehicles for judicial protection of black citizens' freedom from both public and private discrimination.[13] But in the *Civil Rights Cases*[14]—an early landmark analysis of the thirteenth amendment and the accompanying enforcement legislation—the Supreme Court refused to recognize a prohibition of purely private discrimination in this statutory scheme. In 1906 the narrow holding of *Hodges v. United States*[15] reinforced this analysis when the Court limited both the thirteenth amendment and section 1981 to acts of actual en-

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defendant prohibiting them from discriminating solely on the basis of race. The court also awarded plaintiffs compensatory damages and attorney's fees.

8. Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1025-29 (1972).

9. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

10. Act of April 9, 1866, ch. 31, 14 Stat. 27.

11. Although § 1981 was traced to the fourteenth amendment in Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), rather than the thirteenth amendment and the 1866 Act, the Supreme Court has held that § 1981 has the same origin as § 1982 in the 1866 Act. Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). For a discussion of the disputed common origin of the 2 sections see Note, *supra* note 8, at 1036.

12. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1970).

13. The comprehensive language of the original § 1 of the Civil Rights Act of 1866 read as follows:

> [C]itizens, of every race and color, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act of April 9, 1866, § 1, ch. 31, 14 Stat. 27.

14. 109 U.S. 3 (1883) (invalidating §§ 1 and 2 of the Civil Rights Act of 1875 as unconstitutional).

15. 203 U.S. 1 (1906).

slavement.[16] More than half a century later, however, in *Jones v. Alfred H. Mayer Co.*,[17] the Supreme Court overruled *Hodges*[18] and held that the thirteenth amendment empowers Congress to determine what types of discrimination constitute "badges and incidents of slavery" and to pass all laws necessary and proper for abolishing such discrimination.[19] Examining the debates[20] surrounding passage of the Civil Rights Act of 1866,[21] the *Jones* majority[22] concluded that section one, the precursor of section 1982 of 42 U.S.C., intended prohibition of all racially motivated deprivations, whether by individuals or by state action, of the right to acquire both real and personal property. Although the *Jones* reasoning applied directly only to section 1982, a footnote to the opinion linked section 1981 to the analysis.[23] Relying on the *Jones* rationale, the Supreme Court subsequently clarified the purview of section 1982 in *Sullivan v. Little Hunting Park*[24] by implying a "truly private" exception if a plan or purpose of exclusiveness other than race could be shown. Deciding that a community corporation organized to operate a neighborhood pool did not qualify as "truly private" since every white within the geographical area could belong,[25] the Court concluded that the corporation's racially discriminatory membership policies violated property rights guaranteed by section 1982. Most recently, in *Tillman v. Wheaton-Haven Recreation Ass'n*,[26] a case factually similar[27] to *Sullivan*, the Supreme Court finally had occasion to consider section 1981 directly.[28] Observing that the operative

16. Although the Court recognized that the thirteenth amendment prohibits involuntary servitude and that every wrong done to an individual operates to abridge some right, it insisted that no personal acts of discrimination operate to reduce one to a condition of slavery. *Id.* at 17-18.

17. 392 U.S. 409 (1968).

18. *Id.* at 441-43 n.78.

19. *Id.* at 440.

20. *See* CONG. GLOBE, 39th Cong., 1st Sess. (1866).

21. Act of April 9, 1866, ch. 31, 14 Stat. 27.

22. In a vigorous dissent, Justices Harlan and White stated that the majority opinion's construction of § 1982 as applying to purely private action was "at the least . . . open to serious doubt." 392 U.S. 409, 450 (1968). For an argument in support of the dissent's position, see Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485 (1969).

23. 392 U.S. 409, 441-43 n.78 (1968).

24. 396 U.S. 229 (1969).

25. *Id.* at 236.

26. 410 U.S. 431 (1973).

27. This case also involved discriminatory membership policies of a neighborhood corporation operating a community swimming pool, but in addition, this case involved denial of admission to a black guest.

28. The court considered the § 1981 claim that was based upon the refusal of admission

language of both sections 1982 and 1981 was traceable to section one of the 1866 Civil Rights Act,[29] the Court could see no reason to construe section 1981 any differently from section 1982.[30] By directly holding that section 1981 equally is applicable to private discrimination, the Court affirmed the majority view of the federal judiciary[31] that has evolved in the wake of *Jones v. Alfred H. Mayer Co.* Although most of the lower court decisions considering section 1981 have been limited to disallowing the abrogation of contract rights via employment discrimination,[32] *Grier v. Specialized Skills, Inc.*[33] applied section 1981 to discriminatory admissions practices. In that case, the court found that the racially restricted admissions policy of a professional barber school violated section 1981 by denying black applicants the same right to contract for training that white applicants possessed.[34] While use of section 1981 to reach discrimination in private non-professional education had been predicted in legal literature,[35] the courts had continued to use a more traditional judicial assault based on the reasoning of *Brown v. Board of*

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of a member's black guest in the concluding section of its opinion. Although consideration was very brief, it was direct and not relegated to a footnote.

29. *See* note 13 *supra.*

30. 410 U.S. 431, 439-40 (1973).

31. Young v. International Tel. & Tel., 438 F.2d 757 (3d Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Wks. of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970); Scott v. Young, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D.N.C. 1971); United States v. Medical Soc'y of S.C., 298 F. Supp. 145 (D.S.C. 1969). *Contra*, Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972); Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N.D. Ga. 1969), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970).

32. *See, e.g.*, Young v. International Tel. & Tel., 438 F.2d 757 (3d Cir. 1971). The following cases, however, concerned contractual arrangements in a nonemployment context: Scott v. Young, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970) (black refused the right to purchase a ticket for entrance to a recreation area because of her race); Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972) (newspaper's refusal to print Negro wedding announcements in its regular society pages); Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D.N.C. 1971) (black plaintiffs refused admission to barber training program); United States v. Medical Soc'y of S.C., 298 F. Supp. 145 (D.S.C. 1969) (suit to enjoin discriminatory admission practices of defendant hospital).

33. 326 F. Supp. 856 (W.D.N.C. 1971).

34. *Id.* at 860.

35. In an examination of the implications of *Jones*, a legal scholar suggested that in the desegregation of private schools, the state action controversy could be over-leapt by invoking § 1981; he reasoned that a black applying for admission to a private school is, in effect, asking to make a contract with that institution to purchase its educational services. Larson, *The New Law of Race Relations*, 69 WIS. L. REV. 470, 502 (1969).

Education[36] and the state involvement prohibition found in the fourteenth amendment. Thus, even though the courts have enjoined a variety of state programs assisting racially restricted private academies,[37] they have consistently permitted the private discrimination itself.[38] Indeed, in *Norwood v. Harrison*,[39] a recent case invalidating a state statute authorizing state-furnished, free textbooks to private as well as public schools,[40] the Supreme Court noted that the schools' private bias was not barred by the Constitution nor did it invoke any sanction of laws.[41]

In the instant case, after a threshold[42] finding that the schools' admissions practices were racially discriminatory,[43] the court analyzed section 1981. By relying upon the reading given section 1982 in *Jones v. Alfred H. Mayer Co.* and upon the interrelation of sections 1981 and 1982 asserted in *Tillman v. Wheaton-Haven Recreation Ass'n*, the court interpreted section 1981 to cover blacks who have been denied their right to make a contract, including a contract for education, because they are not white. Reasoning that Congress intended to prohibit private racial discrimination against blacks to the same degree in section 1981 as in section 1982, the court concluded that state action is not necessary to invoke the statute in question. To determine if the schools' actions were nevertheless outside the reach of the statute, the court looked to *Sullivan v. Little Hunting Park* and ruled that defendants' activities did not fit the "truly private" exception since no plan or purpose of exclu-

36. 347 U.S. 483, 493 (1954).

37. For a discussion of judicial treatment of state assistance ranging from tuition grants to furnishing free textbooks, see Note, *Post-Brown Private White Schools—An Imperfect Dualism*, 26 VAND. L. REV. 587 (1973).

38. *Id.* at 624.

39. 93 S. Ct. 2804 (1973).

40. The Court analogized state textbooks to state tuition grants and concluded that such state action encourages discrimination in violation of the fourteenth amendment. *Id.* at 2809-11.

41. "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.

. . . .

. . . [But] some private discrimination is subject to special remedial legislation in certain circumstances under section 2 of the Thirteenth Amendment . . . ." *Id.* at 2812-13.

42. The court ruled at the very outset that the case would not be tried as a class action by simply stating, "No determination was made prior to trial that the action might he maintained as a class action . . . , and the Court does not feel it should be so maintained. Accordingly the decision is only binding on the named plaintiffs, the named defendants and those schools which actually comprise the intervenor." 363 F. Supp. at 1203.

43. In addition to plaintiffs' allegations, the court relied upon the testimony of a Mrs. Bryant and a Mr. Brooks who stated that they had made telephone calls to both schools and were told by school officials that blacks were not accepted.

siveness other than race had been shown.[44] Finally, the court disregarded defendants' reliance on "certain dicta"[45] in *Norwood v. Harrison* characterizing private discrimination as a protected exercise of the freedom of association. In rejecting defendants' theory, the court pointed out three significant and determinative features of *Norwood*: first, it involved a fourteenth amendment claim, not a section 1981 claim; secondly, it cited *Jones* as an example of private discrimination made unlawful by Congress; thirdly, it specifically stated that no questions as to the right of citizens to maintain private schools with discriminatory admissions policies were raised. Accordingly, the court concluded that defendants' refusal to admit blacks solely on the basis of race unlawfully denied plaintiffs the right to make contracts guaranteed by 42 U.S.C. § 1981.

Even though the court's reasoning was somewhat abbreviated, the practical and legal implications of the instant decision[46] are considerable. The holding itself will prevent any of the schools represented in the action[47] from openly continuing to deny admission to blacks solely on the basis of race and will establish an important precedent[48] that could be followed in other private education cases. If eventually affirmed by the Supreme Court, the instant decision will more quickly destroy the imperfect dualism between public and private education that has existed since *Brown v. Board of Education*.[49] While critics of the decision might argue that its ulti-

44. The court also thought it "appropriate" to point out its views on the application of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.* (1970), even though no relief was sought under that statute. Thus, noting that *Sullivan* had abolished traditional definitional notions of "private" in cases brought under §§ 1981 and 1982, without expressing its reasons, the court pointed out that §§ 2000a *et seq.* did not limit § 1981 and that, consequently, the private establishments exemption of § 2000a(e) did not apply. Section 2000a(e) provides as follows: "*Private-establishments*. The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

45. The court classified the following excerpt as dicta: "[P]rivate discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . ." Norwood v. Harrison, 93 S. Ct. 2804, 2813 (1973).

46. Although no appeal has been docketed yet, attorney for defendants has stated that the case will be appealed to the Supreme Court if necessary. TIME, Aug. 13, 1973, at 49.

47. The Southern Independent School Association comprises 395 schools and 180,000 pupils in 7 southern states. *Id.*

48. The precedential value of a footnote to the opinion in which the court said that private schools are "free to discriminate against whites, or against non-whites if whites are similarly discriminated against, without running afoul of § 1981" is doubtful since the "all persons" provision of the statute has been read as including whites. *See, e.g.*, Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894, 899 (E.D. Mo. 1969).

49. Note, *supra* note 37.

mate effect will thus be to destroy private white academies, such a result is unlikely. Private academies are more likely to survive virtually intact by more carefully hiding their racially discriminatory admissions practices. If the private school couches its admissions policy in terms of academic, economic, social, or geographical requirements, racially discriminatory practices could be difficult to prove. Under the holding of the instant case, a future plaintiff would initially have to show denial of admission *solely* on the basis of race; therefore, if the school had already admitted a token black or limited its enrollment to a particular geographical, social, economic, or academic class to which plaintiff did not belong, the court could conclude that section 1981 had not been violated. Future decisions following this holding will consequently turn upon factual determinations by the courts, and each will be correspondingly limited in its application. Thus the instant decision will mean an increased work load for the federal courts since this case-by-case method of policing discrimination in private education will be added to the burdensome supervisory responsibilities already assumed in public education. The additional effort in factual analysis created by the instant holding is counterbalanced, however, by the case's promulgation of a legal principle that is more easily applied than the fourteenth amendment. Courts no longer must search for evidence of state action or involvement to bring private schools discriminating solely on the basis of race within the reach of the fourteenth amendment's prohibition. Now a federal statute that has been logically construed as applying directly to private education may be used to end such racially restricted admissions policies. Nevertheless, the instant decision's failure to directly and thoroughly meet the constitutional defense of freedom of association, while simplifying the application of section 1981, did not finally delineate the statute's limits. Thus, because the appropriate balance between freedom from discrimination on the basis of race and freedom of association is not fixed, a higher court's tilting of the scales could upset the instant decision on constitutional rather than statutory grounds. In any event, the instant decision does present the courts with an opportunity to facilitate the kind of activism on behalf of blacks that was begun in *Jones*. The Supreme Court has recently had occasion to voice its disapproval of the racially restricted schools' "educational message" that segregation is desirable in education.[50] If the courts choose to use it, section 1981 could prove an effective means for silencing that message.

50. Norwood v. Harrison, 93 S. Ct. 2804, 2812 (1973).

Copyright—Telecommunications—CATV Importation of Distant Television Signals Constitutes Infringement Under Sections One (c) & (d) of the Copyright Act

Plaintiffs,[1] creators and producers of television programs, brought a copyright infringement action against defendants,[2] owners and operators of Community Antenna Television (CATV) systems.[3] Plaintiffs alleged that defendants' five CATV systems,[4] by intercepting the signals of local[5] and distant[6] television stations that were broadcasting plaintiff's copyrighted works and then channeling those programs to defendants' subscribers, had performed[7] plaintiff's works within the meaning of sections one (c) and (d) of the Copyright Act of 1909.[8] The federal district court, upholding

1. Plaintiffs included Columbia Broadcasting System, Inc., Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures, Inc.

2. Defendants included Teleprompter Corporation and its subsidiary Conley Electronics Corporation.

3. "The terminology used in cable communications borrows needlessly from the nomenclature of broadcasting. 'Community antenna television,' from which the letters 'CATV' derive, 'cable television,' and 'cablecasting' obviously are adaptations of 'television' and 'broadcasting.' However, electronic cable communications are a complete system of telecommunications, of which broadcasting is a component part. A new terminology should be developed. For example, cable communications systems might better be called 'cable communications (CACOM).'"

Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 VAND. L. REV. 681 n.1 (1972).

4. The copyright claims were limited to the operations of Teleprompter's CATV systems in 5 cities at stated periods: Elmira, N.Y. in Nov. 1964; Farmington, N.M. in Nov. 1964, June 1969, and Mar. 1971; Rawlins, Wyo. in June 1969; Great Falls, Mont. in June 1969; and New York City in June 1969 and Mar. 1971.

5. Defendants' CATV systems received certain signals from local television stations through the use of antennas located in or directly adjacent to the communities served by the CATV systems.

6. Defendants' CATV systems also received and retransmitted signals at points as close as 43 miles and as far away as 600 miles from the communities served by the CATV systems.

7. Plaintiff also alleged that the following activities gave defendant's CATV systems the function of performers: (1) program origination, (2) selection of programs, (3) microwave transmission, (4) interconnection with other CATV stations, (5) advertising, and (6) sale of commercials. CBS, Inc. v. Teleprompter Corp., 355 F. Supp. 618, 620 (S.D.N.Y. 1972).

8. The Copyright Act of 1909 reads in pertinent part:

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> . . .
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for

defendants' contention that they had not performed the copyrighted works, dismissed the complaint.[9] On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed in part and reversed and remanded in part. For purposes of copyright liability, a CATV system that imports distant television signals is functionally a performer of those programs and is liable for infringement under the Copyright Act. *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*, 476 F.2d 338 (2d Cir.), *cert. granted*, 42 U.S.L.W. 3173 (U.S. Oct. 9, 1973).

CATV, more commonly called cable television, was an invention of the early 1950's[10] and was designed originally to provide better access to television signals in areas where there was no local station or where local terrain[11] interfered with off-the-air[12] television reception. Early CATV systems had up to five channels that received transmitted signals of television stations from as far away as sixty miles by means of a large, central antenna;[13] these signals were then refined and strengthened through amplifiers and transmitted via coaxial cables to television sets of paying subscribers.[14] Because of numerous technological advancements, modern CATV systems are very different from the earlier systems. As characterized by the Supreme Court in *United States v. Southwestern Cable Co.*,[15] CATV systems now serve two functions: first, they facilitate satisfactory reception of local television signals which are already in a

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profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever.

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever . . . .

17 U.S.C. §§ 1(c), (d) (1970).

9. 355 F. Supp. 618 (S.D.N.Y. 1972).

10. *See* Note, *Regulation of Community Antenna Television*, 70 COLUM. L. REV. 837 (1970). *See also* Barrow, *supra* note 3, at 682. The first use of antenna and cable to capture and carry signals to subscribers for a fee was in 1923, when radio signals were captured and delivered in Dundee, Mich. Barnouw, *The Image Empire*, in 3 A HISTORY OF BROADCASTING IN THE UNITED STATES, 247-48 (1970).

11. *See* Note, *supra* note 10, at 837-38.

12. The term "off-the-air" is used to indicate the reception of broadcast television signals by means of an antenna or similar receiving equipment. 476 F.2d at 343 n.5.

13. *See* Note, *supra* note 10, at 838.

14. United States v. Southwestern Cable Co., 392 U.S. 157, 161 n.8 (1968); 37 FORDHAM L. REV. 597 n.1 (1969).

15. 392 U.S. 157 (1968).

community; and secondly they make possible the reception of distant television signals that must be imported into the community.[16] The latter function is made possible by employing a microwave relay whereby the intercepted signal is focused and transmitted through the air in a beam precisely aimed at a receiving antenna which then channels the signals to the subscribers;[17] this process has the potential of increasing the reception range of CATV systems to possible nationwide proportions.[18] In addition, the modern systems have increased channel capacities and can offer a viewer up to twenty-five channels from which to select.[19] Importation of distant signals, coupled with the increased channel capacity of CATV, has prompted CATV operators to introduce many new and innovative changes, including program origination.[20] Initially, creators and producers of copyrighted programs welcomed the advent of CATV because it extended their program's reception into areas where previously there had been only poor reception or none at all.[21] Indeed, they viewed the development of CATV as a key to new markets;[22] however, when CATV systems began to utilize microwave links to import *distant* programs into local communities, their enthusiasm quickly disappeared.[23] The copyright holders discovered that a CATV system's importation of programs into its market from a distant station's market reduced the copyright holders' ability to license those programs for later presentation in the importing market and diminished the potential audience for those programs if in fact they were licensed subsequently for exhibition by a local sta-

16. *Id.* at 163.

17. 476 F.2d at 343 n.6; Barrow, *supra* note 3, at 682-83.

18. In the instant case, television programs transmitted from Los Angeles stations were seen in Farmington, N.M. via a 1300-mile microwave link system. 476 F.2d at 344.

19. Barrow, *supra* note 3, at 684-85. *See also* Note, *supra* note 10, at 840-41: "The nation's first twenty-four channel system was constructed in Bucks County, Pa., in 1967. A forty channel system is now under construction in Akron, Ohio. The first section of a forty-two channel system is ready for operation in San Jose, California. None of these, however, even approaches the capacities of cable technology which in the present state of the art can provide a system with up to eighty-two television channels on a single cable." (Footnotes omitted).

20. *See, e.g.*, Note, *supra* note 10, at 841.

"At first most origination was limited to providing certain continuous electronic services, such as stock tickers, A.P. or U.P.I. news tickers, weather information channels, etc." *Id.* Today CATV program origination has developed to the point where educational and dramatic works are shown. 476 F.2d at 344.

21. *Hearings Before the Subcomm. on the Revision of the Copyright Law of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. ser. 8, pt. 2, at 1225 (1965).

22. *Id.* pt. 3, at 1828.

23. *Id.*, pt. 2, at 1226; 37 FORDHAM L. REV. 597 (1969).

tion. The net result was a reduction in the price a local station was willing to pay for the right to broadcast those programs.[24] The threat posed by the CATV systems caused copyright holders to look to the Copyright Act[25] in attempts to prohibit CATV operators from importing copyrighted programs. Sections one (c) and (d) of the Copyright Act relate to televised works and give copyright holders the exclusive right to perform those works in public for profit.[26] Because CATV operators charge subscribers a monthly fee, their service is clearly profit making.[27] There is also little doubt that CATV is public for purposes of the Act; in *Jerome H. Remick & Co. v. American Automobile Accessories Co.* the Sixth Circuit held that a performance is public even though the listeners are unable to communicate with each other and are able to enjoy the production alone in the privacy of their homes.[28] The question of whether CATV systems "perform," however, has not been resolved so easily. In the 1929 decision of *Buck v. Debaum*,[29] a federal district court held that a cafe owner who received copyrighted musical compositions broadcast via radio and then permitted his customers to listen to the radio, did not perform the copyrighted works. The court found that one did not perform within the meaning of the Copyright Act when he merely facilitated the reception by others of signals already present in the air.[30] Two years later the Supreme Court reached an opposite result in *Buck v. Jewell-LaSalle Realty Co.*[31] when it held that a hotel did perform by making available to its customers, through a speaker system, copyrighted works broadcast by a local radio station. The Court found that one performs when he sets up elaborate equipment to receive radio signals and makes those signals available to customers.[32] For the copyright holders, this latter *Buck* decision provided a significant precedent with which to attack CATV operations. When the Supreme Court faced the first copyright infringement suit against CATV operators in 1968, however,

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24. 476 F.2d at 342 n.2.

25. 17 U.S.C. §§ 1-216 (1970). The statute refers to "dramatic works." *See* note 8 *supra*.

26. 17 U.S.C. §§ 1(c), (d) (1970).

27. 37 FORDHAM L. REV. 597, 598 (1969).

28. 5 F.2d 411, 412 (6th Cir. 1925).

29. 40 F.2d 734 (S.D. Cal. 1929).

30. The *Buck* court found that "[o]ne who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law." *Id.* at 735.

31. 283 U.S. 191 (1931).

32. *Id.* at 201.

the Court held in *Fortnightly Corp. v. United Artists Television, Inc.*[33] that CATV systems do not perform under the Copyright Act. The Court, using a functional test, characterized the CATV system as a viewer, not a broadcaster, and found that only broadcasters perform.[34] *Fortnightly* involved a CATV system that intercepted signals of local stations; the Court found that the system only enhanced the viewer's ability to receive signals already present in the community and thus served the same function as a home antenna.[35] The Court pointed out that application of pre-television concepts embodied in the 1909 Copyright Act to the technology of the 1960's makes it very difficult to formulate a precise definition of "performance."[36] Although there have been several attempts to update the Act so as to cover specifically the recent technological developments of CATV, the proposed revisions have not been adopted.[37] Congres-

33. 392 U.S. 390 (1968).

34. The Court found that television viewing resulted from the combined activity of broadcasters and viewers. Broadcasters either produce the programs or obtain them from a network or some other source and then convert the images and audible sounds of the program into electronic signals which they broadcast at radio frequency for public reception. Viewers, however, by means of television sets and antennas, receive the broadcasters' signals and reconvert them into visible images and audible sounds. *Id.* at 397-98.

35. The Court found tbat "[e]ssentially, a CATV system no more than enhances the viewer's capacity to receive tbe broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set . . . . [T]he basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer." 392 U.S. at 399 (citations omitted); *accord*, Lilly v. United States, 238 F.2d 584 (4th Cir. 1956) (holding that CATV "was a mere adjunct of the television receiving sets witb which it was connected").

36. 392 U.S. at 395.

37. "A revision of the 1909 Act was begun in 1955 when Congress authorized a program of studies by the Copyrigbt Office. Progress has not been rapid. The Copyright Office issued its report in 1961. Register of Copyrights, Report on the General Revision of the U.S. Copyright Law, House Judiciary Committee Print, 87th Cong., 1st Sess. (1961). Revision bills were introduced in the House in the Eighty-eighth Congress and in both the House and the Senate in the Eighty-ninth Congress. See H.R. 11947, 88th Cong., 2d Sess.; Hearings on H.R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess. (1965); Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 89th Cong., 2d Sess. (1966). H.R. 4347 was reported favorably by the House Judiciary Committee, H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966), but not enacted. In the Ninetieth Congress revision bills were again introduced in both the House (H.R. 2512) and the Senate (S. 597). The House bill was again reported favorably, H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967), and this time, after amendment, passed by the full House. 113 Cong. Rec. 9021. The bill as reported contained a provision dealing with CATV, but the provision was struck from the bill on the House floor prior to enactment.

. . .

The House and Senate Bills are currently pending before the Senate Subcommittee on Patents, Trademarks, and Copyrights."

392 U.S. at 396 n.17.

sional inaction in updating the Act and CATV's increasing economic impact on copyright holders have prompted the Federal Communication Commission (FCC) to enact rules regulating the operations of CATV systems,[38] pursuant to powers granted them under the Communications Act of 1934.[39] The rules require a CATV system to carry all local and other "significantly viewed television signals."[40] In addition, the rules permit CATV to carry a total of three full network affiliated stations and three independent stations, but distant signals may be imported from no more than two independent stations.[41] The FCC rules are very comprehensive and provide some protection for copyright holders through the restriction on importation, but because the rules do allow limited importation of distant signals, the question of copyright liability has remained open.

Noting that the complaint charged five specific CATV systems with copyright infringement, the instant court first discussed the various operations conducted by those systems; it found that the different systems received television signals originating within the community as well as signals received off-the-air at points ranging from 43 to 600 miles away. The court also stated that the systems used both antennae and microwave links, and that some originated their own programming.[42] The court then turned to the *Fortnightly* decision and compared the then-existing technology with the technological advancements of the 1970's. The court found that *Fortnightly* was concerned only with a CATV system that operated as a reception service, while the systems in the instant case origi-

38. 47 C.F.R. § 76 *et seq.* (1972).

39. The FCC was created by the Communications Act of 1934, 47 U.S.C. §§ 151-609 (1970), and was given broad regulatory powers over radio and television broadcasting, 47 U.S.C. §§ 303, 307, 309 (1970). But despite this grant of power, the FCC initially refused to regulate the activities of CATV, because they doubted that they had jurisdiction over the systems. Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958). However, as CATV systems modernized and expanded into the big city areas and threatened local television stations, the FCC asserted indirect jurisdiction in Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963); then ancillary jurisdiction in the Second Report and Order on CATV, 2 F.C.C. 2d 725 (1966); and finally full jurisdiction over CATV systems. The Supreme Court, in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), upheld the FCC's power to regulate CATV. For a thorough discussion of the new FCC rules see Barrow, *supra* note 3.

40. 47 C.F.R. § 76.61 (1972). *See also* Barrow, *supra* note 3, at 705.

41. *Id.* 47 C.F.R. § 76.201 (1972), requiring CATV systems to originate their own programming, has been suspended pending judicial review. CBS, Inc. v. Teleprompter Corp., 476 F.2d 338, 349 n.13 (2d Cir. 1973).

42. In addition, the court found that some of the systems sold commercial time and some interconnected with other CATV systems.

nated programming, used microwave links, and imported distant signals. These differences between the CATV system in *Fortnightly* and the instant CATV systems led the court to find that the *Fortnightly* holding could have only limited bearing on the instant decision. The court recognized, however, that the functional test set forth in *Fortnightly* was still viable, and turned to consider whether the technological developments made by CATV transformed the systems from viewers to performers.[43] The court reasoned that because the system's origination and reception services were different operations they should be considered separately.[44] The court found that under the copyright law, program origination by a CATV system did not convert that system into a performer of those programs it imported off-the-air.[45] The court also found that the use of microwave links did not by itself convert a CATV system into a performer since microwave is simply an alternative to cable in transmitting the broadcast signals.[46] The court did find, however, that the importation of *distant* signals substantially changed the function of a CATV system. The court found that the function of importing *distant* signals was not before the *Fortnightly* Court and thus *Fortnightly* was not controlling on that issue.[47] The court characterized the distant importation function as broadcasting[48] and found that broadcasters do in fact perform.[49] Thus, the court held that when a CATV system imports distant signals that would not otherwise be receivable in a community on either a private rooftop antenna or a large community antenna located in or near the CATV community, the CATV system performs and is subject to copyright liability. Recognizing the need to define a "distant signal," the court found that a precise judicial definition was not possible; instead, the court defined signals that are not distant. Establishing

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43. *See* note 35, *supra*.

44. CBS, Inc. v. Teleprompter Corp., 476 F.2d 338, 347-48 (2d Cir. 1973).

45. *Id.*

46. The court also found that the sale of commercial time and the interconnection of different CATV systems did not change the function of CATV.

47. The court said that the *Fortnightly* Court dealt with signals which "were already in the community and were not imported by the CATV system from another community, as is evidenced by the fact that the system received them from an antenna located in or directly adjacent to the CATV community." 476 F.2d 338, 349 (2d Cir. 1973).

48. The court reasoned that broadcasters' transmission of signals over long distances to viewers who but for this transmission would not be able to view the television programs, was the same function that the CATV systems engaged in by the use of long distance microwave links. *Id.* at 349-50.

49. *See* Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288, 290-91 (S.D.N.Y. 1943) for the proposition that broadcasters perform.

that a CATV community is an area served by the CATV system and designated in a franchise issued to it by a state or local governmental body or regulatory authority,[50] the court held that any signal capable of projecting—without relay or retransmittal—an acceptable image that a CATV system can receive off-the-air during a substantial portion of the time by means of an antenna erected in or adjacent to the CATV community is not a distant signal. Moreover, the court decided that a signal would be presumed distant in cases where the signal was transmitted from an originating community to a CATV community by microwave or cable and where the signal is initially received by a CATV system, an antenna, or some other receiving device located between the two communities. Thus the court concluded that while two of defendant's CATV systems, which received only non-distant signals, had clearly not infringed plaintiff's copyrights, the remaining three, should be presumed to have infringed those copyrights by importing "distant signals," unless there is a contrary showing on remand to the trial courts.[51]

The instant decision will tend to restrict considerably the present scope and future development of CATV. Unless CATV operators are able and willing to pay the price demanded by copyright holders,[52] CATV will be forced to revert to local programming to avoid copyright liability. In following the test espoused by the instant court, CATV may not be able to operate at all in some smaller communities that are too far from conventional television signals, thus totally depriving those communities of television. On the other hand, copyright holders and local television stations will benefit immensely from the instant decision. Copyright holders will now be able to control the dissemination of their programs in distant markets, and they will have an opportunity to collect additional fees for their works from CATV operators who perform them. In addition,

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50. *See* 476 F.2d 338, 351 n.16 (2d Cir. 1973).

51. The court found that the New York and Elmira systems had not infringed plaintiffs' copyrights and that the Rawlins, Great Falls, and Farmington systems had presumably infringed the copyrights. *Id.* at 352-53.

52. "Almost all television programs with rerun value (*i.e.*, excluding news and most live sports) are copyrighted. Although networks do not customarily hold the copyrights, they often participate in rerun revenues (known in industry parlance as syndication receipts) or act as syndication brokers through arrangements with producers.

"Virtually all programs are sold to networks or stations on the basis of exclusive contracts, commonly running from two to seven years. The distributor agrees not to sell the same program to any other broadcast station (frequently including cable outlets) within an area surrounding the buying station." Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1821-22 (1970).

if CATV systems are unable to afford these programs, local television stations will no longer compete with distant stations for viewers in a CATV community. Notwithstanding the new restrictions placed on CATV operators by the decision, the instant court correctly resolved the issue presented in light of the statute and available precedents. The wording of the 1909 Copyright Act clearly does not anticipate a phenomenon such as CATV; thus the application of this antiquated Act to modern inventions has hampered courts' development of a proper concept of performance. The functional test advanced by the *Fortnightly* Court seems to be the best judicial solution, and the instant court, taking into account additional technological advancements, logically extended the *Fortnightly* rationale to the instant facts. Recognizing that "[t]he complex problems presented by the issues in this case are not readily amenable to judicial resolution,"[53] the court appealed to Congress to enact legislation which would accommodate the competing copyright and communications policy considerations in light of modern CATV technology.[54] Although no legislation has been enacted yet, there was recently introduced in the Senate a comprehensive Copyright Revision Bill,[55] which seeks to remedy the problems that confronted the instant court. The bill contains a practical definition of "performance"[56] and indicates when a CATV system is liable for copyright infringement.[57] The bill is now in committee, but chances for its ultimate adoption are questionable in light of prior congressional reluctance to enact proposed revisions.[58] If this bill is not passed, courts probably will resort to the new FCC rules for guidance[59] when confronted with a CATV copyright infringement suit. Although the

53. 476 F.2d at 354.

54. *Id.*

55. The bill was introduced by Senator McClellan on Mar. 26, 1973. S. 1361, 93d Cong., 1st Sess. (1973).

56. "To perform or display a work 'publicly' means:

"(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;

"(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." *Id.* at § 101.

57. *Id.* at § 111.

58. *See* note 37 *supra*.

59. 47 C.F.R. § 76.01 *et seq.* (1972).

FCC is by definition a regulatory agency, their new rules are in effect copyright legislation because they protect copyright holders by imposing a limit of two stations from which a CATV system may import distant signals. Consequently, the FCC rules tend to restrict the scope of CATV as much as the instant decision does. The primary appeal of the CATV systems has been their ability to afford the viewer a wide choice of entertainment via numerous channel selections. By restricting CATV's importation to two distant signals, the FCC may cause those systems to lose subscribers since the systems in many cases will be able to offer only the signals of stations which are already available to the viewer, or at most two additional signals. Thus, unless CATV systems are able to raise new capital through program origination or advertising, many may be forced out of business. Therefore, the only means of preserving CATV may be congressional legislation. Members of both the CATV and the television industries have compromised and agreed on legislation[60] whereby CATV would recognize its obligation to pay reasonable copyright fees, and copyright holders would agree to grant compulsory licenses permitting CATV to carry local and distant signals.[61] They have also agreed to submit to compulsory arbitration in the event no agreement on a reasonable fee can be reached.[62] Congress, therefore, has legislation before it which could solve the problems faced by the instant court and the FCC. Since neither has been able to deal adequately with the problem, Congress should take the initiative and enact appropriate legislation.

Criminal Law—Right to Counsel—Sixth Amendment Does Not Grant Accused the Right to Counsel at Pretrial Photographic Display

Respondent, convicted in federal district court of bank robbery,[1] appealed his conviction alleging denial of his sixth amendment right to counsel.[2] Prior to trial, and to ensure positive in-court

60. 37 Fed. Reg. 3260 (1972); *see* Barrow, *supra* note 3, at 703.
61. 37 Fed. Reg. 3341 (1972); *see* Barrow, *supra* note 3, at 703.
62. *Id.*

1. Respondent Ash and codefendant Bailey were indicted on 5 counts relating to the Aug. 26, 1965 robbery of a Washington, D.C., bank. United States v. Ash, 461 F.2d 92, 94 n.1 (D.C. Cir. 1972).
2. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

identification, the prosecution had conducted a photographic display during which its witnesses identified respondent as a participant in the robbery,[3] and at which neither respondent nor his counsel were present. The trial judge admitted this post-indictment photographic identification into evidence in addition to the witnesses' courtroom identification[4] of respondent.[5] Respondent contended on appeal that the post-indictment[6] photographic display was a critical stage in the prosecution at which the presence of counsel was required by the sixth amendment. The prosecution argued that a photographic identification session which the accused does not attend cannot give rise to a right to counsel. The Court of Appeals for the District of Columbia Circuit adopted respondent's position and reversed.[7] On certiorari from the United States Supreme Court, *held*, reversed. The sixth amendment does not grant the accused the right to have counsel present at photographic displays conducted by the government for the purpose of allowing its witnesses to attempt an identification of the offender. *United States v. Ash*, ___ U.S. ___, 93 S. Ct. 2568 (1973).

In a series of cases beginning with *Powell v. Alabama*,[8] the Supreme Court has developed the principle that the sixth amendment requires representation by counsel of all defendants in state

3. In preparation for trial, the prosecutor used the photographic display to determine whether the witnesses he planned to call would be able to make courtroom identifications of the accused. The display was held less than 24 hours before the trial, nearly 3 years after the robbery itself. There were 5 color photographs in the display, including one each of Ash and codefendant Bailey. While each man pictured was approximately the same age, height, and weight as respondent, only he and Bailey were pictured full-length; the other 3 subjects were cut off at mid-thigh, waist, and mid-chest respectively. Furthermore, only the pictures of the 2 defendants bore police identification markings. At the display, 3 of the witnesses selected respondent's picture, but the fourth was unable to make any selection. 461 F.2d at 95-96.

4. At the trial, all 4 witnesses made courtroom identifications of respondent Ash, but only one of the witnesses was positive of the identification. *Id.* at 95.

5. The only other proof against Ash was the testimony of an informer who was then serving a sentence in connection with another robbery. The defense called an Assistant United States Attorney who testified that he had indicated to the informer his intention to testify on the informer's behalf before the parole board. *Id.* at 97. Other "favors" granted to the informer in exchange for his testimony against Ash were indicated in trial testimony. *Id.* at 97, n.7. After a hung jury, codefendant Bailey was acquitted on motion to the trial judge. *Id.* at 95.

6. At an earlier preindictment photographic display, the 4 witnesses to the robbery tentatively identified respondent as one of the gunmen. Respondent did not assert a right to counsel at that session since Kirby v. Illinois, 406 U.S. 682 (1972) ("showup" or confrontation of any eye-witness and a lone suspect shortly after his apprehension), forecloses application of the sixth amendment to events prior to the initiation of formal adversarial criminal proceedings. *See* notes 24-26 *infra* and accompanying text.

7. 461 F.2d at 105.

8. 287 U.S. 45 (1932).

and federal criminal trials involving potential loss of liberty.[9] Having begun to recognize in *Powell* that the period from arraignment to trial necessarily involves problems of procedural intricacy[10] and prosecutorial advocacy[11] which render that period as critical to the preservation of a defendant's liberties as the trial itself,[12] the Court has held more recently that the assistance of counsel is required at any "critical stage" of the proceedings against an accused.[13] The Court has found "critical stages" for sixth amendment purposes whenever "substantial rights" of the accused may be adversely affected.[14] For example, in *Hamilton v. Alabama*[15] the Court held an arraignment to be "critical stage," even where the defendant had entered a plea of not guilty, since under Alabama law several crucial defenses are considered waived if not pleaded at the arraignment.[16] In *United States v. Wade*,[17] the Court applied the "critical stage" analysis to post-indictment lineups. Considering first the relative unreliability of eyewitness identification at lineups,[18] and then ex-

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9. In *Powell*, the Court carefully limited the extension of the counsel guarantee to capital cases where an indigent defendant was incapable of adequately defending himself due to ignorance, feeble-mindedness, or illiteracy. However, the Court indicated that counsel may be needed at every step in such proceedings. *Id.* at 71. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Court held that the sixth amendment required federal courts to appoint counsel in all federal felony cases. Betts v. Brady, 316 U.S. 455 (1942),held that the *Johnson* ruling was not applicable to the states via the fourteenth amendment due process clause, but 21 years later this case was overruled. In Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held that the fourteenth amendment imposes an absolute right to counsel for indigent defendants in state felony prosecutions. More recently, the Court held in Argersinger v. Hamlin, 407 U.S. 25 (1972), that the counsel guarantee attaches to any criminal case, including misdemeanors, if the person charged with the offense will be incarcerated upon a guilty verdict.

10. *See* 287 U.S. at 69.

11. *Id.* at 72; *accord*, Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

12. Mempa v. Rhay, 389 U.S. 128 (1967) (defendant appeared without appointed counsel for sentencing when sentencing had been delayed by a grant of probation). *See also* cases cited note 14 *infra*.

13. United States v. Wade, 388 U.S. 218, 235-36 (1967); Hamilton v. Alabama, 368 U.S. 52, 54 (1961); *see* cases cited note 12 *supra*.

14. Mempa v. Rhay, 389 U.S. 128 (1967); *see* Escobedo v. Illinois, 378 U.S. 478 (1964); *accord*, Miranda v. Arizona, 384 U.S. 436 (1966) (established due process guidelines for police interrogations; an accused must be advised of his right to counsel and his right to remain silent prior to questioning by police); Massiah v. United States, 377 U.S. 201 (1964) (counsel required at "surreptitious interrogation"; government arranged meeting between accused and government informer).

15. 368 U.S. 52 (1961).

16. *Id.* at 53-54; *accord*, White v. Maryland, 373 U.S. 59 (1963) (defendant pleaded guilty at preliminary hearing, then pleaded not guilty at arraigument; evidence of earlier plea made without assistance of counsel held inadmissable).

17. 388 U.S. 218 (1967).

18. *Id.* at 230-31.

amining the "grave potential" for prejudicial influence inherent in the scientific imprecision of the lineup itself,[19] the Court reasoned that the presence of defense counsel at the lineup not only would deter prejudicial prosecutorial behavior but also would result in a more accurate reconstruction of the lineup at trial, thus assuring a "meaningful confrontation" on the issue of prejudicial lineup practices. The Court therefore concluded that a post-indictment lineup is a "critical stage" at which the sixth amendment right to counsel attaches.[20] In a parallel development, the Court held in *Simmons v. United States*[21] that initial eyewitness identification of a suspect by photographic display is not in and of itself violative of due process.[22] Noting that effective cross-examination could demonstrate to a jury the potential for erroneous photographic identification by a witness, the Court approved initial photographic identification procedures unless they are so suggestive as to involve substantial likelihood of irreparable misidentification.[23] The Burger Court first examined the "critical stage" test in 1972 in *Kirby v. Illinois*[24] and, in the context of preindictment lineups,[25] held that formal commencement of adversarial criminal proceedings is a necessary precondition to the

19. The Court noted that numerous opportunities for subtle suggestion are present, such as placing the suspect in a lineup with persons dissimilar in appearance, dressing only the suspect in clothes similar to those worn by the culprit, and indicating to the witness which member of the lineup is suspected by another witness. *Id.* at 232-33; *see* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26-27 (1965); Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-trial Criminal Identification Methods*, 38 BROOKLYN L. REV. 261, 263-67 (1971).

20. 388 U.S. at 236-37. The Court considered the capacity of the unrepresented accused to provide testimony regarding the lineup and deemed such capacity inadequate for 2 reasons: first, the suspect usually suffers from a lack of training in and sensitivity to suggestive influences, and his tense emotional state precludes accurate observation, *id.* at 230-31; secondly, the suspect's ability to offer useful testimony if he does observe abuse is lessened not only by his subsequent vulnerability to cross-examination and admission of prior conviction records, but also by the probable lack of credence to be given his unsupported version in the face of contrary police testimony. *Id.* at 231.

Two other "lineup" cases were decided the same day: Gilbert v. California, 388 U.S. 263 (1967), which, in applying *Wade* to the states, held that testimony concerning pretrial identification at a lineup where counsel was not present is subject to a *per se* exclusionary rule; and Stovall v. Denno, 388 U.S. 293 (1967), which limited *Wade* and *Gilbert* to prospective application.

21. 390 U.S. 377 (1968).

22. *Id.* at 384.

23. *Id.* Even though *Simmons* was a due process case dealing only with the investigative stage where authorities were trying to expedite the apprehension of the felon, many courts have adopted its standard for the admissibility of any photographic identification. *E.g.*, United States v. Collins, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970).

24. 406 U.S. 682 (1972).

25. *Id.* at 690; *see* note 6 *supra*.

"critical stage" determination.[26] Prior to the instant case, nine of the United States circuit courts of appeal had expressly refused to extend the sixth amendment right to counsel to post-indictment photographic identification sessions,[27] although several state high courts had done so.[28]

In the instant case, the Court first reviewed the early history of the right to counsel[29] and emphasized that such history illustrated a concern primarily for the fair treatment of the accused at trial, where he is confronted with both the complexity of courtroom procedure and the professional advocacy of the prosecutor.[30] The Court then discussed the more recent expansion of the counsel guarantee to certain "critical" pretrial events[31] and noted that each of these events also involves a trial-like confrontation between the accused and the complex procedural system, the expertise of his prosecutorial adversary, or both.[32] Analyzing *Wade* in this context, the Court asserted that the paramount reason for the guarantee of counsel at post-indictment lineups is the attorney's capacity to assist his client in the preservation of his legal defenses, not only by preventing prosecutorial overreaching, but also by providing a method for accurate courtroom reconstruction of the circumstances surrounding the lineup without requiring the accused to testify and thereby to sacrifice his privilege against compulsory self-incrimination.[33] The Court concluded that the test of criticality applied in *Wade* included a mandatory determination that there be a trial-like con-

26. The Court dealt only with the narrow question of what constituted a "stage" in the prosecution and refused to address the broader "criticality" determination upon which *Wade* had largely rested. *Id.* at 696-99 (Brennan, J., dissenting). As the vast majority of lineups are obviously held prior to the initiation of formal adversarial criminal proceedings, the *Kirby* decision represents a significant practical limitation on *Wade*.

27. United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972); United States v. Long, 449 F.2d 288, 301-02 (8th Cir.), *cert. denied*, 405 U.S. 974 (1972); United States v. Serio, 440 F.2d 827, 829-30 (6th Cir. 1971); Allen v. Rhay, 431 F.2d 1160, 1166-67 (9th Cir. 1970); United States v. Ballard, 423 F.2d 127, 130-32 (5th Cir. 1970); United States v. Collins, 416 F.2d 696, 698-700 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970); United States v. Bennet, 409 F.2d 888, 898-900 (2d Cir.), *cert. denied sub nom.* Haywood v. United States, 396 U.S. 852 (1969); United States v. Robinson, 406 F.2d 64, 67 (7th Cir.), *cert. denied*, 395 U.S. 926 (1969); McGee v. United States, 402 F.2d 434, 436 (10th Cir.), *cert. denied*, 394 U.S. 908 (1969).

28. *See, e.g.*, People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738, *cert.denied*, 400 U.S. 919 (1970).

29. 93 S. Ct. at 2572-73.

30. *Id.* at 2573.

31. *See* cases cited notes 12-16, 20 *supra*.

32. 93 S. Ct. at 2574.

33. *Id.* at 2575.

frontation of the accused and the prosecutorial system before the right to counsel would attach.[34] Having thus qualified the holding in *Wade*, the Court turned to the circuit court opinion in the instant case and found the necessary "confrontation" element lacking in photographic identification sessions, held solely for the prosecution's trial preparation, which the accused does not attend.[35] Rejecting the circuit court determination that the inherent dangers of suggestivity automatically render all photographic displays "critical" events, the Court asserted that this approach merely raised without answering the ultimate question whether the trial itself will provide adequate protection of a defendant's rights if the pretrial event is conducted without presence of defense counsel.[36] The Court concluded that the requirement of equal access to witnesses and photographs removes any inequities in the adversarial process itself and thereby satisfies the goal of professional parity implicit in the sixth amendment counsel guarantee.[37] Noting that the ethical responsibility of the public prosecutor is the primary safeguard against the potential for prejudicial prosecutorial behavior inherent in the use of photographic displays, the Court concluded that judicial review under the due process standard as articulated in *Simmons*[38] satisfies all constitutional requirements should that ethical safeguard fail.[39] The Court therefore reversed the circuit court's application of the sixth amendment and remanded the case to the district court for consideration of the due process issue.[40]

Although the instant decision invites the superficial criticism that the Court has retreated somewhat from its earlier position of concern for the protection of defendants' constitutional rights in criminal cases, the paramount significance of the case is its laudable return to a reasonable conception of the proper roles of counsel and court in the preservation of those rights. The seemingly artificial, semantic imposition of the "confrontation" requirement upon the

34. *Id.* at 2576.
35. *Id.* at 2577.
36. *Id.*
37. *Id.* at 2578.
38. *See* notes 21-23 *supra* and accompanying text.
39. 93 S. Ct. at 2579.
40. *Id.* In his dissenting opinion Justice Brennan, author of the *Wade* majority opinion, argued that the scientific imprecision inherent in photographic identifications and the inability to reconstruct the event adequately at trial conclusively established "criticality." Moreover, he found that the absence of the accused from the photographic identification further reduced the likelihood that irregularities in the procedure would ever come to light. *Id.* at 2588.

"critical stage" test actually represents this Court's understandable dissatisfaction with the lawyer-witness role tentatively advanced by *Wade*.[41] The *Wade* majority suggested that lineups might no longer be considered "critical stages" of prosecution if legislative or administrative controls were imposed to alleviate the dangerous potential for suggestivity and misidentification inherent in unregulated encounters.[42] It is thus reasonable to infer that the application of the counsel guarantee in that case was designed as a temporary cure for due process defects in lineup procedure which the Court felt should be remedied on a more permanent basis by legislative or administrative action. The instant Court has properly declined to extend further this approach to due process defects in the criminal justice system. Rather than expanding the function of counsel beyond its traditional and appropriate boundaries, the Court apparently has chosen to face squarely the due process issues raised by photographic identification procedures. As this decision recognizes, the fundamentally adversarial structure of the criminal justice system requires that the counsel guarantee be invoked to preserve parity in the legal contest between the accused and the prosecution. An unfortunate but unavoidable consequence of this parity, however, is that the defense counsel and the prosecutor each possess the independent capacity to mislead or coerce witnesses in the process of preparing for trial.[43] The sixth amendment counsel guarantee, therefore, is not offended by this decision, which merely refuses to require that one party to the contest be allowed to monitor personally the trial preparation of the other. Effective cross-examination within the doctrinal framework of the due process clause remains, except in cases of utterly invidious prosecutorial abuse, as adequate protection of the rights of the accused. The Court properly acknowledges that mere presence of defense counsel at identification sessions would afford no meaningful protection from this latter class of abusive practices, and it further recognizes that reliance on the prosecutor's faithfulness to his ethical responsibility is, realistically, the only available protection from his intentional abuse of power.[44]

41. *See* 77 YALE L.J. 390 (1967). The fundamental nature of the ideological shift in the instant case, and earlier in *Kirby*, is illustrated by the way individual justices voted in *Wade* and in *Ash*. Justice Brennan, who wrote the majority opinion in *Wade*, *see* note 40 *supra*, wrote the dissenting opinion here, joined by Justice Douglas, the only remaining *Wade* majority memher, and by Justice Marshall, a Johnson appointee. The *Ash* majority is comprised of Justices White and Stewart—*Wade* dissenters—and the 4 Nixon appointees to the Court.

42. 388 U.S. at 237.

43. *See* 93 S. Ct. at 2578.

44. *See id.* at 2579.

The instant decision, however, could conceivably lead to the potentially dangerous result that police departments may attempt to circumvent the *Wade* requirements by using photographic displays instead of lineups for all eye-witness identifications.[45] It is arguable that the same characteristics of two-dimensional rigidity which allow suggestiveness and create comparative inaccuracy in the photographic medium[46] also render this type of identification more susceptible than the more fluid lineup to effective regulation. Due to the present lack of thoughtful legislative or administrative regulation of identification procedures, the case-by-case approach adopted in *Simmons*[47] seems inadequate. Since photographic identification procedures are used so frequently by prosecutors, and since such procedures would be quite susceptible to regulation, such a case-by-case approach would unnecessarily deter development of sound due process standards.[48] Instead, courts should follow the *Miranda* model and promulgate guidelines which would ensure both the fairness and accuracy of photographic identification procedures to the greatest possible extent.[49]

45. This would be highly unfortunate, as photographic identifications are certainly less reliable than lineups. *See* materials cited note 47 *infra*. Arguably, an accused is entitled to the most accurate method readily available.

At least one commentator has pointed out that "eyewitness identification is the most unreliable form of evidence and causes more miscarriages of justice than any other method of proof." M. HOUTS, FROM EVIDENCE TO PROOF 10-11 (1956). The issue of identification arises primarily in robbery and rape cases, where there is often little time for the victim to observe the assailant. Often the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experiences that his perception becomes distorted. Other motives, such as the desire to requite a crime, to exact vengeance upon the person believed guilty, or to find a scapegoat, also enter into the identification. E. BORCHARD, CONVICTING THE INNOCENT xiii (1932).

46. *See* notes 19, 20, 23, 40, 45 *supra*. For a discussion of the possibilities for impermissible suggestion in the context of photographic displays see P. WALL, *supra* note 19, at 68-73. For a discussion of the unconscious suggestion that a photographic identification process may have on the accuracy of a subsequent corporeal identification see Williams & Hammelmann, *Identification Parades* (pts. 1 & 2), 1963 CRIM. L. REV. 479, 545; 56 IOWA L. REV. 408 (1970).

47. *See* notes 21-23 *supra* and accompanying text.

48. *See* notes 45, 46 *supra* and accompanying text. *See also* 77 YALE L.J. 390 (1967).

49. *See* note 14 *supra*; notes 45, 46 *supra* and accompanying text. For a comprehensive statutory proposal regulating pretrial identification procedures see Murray, *The Criminal Lineup at Home and Abroad*, 1966 UTAH L. REV. 610. For a more general discussion accompanied by suggested procedural reforms see 69 COLUM. L. REV. 1296 (1969); 56 IOWA L. REV. 408 (1970); 47 NEB. L. REV. 740 (1968). *See also* P. WALL, *supra* note 19, at 68-73.

Labor Law—Strikes—Union Has Implied Obligation Under No-Strike Clause to Use Every Reasonable Means to End Wildcat Strike

Pursuant to section 301 of the Labor-Management Relations Act,[1] plaintiff employers[2] brought an action against defendant local and international unions[3] for damages resulting from "wildcat strikes."[4] Plaintiffs alleged that defendants' failure to use every reasonable means to end the strikes[5] constituted a breach of no-strike provisions[6] in their collective bargaining agreements.[7] Defendants asserted that a provision of the agreement stating that the Union would not be liable for any "unauthorized acts" of members expressly precluded union liability for such unauthorized strikes.[8] The federal district court *held,* judgment for plaintiffs.[9] Implied in the

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1. Labor-Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1970).

2. The instant case is a consolidation of 2 actions: Eazor Express, Inc. v. Teamsters Union (International and Local 249), and Daniels Motor Freight, Inc. v. Teamsters Union (International and Local 377). The facts of the 2 cases are so closely related that all discussion will apply to both cases unless otherwise indicated.

3. The international union denied that it was a party to the contracts in question. The court, however, found that the international was a party through its wholly controlled "National Committee," a signatory to the contracts.

4. The court defined the term "wildcat strike" to mean a strike that is not authorized by union officials, rather than one not authorized by the labor agreements. Eazor Express, Inc. v. Teamsters Union, 357 F. Supp. 158, 161 n.4 (W.D. Pa. 1973). The strikes began when members of Local 377 walked out over discharge of 2 employees by Daniels for refusing work assignments. Local 249 struck both to honor the Local 377 picket line and to demonstrate its own grievances over working conditions at Eazor.

5. The contract between Daniels and Local 377 contained an express provision making it mandatory for the union to ". . . undertake every reasonable means to induce [striking] employees to return to their jobs during any [unauthorized strike]." 357 F. Supp. at 162. Because a similar provision was not included in the contract between Eazor and Local 249, defendants international and Local 249 asserted that they had no liability to Eazor.

6. The National Master Freight Agreement, which was signed by all the parties, contained a no-strike provision as follows: "The Union[s] and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of [a] settlement, as provided for in this Agreement, . . . of any controversy which might arise." *Id.* at 161. Neither of the grievances had been processed through the steps of the grievance machinery at the time of the strikes. *Id.* at 161 n.5.

7. Daniels alleged that the Local 377 strike was authorized by union officials, but the court determined that it was not. *Id.* at 163.

8. The National Master Freight Agreement stated: "Job Stewards and alternates have no authority to take strike action . . . except as authorized by official action of the Local Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts." *Id.* at 162.

9. The nonjury trial was bifurcated and only evidence concerning liability was presented. *Id.* at 161 n.2.

"no-strike" provision of a collective bargaining agreement is a union's obligation to use all reasonable means, both punitive and persuasive, to induce wildcat strikers to return to work. *Eazor Express, Inc. v. Teamsters Union,* 357 F. Supp. 158 (W.D. Pa. 1973).

Traditionally, a labor union's liability for the acts of its members has been restricted to acts authorized or subsequently ratified by union officials.[10] With the passage of the Norris-LaGuardia Act in 1932, Congress established a standard of "clear proof" of union involvement or authorization that must be met before the union will be liable for members' acts.[11] The application of this standard, however, created evidentiary difficulties for an employer damaged by a wildcat strike.[12] Recognizing this difficulty, Congress limited the clear proof standard in the Labor-Management Relations Act (L.M.R.A.).[13] Under the L.M.R.A. a union is liable for the acts of its agents,[14] and in determining the agency relationship, a union's

10. United Constr. Workers v. Haislip Baking Co., 223 F.2d 872 (4th Cir.), *cert. denied,* 350 U.S. 847 (1955); *In re* New York Times Co., 2 App. Div. 2d 31, 152 N.Y.S.2d 884 (1956). *See also* Garmeada Coal Co. v. International Union, UMW, 230 F.2d 945 (6th Cir. 1956); Textile Workers Union v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D.N.C. 1950); General Magnetic Corp. v. United Elec. Workers, Local 937, 328 Mich. 542, 44 N.W.2d 140 (1950). This standard has been applied to criminal as well as civil damage suits. United Bhd. of Carpenters v. United States, 330 U.S. 395 (1947); Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842). *But see* United States v. Railroad Trainmen, 27 L.R.R.M. 2308 (N.D. Ill. 1951). *See generally* M. FORKOSCH, A TREATISE ON LABOR LAW §§ 176-84 (1965).

11. Norris-LaGuardia Act § 6, 29 U.S.C. § 106 (1970). Section 6 of the Act provides: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after knowledge thereof." *Id.* § 6. This standard was applied in numerous civil and criminal cases. *See, e.g.,* Ramsey v. UMW, 401 U.S. 302 (1971); UMW v. Gibbs, 383 U.S. 715 (1966); Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 450 F.2d 271 (2d Cir. 1971). *See generally* Adler, *Section 6 of the Norris-LaGuardia Act: The Chameleons Are Coming,* 24 LAB. L.J. 131 (1973).

12. Inherent in a wildcat strike is the possibility that a union may secretly encourage the illegal activities while publicly urging strikers back to work. Proving such action on the part of the union without an informer is extremely difficult.

13. Labor-Management Relations Act (Taft-Hartley Act) § 301 *et seq.*, 29 U.S.C. § 185 *et seq.* (1970). Section 301(a) of the Act provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States . . . ." *Id.* § 301(a), 29 U.S.C. § 185(a). *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1953); Textile Workers Union v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D.N.C. 1950) (holding that § 301(a) allows federal courts to fashion substantive law from national labor policies). In debate over the bill, Senator Taft, sponsor of the Act, remarked that it was designed to avoid the standard of clear proof announced in United States v. International Bhd. of Carpenters, 330 U.S. 395 (1947). 93 CONG. REC. 7001 (1947).

14. Section 301(b) provides, in part: "Any labor organization which represents employ-

authorization or subsequent ratification of specific acts is not controlling.[15] The L.M.R.A.'s agency test was applied in *United Mine Workers v. Patton,*[16] where the Court of Appeals for the Fourth Circuit held that the absence of formal union approval of a member's acts will not preclude a finding of agency if the union member is acting in his official capacity. In addition to the statutory agency principle, a similar, judicially created doctrine—the "mass action" principle—has given rise to union liability for wildcat strikes. The mass action principle was first applied in *United States v. United Mine Workers,*[17] in which the court held that "as long as a union is functioning as a union it must be responsible for the mass action of its members."[18] The mass action principle recognizes that action on the part of a substantial number of union members is actually union activity, even though it lacks official authorization.[19] Some courts have gone beyond the activity attribution question and have considered whether inactivity of union officials in the face of a wildcat strike creates union liability. Two cases illustrate the divergent positions that courts have taken concerning the union's duty to take positive action to return wildcat strikers to work. In *United Construction Workers v. Haislip,*[20] the Fourth Circuit held that positive action on the part of union officials is not required where the union has neither adopted, encouraged, nor prolonged the strike.[21] The Fifth Circuit, however, in *Vulcan Materials Co. v. United Steelworkers of America*[22] held that the absence of union measures rea-

ees in an industry affecting commerce . . . and any employer whose activities affect commerce . . . sball be bound by the acts of its agents." Labor-Management Relations Act § 301(b), 29 U.S.C. § 185(b) (1970).

15. Section 301(e) provides: "For the purposes of this section, in determining whether any person is acting as an 'agent' of anotber person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." *Id.* § 301(e), 29 U.S.C. § 185(e) (1970).

16. 211 F.2d 742 (4th Cir.), *cert. denied,* 348 U.S. 824 (1954).

17. 77 F. Supp. 563 (D.D.C. 1948), *aff'd,* 177 F.2d 29 (D.C. Cir.), *cert. denied,* 338 U.S. 871 (1949).

18. 77 F. Supp. at 566. *See also* Vulcan Materials Co. v. United Steelworkers of America, 430 F.2d 446 (5th Cir. 1970), *cert. denied,* 401 U.S. 963 (1971); Colt's, Inc. v. Amalgamated Local 376, 314 F. Supp. 578 (D. Conn. 1970); United States v. International Union, UMW, 89 F. Supp. 179 (D.D.C. 1950).

19. This situation must be distinguished from an unauthorized strike involving only a few union employees. Only when all of the union employees engage in a wildcat strike are they to be considered a union entity.

20. 223 F.2d 872 (4th Cir.), *cert. denied,* 350 U.S. 847 (1955).

21. *Id.* at 877.

22. 430 F.2d 446 (5th Cir. 1970), *cert. denied,* 401 U.S. 963 (1971) (secondary boycott, workers refused to cross picket lines).

sonably calculated to return strikers to work indicates union acquiescence or sanction of an illegal activity.[23] None of the cases that have considered this duty of positive action have faced the question of a union's duty where its collective bargaining agreement contains a provision precluding liability for the unauthorized acts of members.

In the instant case, the court declined to apply the mass action principle to find liability, reasoning that, in light of the specific contract provision denying union liability for unauthorized acts, its application would rewrite the contract for the parties. Rather, the court implied from a no-strike provision an affirmative duty on the part of a union to undertake all reasonable means to induce wildcat strikers to return to work. The court found that the implied obligation was so clearly within the contemplation of the parties that they deemed its expression unnecessary.[24] Furthermore, the court noted that in a collective bargaining agreement the employer deals with his employees collectively in exchange for the assurance of uninterrupted operation during the term of the agreement.[25] This agreement is meaningless if the union is able to publicly disavow the strike while privately supporting the strikers. Moreover, the court emphasized the reasonableness of measures designed to induce strikers to return to work because the benefits obtained through collective bargaining inure directly to the union members. The court also stated that the emphasis of federal labor law policy upon peaceful arbitration[26] is consistent with the union's implied obligation. Applying the union's affirmative duty to the facts of the case, the court held that reasonable means included exercise of the union's

23. A similar rationale was advanced in United States v. Railroad Trainmen, 27 L.R.R.M. 2308 (N.D. Ill. 1951) (criminal liability for contempt). The court also utilized the mass action principle.

24. The court quoted from an earlier decision that had set out the principles that control the interpretation of collective bargaining agreements. 357 F. Supp. at 164; *see* Kellogg Co. v. NLRB, 457 F.2d 519, 524 (6th Cir. 1972), *quoting*, Refinery Employees' Union v. Continental Oil Co., 160 F. Supp. 723, 731 (W.D. La. 1958).

25. "[T]he cbief advantage which an employer can reasonably expect from a collective [bargaining] agreement is assurance of uninterrupted operation during the term of the agreement." S. Rep. No. 105, 80th Cong., 1st Sess. at 16 (1947). Thirty-two % of the collective bargaining contracts in the United States today that contain no-strike provisions also contain provisions limiting union liability, but in all but 2% of these the union is required to take positive action in order to avoid liability. Eighty-seven% of such clauses require the union to order a resumption of work and 53% require a public disavowal of the stoppage. 2 COLL. BARG. NEG. & CONTR. 77:1-2 (1971). For illustrative contract provisions see *id.* at 77:151-54 (1972).

26. *See* Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1953).

powers to fine, lift the books of members,[27] or place locals in trusteeship, and that the failure to do so constituted a breach of the implied obligation.

A practical effect of the instant decision may well be the general inclusion of provisions in collective bargaining agreements that provide for a union's affirmative duty to use all reasonable means to end wildcat strikes. The parties to the contract may also specify, more completely, the means to be undertaken.[28] More significantly, perhaps, by requiring exercise of the union's power to levy fines and threaten suspension of striking members the instant decision will lessen a union's ability to encourage secretly a wildcat strike while publicly urging members back to work. This affirmative duty, however, may cause serious difficulties within a union itself. A wildcat strike supported by a substantial portion of a local's membership might create an internal power struggle that would be accentuated by the union's duty of affirmative action. Therefore, it may be questioned whether sound public policy dictates such intrusion into a union's internal affairs.[29] Despite this problem, however, the practical effect of the instant decision is grounded in sound federal labor policy. Certainly, the employer who bargains in good faith should have a remedy against the dangers of a wildcat strike.[30] Since individual union members are not liable,[31] it is logical that the union officials should be held responsible for exercising all reasonable means to end the strike. Moreover, the means suggested by the court are well within the powers of the union and should prove effective to enforce the no-strike contract provisions. This union responsibility necessarily will encourage the peaceful arbitration of labor disputes, and consequently, employers will have more incentive to enter into collective bargaining negotiation. Nevertheless, the court could have reached its result by more analytically sound means. The court implied a duty of affirmative action despite a specific contract provision denying liability for unauthorized acts. These seemingly opposite provisions were reconciled on the theory

27. Lifting the books of union members insures that they will not be employed at other union plants during the strike.

28. *See, e.g.,* 2 COLL. BARG. NEG. & CONTR. 77:151-54 (1972).

29. *See* Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act,* 52 CORNELL L. REV. 672, 701-02 (1967).

30. The possibility of injunctive relief was recognized hy the Supreme Court in Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235, 248-49 (1970). This possibility was not discussed in the instant case, although in most situations it would prove to be a major solution to the problem of a wildcat strike.

31. Sinclair Oil Corp. v. Oil Workers Union, 452 F.2d 49 (7th Cir. 1971).

that the implied obligation was so clearly within the contemplation of the parties that they deemed its expression unnecessary.[32] The court apparently did not consider the possibility that this duty was intentionally omitted in order to give exclusive effect to the provision limiting liability for unauthorized acts. Had the court recognized this possibility, it could have reached a similar and more logical result by utilizing the mass action principle. Under this theory, the striking members are considered agents of the union unless the union takes reasonable measures to induce them to return to work. If such measures are taken, the agency relationship is terminated. Such a theory would also operate directly within sections 301(a) and 301(e) of the L.M.R.A.[33] Because under these sections authorization and subsequent ratification do not control the determination of the agency relationship, the expansion of the mass action principle would create a workable standard of agency within the collective bargaining setting. Moreover, it is readily seen that the mass action principle is particularly applicable to wildcat strikes. The striking workers are not individuals who, by chance, choose to protest their grievances simultaneously in a work stoppage. Rather, they are a group banded together to attain their goals *collectively* through the strike. Since their only *acknowledged* collective bargaining agent is the union, it is entirely reasonable that the union be compelled to disassociate itself from the strike in order to negate its agency relationship.[34] Thus, this proposed theory—expansion of the mass action principle to a workable standard of agency—would produce the same result as that of the instant court and would have greater analytical consistency with existing labor law. Because the persuasiveness of a district court decision lies in the strength of its reasoning, the instant court would have established a more viable precedent if it had utilized the existent provisions of the L.M.R.A. and the mass action doctrine.

32. 357 F. Supp. 158, 164 (W.D. Pa. 1973).

33. Labor-Management Relations Act §§ 301(a), (e), 29 U.S.C. §§ 185(a), (e) (1970). The reasoning is as follows: (1) a union is responsible for the acts of its agents (§ 301(b)); (2) authorization on the part of the union is not controlling as to agency (§ 301(e)); (3) agency, and therefore union liability, can be found unless the union takes all reasonable means to stop the strike (§ 301(a)).

34. *But see* Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act,* 52 CORNELL L. REV. 672, 700-02 (1967).

Securities Regulation—Inside Information—Tippees Accountable at Common Law to Corporation for Profits Gained by Use of Inside Information

Plaintiffs, corporate stockholders of Lum's, Inc.,[1] brought a derivative action against an investment firm,[2] its stockbroker,[3] and two mutual funds,[4] claiming profits that defendant mutual funds had realized upon their timely sale of stock in the corporation before the stock declined in price. Defendants had made the sale after receiving confidential information in the form of a "tip"[5] by the corporation's president.[6] Although the corporation suffered no alleged specific damages from the sale,[7] plaintiffs contended that defendant's use of confidential information received while engaged in a common enterprise with an insider violated a state common law fiduciary duty[8] owed to the corporation. Defendants did not deny that they had been engaged in a joint enterprise with the corporation's president to misuse corporate property, but they argued that

1. Plaintiffs were stockholders in Lum's, Inc., a Florida corporation primarily engaged in restaurant franchising.

2. Defendant Lehman Brothers is a partnership engaged in stock brokerage and investment counseling.

3. Defendant Simon was employed in Chicago by Lehman Brothers.

4. Defendants Investors Variable Payment Fund, Inc. and IDS New Dimensions Fund, Inc. are mutual funds whose stock portfolios are managed by employees of Investors Diversified Services, Inc., a Minnesota corporation licensed to do business in New York, which had been joined originally as a defendant at the trial court level. Plaintiffs also had joined as defendants Chasen, Lum's president, and Sit and Jundt, the managers of the 2 mutual funds. These individual defendants were dismissed by the trial court because of invalid service of process under the New York State Long Arm Statute. Gildenhorn v. Lum's, Inc., 335 F. Supp. 329, 334-35 (S.D.N.Y. 1971).

5. When corporate insiders—officers, directors, and persons holding substantial proportions of shares—improperly disclose confidential information to outsiders, they are "tipping." The recipients are "tippees." *See* Ross v. Licht, 263 F. Supp. 395, 410 (S.D.N.Y. 1967).

6. In November 1969, Chasen publicly announced prospective fiscal year earnings of approximately $1.00 per share. When he learned in January, 1970, that earnings would be only $0.76 per share, he telephoned the news, prior to its public disclosure, to defendant Simon, who then relayed it to defendant mutual funds' managers. Knowing that the information was confidential corporate property, defendant mutual funds avoided a loss by selling 83,000 shares of Lum's at $17.50 per share, only 4 hours before public disclosure of the earnings decline. Three days later, when trading in Lum's resumed, the stock closed at $14.00 per share.

7. The complaint contained a general allegation of damages.

8. *See* 1970 WIS. L. REV. 576, 579-83 (duty not to use inside information for personal gain). *See generally* Conant, *Duties of Disclosure of Corporate Insiders Who Purchase Shares,* 46 CORNELL L.Q. 53 (1961).

because they were not insiders[9] they had breached no fiduciary duty. The federal district court[10] accepted defendants' assertion[11] and dismissed the case for failure to state a cause of action.[12] On appeal to the Second Circuit Court of Appeals, *held,* reversed. Tippees who are not corporate officers or directors are nevertheless accountable at common law to the corporation for profits realized by the use of inside information received from a corporate official. *Schein v. Chasen,* 478 F.2d 817 (2d Cir.), *cert. granted sub nom. Lehman Bros. v. Schein,* 42 U.S.L.W. 3325 (U.S. Dec. 4, 1973) (No. 439).

There has been no previous recognition at common law of any duty on the part of tippees to account to stockholders for profits made through the use of inside information.[13] On the ground that nondisclosure breached a fiduciary duty owed to the owners of the corporation,[14] a few cases representing a minority common law view have held *insiders* liable to stockholders when the former purchased stock directly from the stockholders without divulging information affecting stock prices. In *Oliver v. Oliver,*[15] the Georgia Supreme Court characterized confidential information as a corporate asset[16] and held that the fiduciary duty to shareholders includes holding this asset in trust for their benefit. Reasoning that insiders must forego personal benefit from this asset, the court rescinded a director's purchase of stock from his corporation's stockholders when

9. On appeal, defendants Lehman Brothers and Simon further argued that they should not be held liable for the profits made by the mutual funds because they had not profited personally.

10. Plaintiffs invoked the diversity jurisdiction of the court.

11. Since Lum's was incorporated in Florida, the district court reasoned that Florida had the strongest interest in settling the suit. It therefore applied Florida law, which recognizes no duty under these facts. Gildenhorn v. Lum's, Inc., 335 F. Supp. 329, 332-33 (S.D.N.Y. 1971).

12. *See* FED. R. CIV. P. 12(b)(6).

13. *Cf.* 3 L. LOSS, SECURITIES REGULATION 1450-51 (2d ed. 1961); Comment, *Securities Fraud: Caveat Tippee—The Creation and Development of a Doctrine,* 33 U. PITT. L. REV. 79, 81 (1972).

14. *See, e.g.,* Jacquith v. Mason, 99 Neb. 509, 156 N.W. 1041 (1916) (director is trustee for stockholders); Dawson v. National Life Ins. Co., 176 Iowa 362, 157 N.W. 929 (1916) (withholding knowledge that stock was worth much more than hook value). *See also* Conant, *supra* note 8, at 59-60. The majority view, which did not even recognize this duty, was based on reasoning that insiders are not dealing with the corpora of their trusts when purchasing shares from shareholders, that corporations have no interest in outstanding shares, and that mere superior knowledge or insider-stockholder relations are not enough to raise fiduciary relationships. *Id.* at 54-58.

15. 118 Ga. 362, 45 S.E. 232 (1903).

16. For a discussion of the relationship between insiders' fiduciary duties and their use of corporate assets see 1970 WIS. L. REV. 576.

inside information had indicated to the director that the stock price was likely to rise.[17] A few state courts followed *Oliver*,[18] and the Supreme Court adopted a similar rule,[19] but these cases laid no basis for imposing parallel fiduciary duties on tippees; none developed the *Oliver* implication that misuse of inside information is *per se* a breach of fiduciary duty.[20] Moreover, they even failed to create effective remedies against insiders' abuses of undisclosed knowledge, and because no cases extended insiders' fiduciary duties to the corporate entity, shareholders could sue derivatively[21] only when the corporation was harmed by the insiders.[22] Thus, insiders could use confidential information for their personal benefit if they bought or sold securities as individuals. Such transactions not only created unfair securities markets but also allowed insiders to escape accounting to shareholders for misuse of confidential information.[23] In an attempt to remedy these problems, Congress enacted the Securities Exchange Act of 1934,[24] which not only protects stockholders in securities trading[25] but also has been held to reach tippees in certain instances.[26] Section 16(b) of the Act makes insiders' short-swing

17. Only the director knew of a pending profitable sale of the company's oil plant. Stock prices jumped from $100 before the sale to $185 afterwards. *See* Conant, *supra* note 8, at 59.

18. *See, e.g.,* Hotchkiss v. Fischer, 136 Kan. 530, 16 P.2d 531 (1932) (director who bought stockholder's shares without divulging pending dividend violated fiduciary duty).

19. *See* Strong v. Repide, 213 U.S. 419 (1909) (special facts create fiduciary duty; director owned ¾ of stock, had broad powers to administer company, and alone negotiated profitable sale of assets).

20. *Cf.* Comment, *A Comparison of Insider Liability Under Diamond v. Oreamuno and Federal Securities Law,* 11 B.C. IND. & COM. L. REV. 499, 502-04 (1970). Most of these cases were based on common-law active fraud perpetrated on the shareholders as individuals, and elements of the common-law action carried over to securities trading regulation. *See* List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir.), *cert. denied,* 382 U.S. 811 (1965) (elements of reliance and materiality required; individual must have acted on misrepresentation a reasonable man would have followed); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 353 F. Supp. 264, 270 (S.D.N.Y. 1972) (misrepresentation, materiality, scienter, privity, reliance, and causation required); 3 L. LOSS, SECURITIES REGULATION 1430-48 (2d ed. 1961); *The Prospects for Rule X-10b-5: An Emerging Remedy for Defrauded Investors,* 59 YALE L.J. 1120, 1123-26 (1950). Thus, shareholders had difficulty in proving common law fraud. 45 NOTRE DAME LAW. 314, 315 (1970).

21. Conant, *supra* note 8, at 64.

22. *See, e.g.,* Comment, *supra* note 20, at 502-03. New York courts allowed derivative actions against directors only when the latter usurped corporate opportunities, competed with the corporation, mismanaged assets, or otherwise directly injured the corporation. *Id.*

23. *See, e.g.,* Seitz v. Frey, 152 Minn. 170, 188 N.W. 266 (1922) (no fiduciary relation or duty of disclosure); Conant, *supra* note 8, at 64; 45 NOTRE DAME LAW. 314 (1970).

24. 15 U.S.C. §§ 78a-78hh-1 (1970).

25. The purpose of the Act is to insure honest securities markets by giving all investors equal access to information and preventing unfair advantage from inside information. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969).

26. *See* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

profits from trading in the company's stock payable to the corporation;[27] section 10(b)[28] and ensuing Securities Exchange Commission Rule 10b-5[29] forbid any person to defraud any other person through the use of inside information in securities trading. Explicit statutory limitations on the reach of section 16(b) have precluded its application by shareholders to recover profits from tippees,[30] but federal courts and the Securities Exchange Commission (SEC), in certain factual situations, have extended liability under Rule 10b-5 to outsiders who collaborate in deceitful use of confidential information.[31]

27. Section 16(b), entitled "Directors, officers, and principal stockholders," provides in pertinent part:

> For the purpose of preventing the unfair use of information which may have been obtained by [a] beneficial owner [of more than 10 per cent of the corporation's stock], director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer . . . . Suit to recover such profit may be instituted . . . by the owner of any security of the issuer in the name and in behalf of the issuer . . . .

Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970).

28. *Id.* § 10(b), 15 U.S.C. § 78j (1970).

29. Entitled "Employment of manipulative and deceptive devices," the Rule states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interestate [sic] commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1973).

30. To its drafters, § 16(b) was simply an application of a settled agency principle: an agent who profits from information concerning the affairs of his principal owes those profits to the principal. *Hearings on H.R. 7852 and H.R. 8720 Before House Comm. on Interstate and Foreign Commerce,* 73d Cong., 2d Sess. 133 (1934); *see* 2 L. Loss, Securities Regulation 1123 (2d ed. 1961). Nevertheless, it applies not to tippees, but only to traditional insiders—directors, officers, and principal stockholders—who complete their sale or purchase transaction within 6 months. Thus, it has not pre-empted a common-law remedy based on insiders' fiduciary duties. Conant, *supra* note 8, at 68-69; Comment, *supra* note 20, at 507-10; 45 Notre Dame Law. 314, 316 (1970). These limitations have been strictly followed. *See, e.g.,* Levy v. Seaton, 358 F. Supp. 1 (S.D.N.Y. 1973) (vice president's purchase and sale 3 months after resignation not within § 16(b)); Rattner v. Lehman, 193 F.2d 564 (2d Cir. 1952) (alleged tippees, partners of corporate director, not within § 16(b)).

31. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848, 852-53 (2d Cir. 1968) (rule applies to anyone taking advantage of inside information; employee held liable as tipper for violation); Ross v. Licht, 263 F. Supp. 395, 410 (S.D.N.Y. 1967) (dicta: tippees subject to same duty as insiders); Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961) (broker-dealer, when informed by director of corporation of dividend cut, liable for selling short on stock of corporation before news made public); 40 Fordham L. Rev. 985 (1972) (focuses on development of tippee liability).

Investors Management Co.[32] imputed insiders' duties to tippees who had reason to know that material,[33] nonpublic information received by them was divulged improperly by a corporate source. Censuring the tippees, the SEC ruled that sales prompted by the information violated Rule 10b-5.[34] Despite this broad application of the Rule, shareholders have not been able to recover tainted profits when neither they nor the corporation suffer harm by purchasing from or selling to possessors of inside information.[35] Courts therefore have been forced to turn to common law theories when neither section 16(b) nor Rule 10b-5 applies. In *Brophy v. Cities Service Co.,*[36] an employee profited from knowing that his corporate employer secretly intended to force the price of its stock up by purchasing large blocks of shares. Requiring no harm to the corporation, the Delaware court held that the employee must account to the shareholders as a constructive trustee of the profits and stated that acquisition of the information clothed him with a fiduciary duty not to misuse it.[37] *Brophy* only implied that it was an agency relationship that

32. [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,832, at 83,939-40 (SEC 1970).

33. SEC v. Texas Gulf Sulphur Co. solidified the requirement that the information be material; i.e., if a reasonable man would give it importance in deciding whether to buy or sell securities, the holder of the information must disclose it or abstain from dealing in it. 401 F.2d 833, 849 (2d Cir. 1968).

34. Pursuant to the case, the SEC ruled that tippee liability depended on 3 elements: "that the information in question be material and non-public; that the tippee, whether he receives the information directly or indirectly, know or have reason to know that it was non-public and had been obtained improperly by selective revelation or otherwise; and that the information be a factor in his decision to effect the transaction." Thus, one gains a relationship and ensuing duty to the corporation simply by receiving inside information about whose disclosure he should be on guard. Investors Management Co., SEC Securities Exchange Act Release No. 9267, [1970-1971 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,163, at 80,519-20 (1971).

35. Under Rule 10b-5, the fraud must be "in connection with a purchase or sale." *See* note 29 *supra*. Relying on this language, *Birnbaum v. Newport Steel Corp.* held that Rule 10b-5 had "no relation to breaches of fiduciary duty by corporate insiders resulting in fraud upon those who were not purchasers or sellers." 193 F.2d 461, 463 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). Subsequent cases, however, have weakened this rule. *See, e.g.*, Superintendent of Ins. v. Banker's Life & Cas. Co., 404 U.S. 6 (1971) (shareholders allowed to sue under Rule 10b-5 when fraud only "touched" a purchase or sale). *See generally* Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5,* 54 VA. L. REV. 268 (1968). Nevertheless, courts continue to require some connection. *See* Feldman v. Hanley, BNA 200 SEC. REG. & L. REP. A-13 (S.D.N.Y. Apr. 25, 1973) (shareholder status alone does not confer standing to recover loss when induced to hold shares by fraudulent financial statements).

36. 31 Del. Ch. 241, 70 A.2d 5 (1949).

37. *Id.* at 246, 70 A.2d at 8. Section 16(b) did not apply to *Brophy* because the employee was not a traditional insider; Rule 10b-5 probably did not apply because, although the corporation planned to buy stock, it did not buy from him.

created the duty not to profit from inside information,[38] but in *Diamond v. Oreamuno,*[39] the New York Court of Appeals held corporate officers and directors accountable for profits on express agency theory. In *Diamond,* officers and directors of a corporation learned through inside information that net earnings had declined significantly for the year and sold their stock before the information was made public. The New York court held that officers and directors are agents of their corporations and thus hold property of the corporate principal in trust for its benefit. Since inside information is corporate property, insiders must therefore eschew both personal benefit and harm to the corporation from its use.[40] Inferring that improper disclosure could damage the reputation and the market for securities of the corporation,[41] the court concluded that insiders who misused the information were constructive trustees of their profits for the shareholders.[42] Agency law also imposes a status of constructive trustee on persons who intentionally aid an agent in violating his duty to his principal.[43] A few courts have developed a parallel theory, based on common law fiduciary duties, that liability will extend to all participants in a common enterprise that violates

38. By reasoning that the employee had a position of trust and confidence toward his employer's business, the court put him in the same position as an agent. *See* RESTATEMENT (SECOND) OF AGENCY § 388, comment c at 205 (1958).

39. 29 App. Div. 2d 285, 287 N.Y.S.2d 300 (1968), *aff'd,* 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969).

40. Comment c to § 388, RESTATEMENT (SECOND) OF AGENCY, provides:

> An agent who acquires confidential information in the course of his employment or in violation of his duties has a duty not to use it to the disadvantage of the principal. . . . He also has a duty to account for any profits made by the use of such information, although this does not harm the principal. . . . So, if he has 'inside' information that the corporation is about to purchase or sell securities, or to declare or to pass a dividend, profits made by him in stock transactions undertaken because of his knowledge are held in constructive trust for the principal.

41. The court reasoned that revelation of improper conduct clouded the image of probity in management, therefore undermining the public confidence in its securities and injuring shareholder relations. 24 N.Y.2d at 499, 248 N.E.2d at 912-13, 301 N.Y.S.2d at 81-82.

42. Section 16(b) did not apply to *Diamond* defendants because they had not bought and sold within 6 months; Rule 10b-5 did not apply because neither plaintiffs nor the corporation purchased any stock. Moreover, tippee liability was not at issue in the case, and the court dismissed directors not directly implicated. 29 App. Div. 2d at 286 & n.1, 290, 287 N.Y.S.2d at 301-02 & n.1, 305.

43. "A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal." RESTATEMENT (SECOND) OF AGENCY § 312 (1958). A comment to this section states: "A person who, with notice that an agent is thereby violating his duty to his principal, receives confidential information from the agent, may be enjoined from disclosing it and required to hold profits received by its use as a constructive trustee." *Id.,* comment c at 51-52.

one participant's fiduciary duties.[44] Combining these agency principles with the *Diamond* reasoning seems to produce a workable theory upon which shareholders could recover profits from tippees; nevertheless, since both *Diamond* and *Brophy* defendants had close relationships to the corporations whose securities were being traded, no court previous to the instant case had taken that extra step.[45]

Noting that plaintiffs probably could not prevail under federal securities law,[46] the instant court, because it was sitting in diversity jurisdiction, looked to the applicable state law of Florida.[47] Finding that the Florida Supreme Court never had faced the precise issues present in this action, the court found it proper to look to the law of other jurisdictions and particularly to that of New York. Recognizing that the New York *Diamond* case was relevant to the issue in the instant case, the court stated its further objective of interpreting *Diamond* as the Florida court probably would. First, the majority reasoned that nothing in *Diamond* suggests that defendants in the instant case did not have the same liabilities as the president of Lum's, because as long as an insider is engaged with outsiders in a common enterprise to disclose information, revelation of such insider participation tarnishes the prestige and good will of the corporation,[48] even though the information-prompted stock sales are made by tippees rather than by the insider; thus, defendants aided an agent in violating his duty to his corporate principal. Secondly, the majority asserted that upon receiving the tip, defendants automatically assumed a position of trust for the corporation and held their profits as constructive trustees. Buttressing legal authority with policies of securities regulation, the court pointed out reasons for extension of the *Diamond* holding to tippees. First, it determined that outsider liability would discourage insiders from evading the

44. *See, e.g.*, Oil & Gas Ventures—First 1958 Fund, Ltd. v. Kung, 250 F. Supp. 744, 749 (S.D.N.Y. 1966) ("[O]ne who knowingly participates in or joins in an enterprise whereby a violation of a fiduciary obligation is effected is liable jointly and severally with the recreant fiduciary."); *accord*, Bankers Life & Cas. Co. v. Kirtley, 338 F.2d 1006, 1013 (8th Cir. 1964); Quinn v. Phipps, 93 Fla. 805, 807-12, 113 So. 419, 420-21 (1927) (broad fiduciary relation that embraces both technical fiduciaries and informal relations concerning trust).

45. *Cf.* 40 FORDHAM L. REV. 985, 991 (1972).

46. Section 16(b) and Rule 10b-5 did not apply because defendants were not traditional insiders and neither plaintiffs nor the corporation had made the requisite purchase or sale. *See* notes 30 & 35 *supra* and accompanying text.

47. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

48. Even though both *Brophy* and *Diamond* stated that harm need not be alleged in these suits, the instant court accepted the *Diamond* theory of inferred harm. Moreover, it held that denials of personal benefit by some shareholders were irrelevant because they had joined the common enterprise. *See* note 9 *supra*.

Diamond rule and preserving unfair advantages by giving information to outsider traders. Secondly, the court noted that although tippees have been liable under parallel federal securities statutes designed to prevent unfair trading advantages, judicial construction of these statutes leaves tippees who misuse confidential information with an escape from liability in certain instances, unless common law corporate fiduciary duties are applied.[49] Thirdly, the court decided that plaintiffs, suing on behalf of their corporation, had a higher claim in equity to the profits than did defendants. The court noted finally that the *Diamond* court could have insulated tippees against their collaborators' fiduciary duties, but failed to do so.[50] Therefore, it concluded that defendants must turn over their profits to the corporation. Although agreeing with the objective of honesty in securities markets, Judge Kaufman dissented[51] vigorously against tippee liability as a means to achieve the objective in the instant case. The dissent argued that *Diamond,* which imposed liability only on directors and officers, is inapplicable because there is no relation in the instant case between defendants and the corporation;[52] moreover, he found that neither agency law nor a common enterprise theory extended liability to defendants because they did not actively or intentionally help the president violate his duty not to misuse the information.[53] Finally, in noting ample remedies under federal securities statutes to punish conduct like that in the present case,[54] the dissent suggested that federal, not state, courts have expanded tippee liability and that the instant court should be applying Florida law.[55]

By deterring corporate insiders' collaboration with tippees to misuse confidential information, the synthesis provided in the present case not only reaches conduct beyond the purview of the federal

49. *See* material cited notes 30 & 35 *supra.*

50. The court not only overruled the district court's dismissal of defendants who only "acquiesced" in the wrong but also distinguished a similar action in *Diamond* because the dismissed defendants there were not actively engaged in a joint venture. 478 F.2d 817, 822 n.6 (1973).

51. *Id.* at 825 (Kaufman, J., dissenting).

52. Since no specific damages were suffered, Judge Kaufman claimed that the court should have required a relationship between defendants and the corporation.

53. *See* note 43 *supra.* Judge Kaufman, who considered the distinction between acquiescence and active aid in violation of fiduciary duties controlling, found that defendants were not active participants since they had not planned to misuse or solicited the information. 478 F.2d 817, 827 n.3.

54. *But see* note 46 *supra.*

55. Unlike the majority, Judge Kaufman would look only to Florida decisions, which had no correlate to *Diamond.* 478 F.2d at 828.

securities laws but also furthers those laws' purposes of protecting investors and insuring a fair securities market.[56] It also accords with the trend in federal cases toward liability of tippees, some of whom may affect the market more than traditional insiders by virtue of having more money and investment sophistication.[57] Moreover, the instant ruling was necessary; the cases suggest that Rule 10b-5 may never be extended to situations like the present one because there is still a requirement in suits for damages that the plaintiff or the corporation on whose behalf he is suing[58] be a purchaser or seller. In comparison, the present common law theory accords with a settled agency rule that can be applied effectively.[59] Unfortunately, however, the instant case inadequately defined the breadth of that theory. First, *Diamond,* on which the court placed heavy reliance, can easily be distinguished—it involved no tippees. Thus the instant court is probably going much farther in extending tippee liability than would most courts that looked to *Diamond* as a precedent for such an extension. In the future, courts may therefore refuse to follow the instant case. Secondly, the court left unanswered questions of multiple liability. If either stockholders or the corporation has purchased or sold securities in connection with fraudulent misconduct, and if the instant case as well as Rule 10b-5 applies, tippees could face double counts of misconduct.[60] Even if stockholders do not purchase any securities from dishonest tippees, they may sue under the common law theory, while identifiable purchasers sue under Rule 10b-5.[61] Moreover, when either the stockholders or the corporation has purchased, recovery from tippees is available under both Rule 10b-5 and the *Schein* theory,[62] despite the 1934 Act's

56. *See* 45 NOTRE DAME LAW. 314, 316-17 (1970).

57. *Cf.* 119 U. PA. L. REV. 502, 508-10 (1971).

58. *See, e.g.,* Schoenbaum v. Firstbrook, 405 F.2d 200, *rev'd on rehearing en banc,* 405 F.2d 215 (2d Cir. 1968), *cert. denied,* 395 U.S. 906 (1969) (plaintiff sued derivatively on behalf of the corporation, which was a purchaser). *See also* note 35 *supra.*

59. *See* note 43 *supra.* The dissent's statement that the agency rule is inapplicable because defendants were not actively involved lacks merit; they did not deny active participation.

60. *See* notes 61-62 *infra* and accompanying text.

61. 45 NOTRE DAME LAW. 314, 322-23 (1970). For the applicable rules, see notes 29 & 43 *supra.* Although the instant court reasoned that defendants could escape multiple liability by baving any state court judgment amount paid into court escrow subject to claims of actual defrauded purchasers, *see* SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971), there is no reason to assume tbat tbis would preclude the purchasers from suing in federal court on a different claim.

62. Although Rule 10b-5 does not provide standing for private shareholders to sue under it, courts have consistently allowed them to do so. *See, e.g.,* Superintendent of Ins. v. Banker's Life & Cas. Co., 404 U.S. 6 (1971); 45 NOTRE DAME LAW. 314, 317 (1970). *But see*

efforts to limit recovery to no more than actual damages.[63] If the primary purpose of the remedies is to reimburse investors, these multiple remedies may be desirable; if it is primarily to insure fair markets, one punishment of the dishonest party may be enough. This priority should be determined. Thirdly, the uncertainty of multiple recovery is matched by uncertainty as to who may now be a liable tippee. The court did not explicitly distinguish between the casual tippee and the institutional investor whose primary job is to gather investment information and whose fear of liability could hinder its function, thus damaging the securities market more than the use of inside information.[64] The facts in the present case clearly would encompass institutional investors and would not exemplify casual slips that divulge information, but the court could have added certainty by specifying as much. The instant court was not examining cases under the federal securities statutes;[65] however, it might have clarified the decision's breadth by applying the criteria for tippee liability pronounced in *Investors Management.*[66] These criteria are well-defined and reasonably suited to common law theory. Instead, the court relied heavily on the common enterprise theory in order to find a relationship between defendants and the corporation and noted no definite tests of that theory's applicability.[67] The illustration of a potent agency theory in *Diamond* and the reasoning of the courts in *Oliver, Brophy,* and *Investors*—that receiving the information while knowing of impropriety is more important in attributing fiduciary duties to the recipients than the relationship that gives them access to the information—suggest a less strained and more definite test of common law tippee liability. Such

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Comment, *supra* note 20, at 511-12 (proper plaintiffs under Rule 10b-5 are purchasers, because the purpose of the Rule is to prevent general fraud in the securities market).

63. Section 28 of the 1934 Act provides:

> The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover . . . a total amount in excess of his actual damages . . . . Nothing in this chapter shall affect the jurisdiction of . . . any State . . . insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

Securities Exchange Act of 1934 § 28, 15 U.S.C. § 78bb(a) (1970). The clause saving all other remedies has heen viewed as allowing double recovery in spite of the damages limitation. 45 NOTRE DAME LAW. 314, 332 (1970).

64. 119 U. PA. L. REV. 502, 508-10 (1971).

65. Since the court was sitting in diversity jurisdiction and applying state law, it did not examine *Investors* and similar cases.

66. *See* note 34 *supra*.

67. *See* cases cited note 44 *supra* and accompanying text.

a test would be whether, after having met the *Investors* criteria, one can be said to have (1) personally benefited from *intentionally* assisting an insider in violating his duty as an agent to the corporation and (2) converted a corporate asset, the confidential information. This test would likely apply to the present defendants, and hopefully it would be specific enough to prevent an overly broad interpretation of the instant ruling. It is noteworthy that in a bill presented to Parliament, the Department of Trade and Industry of Great Britain has aimed at prohibiting misuse of inside information not only by restricting trading of directors, employees, major shareholders, professional advisers, and the near relations of each, but also by defining insider dealing broadly enough to imply that tippees could be included.[68] This implication, the inclusion of employees, advisers, and their relations in the bill, and the potential overbreadth of decisions such as the instant case that attempt to fill gaps in our own securities laws, all point to the need for revision of Rule 10b-5 or amendment of section 16(b) to place liability on others than traditional insiders. An amendment could contain concrete criteria that clearly determine the extent of the prohibition on misuse of inside information. For example, section 16(b) might be amended to allow shareholders to recover profits from institutional investors who complete a purchase-sale or sale-purchase transaction within six months of receiving material, confidential information whose disclosure they knew was improper.[69] The possible overbreadth of the present case and the British attempt at securities regulation indicate that changes in federal securities law would be a more prudent solution than attempts to develop a lasting common law theory based on the instant precedent.

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68. It is important to avoid an unfairly onerous restriction on normal transactions by people who have no direct relationship with the company or its officers. The definition [of insider[should, in the Government's view, include directors, employees, major shareholders and professional advisers of a company, together with the near relations of each of these people. Secondly, there is the question whether an offence is committed by an insider only when he deals with the guilty intent of profiting from inside information, or simply when he deals having price-sensitive inside information at the same time. The Government's view is that dealing in a company's securities by anyone who, by reason of his relationship with the company or with its officers, has information which he knows to be price-sensitive, should be a criminal offence unless he can show that his primary intention . . . was not to make a profit or avoid a loss.

DEPARTMENT OF TRADE & INDUSTRY, COMPANY LAW REFORM BILL, CMND. NO. 5391, at 9 (1973).

69. Early drafts of the Securities Exchange Act of 1934 would have applied to tippees as well as insiders, but final enactment excluded these provisions. Rattner v. Lehman, 193 F.2d 564 (2d Cir. 1952).