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First Amendment--Free Speech--Schacht v. United States, 398 U.S. 58 (1970)

If the situation arose where no individual could answer the interrogatories without subjecting himself to a real and appreciable risk of self-incrimination,[33] the civil discovery could be postponed until the termination of the criminal action.[34]

Since, in *Kordel*, it was never claimed that there was not an authorized person who could answer the interrogatories without the possibility of self-incrimination, the Court felt it unnecessary to utilize procedures to delay the civil action. Of particular interest is the extent to which public policy influenced the Court's refusal to grant a deferment.

> The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief or to defer civil proceedings pending the ultimate outcome of a criminal trial.[35]

Indeed, this statement may direct us to the reason why the original court failed to recognize the self-incrimination inherent in the interrogatories. In an area such as food and drugs, where constant control is so necessary, not only is it desirable to proceed on both the civil and criminal fronts as quickly as possible, but even *more* desirable to win in both litigations. If this was the attitude of the court when the interrogatories were ordered to be answered, it would indicate judgment by the bench before disclosure of the facts. Furthermore, does not such judicial action virtually destroy the efficacy of the privilege against self-incrimination? It is not just the guilty defendant who is affected; an innocent party may be also be compelled to convict himself.

[33] Prior to 1948, Rule 33 provided that:

> Any party may serve upon any adverse party written interrogatories to be answered . . . , if the party served is a public or private corporation or a partnership or association, *by any officer thereof competent to testify in its behalf.* (emphasis added)

It currently reads "by any officer or agent." Since an agent need not be a corporate officer, it would be the exception if a corporation could not appoint a person free from possible self-incrimination to answer the interrogatories. The agent need not have personal knowledge, but regardless of who the individual is, the answers must respond to the corporate knowledge and not necessarily to the knowledge of the individual making the answer. United States v. 42 Jars . . . "Bee Royale Capsules," 264 F.2d 666, 670 (3d Cir. 1959); Segarra v. Waterman Steamship Corp., 41 F.R.D. 245, 248 (D. Puerto Rico 1966).

[34] At the time of *Kordel*, Rule 30(b) of the FEDERAL RULES OF CIVIL PROCEDURE provided in part:

> After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken. . . .

Rule 30 was amended on March 30, 1970, to be effective on July 1, 1970. The relevant material is now found in Rules 30(d) and 26(c). *See* Dienstag v. Bronsen, 49 F.R.D. 327 (S.D.N.Y. 1970); Paul Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953).

[35] 397 U.S. at 11.

FIRST AMENDMENT—FREE SPEECH

Schacht v. United States, 398 U.S. 58 (1970)

Schacht v. United States[1] dealt with the right of an amateur actor to wear the uniform of the United States Army in a theatrical production critical of the government's military and foreign policies. Petitioner Schacht, wearing parts of a U.S. Army uniform,[2] participated in a street skit in front of an armed forces induction center. The skit was designed to "expose the evil of the American presence in Vietnam."[3] The nature of the skit and Schacht's role in it were described by the court of appeals as follows:

> The skit was composed of three people. There was Schacht who was dressed in a uniform and cap. A second person was wearing 'military colored' coveralls. The third person was outfitted in typical Viet Cong apparel. The first two men carried water pistols. One of them would yell, 'Be an able Ameri-

[1] 398 U.S. 58 (1970).

[2] *Id.* at 59 n. 2.

[3] *Id.* at 60.

> can,' and then they would shoot the Viet Cong with their pistols. The pistols expelled a red liquid which, when it struck the victim, created the impression that he was bleeding. Once the victim fell down the other two would walk up to him and exclaim, 'My God, this is a pregnant woman.' Without noticeable variation this skit was reenacted several times during the morning of the demonstration.[4]

Subsequent to his participation in this skit, Schacht was indicted for violation of 18 U.S.C. §702 (1964), which imposes criminal sanctions upon any person who "without authority [wears] the uniform or a distinctive part thereof . . . of any of the armed forces of the United States." [5]

At trial, petitioner defended his conduct on the ground that he was authorized to wear the uniform under the provisions of 10 U.S.C. §772(f) (1964), which provides:

> While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion picture production may wear the uniform of that armed force *if the portrayal does not tend to discredit that armed force.* [Emphasis added]

He contended that this section protected his conduct as a matter of law, since he was engaged in a theatrical production. He argued that the last clause of the provision did not take his conduct outside of the section since it was an unconstitutional restriction on free speech and was therefore void. Schacht argued in the alternative that §702 was unconstitutional as applied to his case. Schacht was convicted, however, and the judge imposed the maximum sentence.[6]

On appeal Schacht raised the same issues. The court of appeals dealt with both issues as a single contention, saying that

> by regulating the wearing of armed forces uniforms, the United States has on this occasion restricted their [petitioners Schacht's and Smith's] constitutional right to peaceably demonstrate and speak on topics that are unpleasant to the majority of citizens.[7]

After mentioning Schacht's contention that he was covered by §772(f), the court disregarded it and proceeded to consider §702.

[4] United States v. Smith, 414 F.2d 630, 632 (5th Cir. 1969).
[5] The maximum sentence is a $50 fine and six months imprisonment.
[6] 398 U.S. at 59.
[7] 414 F.2d at 633.

The court of appeals labored over the problem of speech versus conduct, citing many important symbolic speech cases.[8] In denying Schacht's argument that his conduct was protected by the first amendment, the court set up a dichotomy between acts which violate a statute and acts which do not. The former was illustrated by *Giboney v. Empire & Ice Co.*,[9] where peaceful labor picketing was found to be an inherent part of a "single and integrated course of conduct" which violated Missouri's anti-trust laws by forcing an ice company to deal only with union peddlers.[10] The court upheld the injunction against the union's picketing despite its claim that the picketing was protected as "symbolic speech." An example of acts which do not violate a statute was *Tinker v. Des Moines School Dist.*,[11] where the wearing of black armbands in a public high school violated only a ban against such actions by the principal. The Supreme Court ruled that the armband-wearing was a type of symbolic act closely akin to pure speech and falling within the protections of the Free Speech Clause.[12] Schacht's conduct, however, was found to fall within the category of acts which violate a statute and therefore fell within the *Giboney* rationale. The majority concluded:

> Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information of opinion.[13]

Judge Goldberg of the Fifth Circuit concurred,[14] relying upon *O'Brien v. United States*.[15] In *O'Brien*, the Supreme Court upheld the 1965 draft card burning amendment, finding that it protected a valid governmental interest. Although this statute might impinge on one's freedom of speech, the Court held that its chilling effect upon first amendments rights was both *indirect* and *necessary* to the protection of the valid governmental interest.[16]

[8] *E.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); O'Brien v. United States, 391 U.S. 367 (1968); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).
[9] 336 U.S. 490 (1949).
[10] *Id.* at 498.
[11] 393 U.S. 503 (1969).
[12] *Id.* at 505–506.
[13] 414 F.2d at 636, quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939).
[14] *Id.*
[15] 391 U.S. 367 (1968).
[16] *Id.* at 377–382.

In his opinion, Goldberg held that *O'Brien* dictated the constitutionality of §702 because the statute "was not conceived in the suppression of freedom of expression." [17] With these words, Goldberg seized upon the *O'Brien* requirement that the constitutionality of a statute depends on its being only indirectly suppressive of expressive freedom; both he and the majority completely ignored *O'Brien*'s additional requirement that the suppression of first amendment freedoms be *necessary* to the accomplishment of the governmental interest. As the Court stated in *O'Brien*,

> A government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; *and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.*[18]

Isolation of the "governmental interest" which §702 seeks to protect is the first step required in analyzing the present case under the *O'Brien* test. That interest might be broadly defined as protecting the reputation of the military *in general*. But if such a broad definition is adopted, nearly any impingement on first amendment freedoms might be judicially swept into the category of the "incidental." This would seem contrary to the spirit of *O'Brien*'s requirement that the impingement be "no greater than is essential." The alternative solution, more in keeping with the spirit of *O'Brien*, is to split the broad interest into its component parts, some of which would seem valid because they involve no direct impingement upon first amendment rights. Examples of such valid interests might be those of maintaining the identity of the military and protecting its reputation for good discipline.

Splitting the broad governmental interest into its component parts would result in the invalidation of any which directly impinged on first amendment rights. Thus the military's general reputation depends in part upon whether the wars it is involved in are considered "just" by the citizenry. Protecting what might be termed the military's "political" reputation would clearly be an invalid state interest because it would directly impinge upon first amendment rights.

It should be at once apparent that none of the above valid governmental interests was placed in jeopardy by Schacht's conduct. His wearing of the uniform did not threaten the reputation of the military for good discipline; nor did it jeopardize the government's interest in maintaining the military's separate identity. These interests would only have been placed in danger had there been a reasonable probability that those who observed Schacht's conduct would have *mistaken* him for an actual member of the armed forces. As the Supreme Court held in this case, Schacht was clearly engaged in a fictitious portrayal. No reasonable observer could have mistaken him for anything but what he was: an actor engaged in an amateur theatrical production.

Because Schacht's conduct did not endanger any valid state interest, it would seem clear under *O'Brien* that the application of §702 to his conduct was not "essential to the furtherance of that interest."

Section 702 does not stand alone, however. Among the exceptions to it is 10 U.S.C. §772(f), which Schacht claimed as a defense. The appellate court's only discussion of that section was in connection with Schacht's appeal of the finding that the language of it was "amply clear." [19] The Fifth Circuit panel failed to consider at all whether, as a matter of law, Schacht's course of conduct was a "theatrical production" within the meaning of that section. It also did not specifically rule on the constitutionality of the proviso "if the portrayal does not tend to discredit that armed force." If his acts qualified as a "theatrical production" under §772(f), he could only be convicted if he said something which discredited the military. His speech *while wearing* the uniform would be the gravamen of the offense, *not* the simple fact that he wore a uniform. This is a pure speech issue, not a symbolic speech issue.

Unlike the court of appeals decision, the Supreme Court addressed itself both to whether Schacht's conduct constituted a "theatrical production" and to the constitutionality of the aforementioned proviso "if the portrayal does not tend to discredit that armed force." After disposing of a procedural issue brought up by the government,[20]

[17] 414 F.2d at 638.
[18] 391 U.S. at 377 (emphasis added).
[19] 414 F.2d at 636.
[20] The government contended that the Court lacked jurisdiction over Schacht's case because he had filed his petition for certiorari 101 days late. Mr. Justice Black found Supreme Court Rule 22(2), which governs the filing of petitions for certiorari, no obstacle:

> Rule 22(2) contains no language that calls for so harsh an interpretation.... The procedural rules

the Court quickly rejected, as a matter of law, the government's contention that Schacht had not been engaged in a "theatrical production" within the meaning of 10 U.S.C. §772(f) and was thereby excluded from its protection. The Court said in part:

> Here, the record shows without dispute the preparation and repeated presentation by amateur actors of a short play designed to create in the audience an understanding of and opposition to our participation in the Vietnam war. . . . We cannot believe that when Congress wrote out a special exception for theatrical productions it intended to protect only a narrow and limited category of professionally protected plays.[21]

This interpretation of "theatrical production" is an important change in the meaning of the statute. As Justice Black himself pointed out, the predecessor of §772(f) referred to an actor "in any playhouse or theater or in moving-picture films." [22] The 1956 codification which produced §772(f) was not intended to make substantive changes in the law, but was intended only to make the language clearer, more modern, and more flexible.[23] By extending the protection of this section to petitioner Schacht's case, the majority substantially changed the meaning of the old law, but without delineating the scope of the term "theatrical production." It said only that Congress could not have intended that Schacht's type of "theatrical production" be given no protection.[24]

The Court then considered petitioner's contention that the last clause of §772(f), which authorizes the wearing of the uniform *only* "if the portrayal does not tend to discredit that armed force," must be stricken because it imposes an unconstitutional restraint on free speech. Schacht's performance was conceded to be critical of the armed forces, so he would have had no defense against §702 if that last clause were found to be valid. The Court's conclusion was:

> In light of our earlier finding that the skit in which Schacht participated was a "theatrical performance" . . . it follows that his conviction can be sustained only if he can be punished for speaking out against the role of our Army in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech. The final clause of §772(f) . . . leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it. . . . To preserve the constitutionality of §772(f) that final clause must be striken from the section.[25]

Accordingly, the conviction was reversed.

Mr. Justice White, who was joined by The Chief Justice and Mr. Justice Stewart, concurred in the Court's judgment, agreeing that

> Congress cannot constitutionally distinguish between those theatrical performances which do and those which do not "tend to discredit" the military, in authorizing persons not on active duty to wear a uniform.[26]

He disagreed with the majority's holding that, as a matter of law, the petitioner had been engaged in a theatrical performance.

Justice White first defined the term "theatrical production," something the majority neglected to do. Justice White's proposed test was

> whether or not, considering all the circumstances of the performance, an ordinary observer would have thought he was seeing a fictitious portrayal rather than a piece of reality.[27]

This is a practical test, since it depends on what

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adopted by this Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require. 398 U.S. at 64.

Mr. Justice Harlan, concurring, felt it necessary to clarify and amplify the decision on this procedural issue. Taglianetti v. United States, 394 U.S. 316 (1969), and Heflin v. United States, 358 U.S. 415 (1959), cited by Justice Black as authority for waiving Rule 22(2), did not explain why the Court had the power of waiver over the rule. The Court had held in other cases that it could not waive time limitations set by statute. 398 U.S. at 65 n. 2. In *Schacht*, the time limit was set by a Supreme Court Rule rather than a federal statute, so that 18 U.S.C. § 3772 (1964), an unqualified delegation of power, allowed the Court to disregard a rule it promulgated itself. 398 U.S. at 68.

[21] 398 U.S. at 61–62. Mr. Justice Black noted:

> Certainly theatrical productions need not always be performed in buildings or even on a defined area such as a conventional stage. . . . Since time immemorial outdoor theatrical performances, often performed by amateurs, have played an important part in the entertainment and education of the people of the world. . . . It may be that the performances were crude and amateurish and perhaps unappealing, but the same thing can be said about many theatrical performances. 398 U.S. at 61–62.

[22] *Id.* at 60 n. 3.

[23] *Id.* Justice Black referred to the legislative history of the code, especially the statement of Senator O'Mahoney, 102 CONG. REC. 13944 (July 23, 1956), the chairman of the drafting committee, when the code came to the floor of the Senate.

[24] *Id.* at 62.

[25] *Id.* at 61–62.

[26] *Id.* at 69.

[27] *Id.* at 70.

the actor does rather than where he does it. The test subsumes a more general case than the obvious case of the formal theatrical presentation, which accords with the desire of the majority to broaden the coverage of the exemption in §772(f).

Justice White wished to have the jury determine as a matter of fact whether Schacht's course of conduct fell within this definition.[28] But when two people in military clothing squirt a third in Viet Cong clothing with red dye on a Houston street in front of an armed forces induction center, no reasonable man could find this to be "a piece of reality" rather than "a fictitious portrayal." The "piece of reality" is in Viet Nam, not in Houston. Thus, there is no question of fact here, and it should not be put to a jury.[29]

Justice White arrived at his result on the grounds that the trial court's instructions were in error. He noted that the jury in convicting Schacht might have found either 1) that he was not engaged in a theatrical performance, or 2) that he was in a theatrical production which discredited the military.[30] Since the latter finding would necessarily violate Schacht's first amendment privilege, it would be constitutionally impermissible. And since there was a general verdict, it was impossible to determine upon which of the two instructions his conviction had been based. Therefore, White felt constrained to reverse the conviction.[31]

The Supreme Court did not reach the symbolic speech issue. Had it done so, it might very well have reached the same result and reversed. Without the statutory authorization of 10 U.S.C. Section 772(f), Section 702 of 18 U.S.C. would probably be overly broad as applied, under *O'Brien*, if it had been utilized to prevent actors from portraying military personnel. Under the Fifth Circuit's reasoning, and absent §772(f), all actors would be prohibited from using military uniforms even though their conduct endangered no valid governmental interest. Hence, the Supreme Court might well have found this situation impermissible under the first amendment.

The Supreme Court reversed the Fifth Circuit on the narrower ground that it had failed to take Schacht's statutory defense into consideration. Since the symbolic speech issue was not reached at all, *Schacht* will have little bearing on future symbolic speech cases. It does represent, however, a continuing preservation of the right to dissent by the Supreme Court.

[28] *Id.*

[29] In view of current public disfavor of war protestors who "hide behind" the protections of the first amendment, it goes against good policy for the Court to remand a case like this one unnecessarily. The propensity of jurors to react favorably and unfavorably to the personalities and appearance of defendants is discussed in Kalven and Zeisel, *The American Jury* (1966).

[30] 398 U.S. at 70.

[31] Justice White here referred to Stromberg v. California, 283 U.S. 359 (1931), one of the first symbolic speech cases, which was similarly reversed because one of the three alternative grounds for conviction for a violation of the California "red flag" law was found to be unconstitutional. All three were combined in the judge's instructions, and a general verdict was handed down by the jury.

Editor's Note

The unsigned student comments in the June issue of the present volume of the Journal, previously unacknowledged, were prepared by *Gloria M. Michelotti, Norman P. Jeddeloh,* and *Jon E. Steffensen.*