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Recent Developments: Constitutional Law—Equal Protection Clause—Sunday Blue Laws Held Constitutional. *Giant of Maryland v. State's Attorney for Prince George's County*, __ Md. __, 298 A. 2d 427 (1973)

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“exigent circumstances” that would allow warrantless searches of cars in police custody where such exigent circumstances were present at the time of the initial seizure. However, the police should continue to exercise care and caution and obtain a search warrant (as did the police in the *Skinner* case), both for their own benefit in suppression hearings, and for the protection of a defendant under the fourth amendment.

Frederick S. Lipton

CONSTITUTIONAL LAW—EQUAL PROTECTION CLAUSE—
SUNDAY BLUE LAWS HELD CONSTITUTIONAL. *Giant of Maryland v. State's Attorney for Prince George's County*, __ Md. __, 298 A. 2d 427 (1973).

In *Giant of Maryland v. State's Attorney for Prince George's County*¹ the Maryland Court of Appeals held that, in accordance with Article 27, § 534H² of the Maryland Code, a retail establishment may not remain open on Sunday if, at any time in the course of its weekday operating scheme, it employs more than six persons per shift.³

1. __ Md __, 298 A.2d 427 (1973). Safeway Stores, Incorporated and the Grand Union Company were enjoined from operating on Sunday by identical petitions brought by the Prince George's State's Attorney in the Court of Appeals of Maryland No. 149, September Term. The appeals were separately argued, but the court chose to consolidate both into one opinion because of their similarity of issues.

2. MD. ANN. CODE art. 27, § 534H (1971). Insofar as pertinent to the issues presented in *Giant*, this article provides:

(a) In Prince George's County, except as specifically in this section otherwise provided, it is unlawful on Sunday for any wholesale or retail establishment to conduct business for labor or profit in the usual manner and location or to operate its establishment in any manner for the general public. It shall not cause, direct, permit, or authorize any employee or agent to engage in or conduct business on its behalf on Sunday.

(b) Notwithstanding any provision of this section, the operation of any of the following types of retail establishment is allowed on Sunday.

1. Drugstores whose principal business is the sale of drugs and related items.
2. Delicatessens whose principal business is the sale of delicatessens and related food items.
3. Bakeries and bakeshops.

(c) Nothing in this section applies to:

3. Small business with not more than six (6) persons on any shift with the exception of persons or retailers engaged in the sale of motor vehicles.

The statute further authorizes the Circuit Court to enjoin violation of this section and provides for misdemeanor penalties of one thousand dollars per employee directed to operate in violation thereof.

3. The Blue Laws of Maryland are found in MD. ANN. CODE art. 27, §§ 492-534M. Section 534H, which governs Sunday sales in Prince George's County, is similar to those sections operative in Montgomery (*id.* § 534J), Baltimore (*id.* § 534L), Harford and Wicomico (*id.* § 534M) Counties. Section 534J is identical except that it contains the word “basic” in subsection (b)(1), while § 534H(b)(1) uses the word “principal”. Section 534L is nearly

On June 4th, 1972, Giant, which had previously operated its Maryland stores on a six-day schedule, followed the lead of competitor Safeway⁴ and began Sunday sales.⁵ In so doing, Giant interpreted the Prince George's County Blue Law as allowing unlimited staffing in the bakeshop, delicatessen, and drug departments of its supermarket stores,⁶ and additionally, as permitting staffing with six or less employees per shift in the remaining sections of its supermarket. In response to Giant's Sunday opening, the Prince George's County State's Attorney filed a criminal action to enjoin Giant from dealing on Sundays.⁷ The Circuit Court held Giant in violation of the law, and ordered it to cease and desist its Sunday operations,⁸ despite Giant's contention that it met the bakery-delicatessen-drug store exception.

While the appeal was pending, Giant's retail establishments in Prince George's County remained open on Sunday, using special shifts of six or less persons.⁹ On January 2, 1973, the Court of Appeals held that only those businesses which regularly operate with six or less employees on *any* shift during the week may lawfully open their doors on Sundays.¹⁰

Giant contended¹¹ that the Prince George's County Blue Law: (1) is unconstitutional under the due process clause of the fourteenth amendment, pursuant to the *void-for-vagueness* rule;¹² (2) denies Giant equal protection of the laws under the fourteenth amendment; and (3) exempts specific departments of Giant's stores from sanctions

identical to § 534H, with the exception that § 534L(c)(3) places a three employee shift limitation instead of six employees and that the penalties under § 534L are less stringent. Section 534M(c)(3) differs only in using a two employee limitation and less stringent penalties.

4. Brief of Appellee at 2, app. 1, *Giant of Maryland, Inc. v. State's Attorney for Prince George's County*, — Md. —, 298 A.2d 427 (1973).
5. Brief for Appellant, at E.41, *Giant of Maryland, Inc. v. State's Attorney for Prince George's County*, — Md. —, 298 A.2d 427 (1973) [hereinafter cited as Brief for Appellant]; *The Washington Post*, June 3, 1972, § B, at 9, col. 3.
6. *Id.*
7. Brief for Appellant at E.5.
8. Brief for Appellant at E.7. In the concurrent Safeway and Grand Union opinion, the lower court did not enjoin the operations of those stores as they had been operating with less than six employees at "any given time on Sunday."
9. The lower court's interpretation "of any one shift" to mean "any given time on Sunday," specifically permitted Giant's opening as well as instigated the proliferation of store openings on Sunday throughout the 1972 Christmas Season.
10. — Md. —, 298 A.2d 427 (1973).
11. Giant made no "contention" that Maryland's Sunday Blue Laws violated the first amendment prohibition against establishment of religion because of an invalid religious purpose contravening the well established guideline in *McGowan v. Maryland* 366 U.S. 420 (1961), *affg* 220 Md. 117, 151 A.2d 156 (1957). In *McGowan*, the Supreme Court outlined the present-day motivation for Blue Laws and stated that, "the state's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility. . . ." *Id.* at 450.
12. *Connally v. General Construction Co.*, 269 U.S. 385 (1926). *See also* *Winters v. New York*, 333 U.S. 507 (1948); *U.S. v. Petrillo*, 332 U.S. 1 (1947); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Whitney v. California*, 274 U.S. 357 (1927); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926).

(bakeshops, delicatessens and drug stores are statutorily permitted to remain open on Sundays¹³).

It has been well established by the Supreme Court that a state statute which either forbids or requires the doing of an act in terms so equivocal that men of common intelligence must necessarily guess as to its meaning and application is unconstitutional as void for uncertainty, and thereby violating the due process clause.¹⁴ Most recently, Mr. Justice Marshall outlined the constitutional objections to vague laws:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we must insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Secondly, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matter to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.¹⁵

Specifically, Giant asserted that the terms "small business" and "on any one shift" as used in § 534H were so vague, uncertain and unsusceptible of definition as to fail to inform retail operators of those acts which would render them subject to criminal penalties.¹⁶ The Court of Appeals, while admitting that the statute in question was not a model of legislative precision, held that no constitutional right of due process is violated by an imprecise enactment.¹⁷

Giant further asserted that a law which imposed an economic penalty on stores whose operating schemes demand that more than six persons be employed therein, while imposing no penalty on stores in direct competition with the penalized stores, constituted a denial of equal protection.¹⁸ Such an equal protection argument was made to the

13. MD. ANN. CODE art. 27, § 534H(b) (1971).

14. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); Annot., 70 L. Ed. 322 (1927).

15. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

16. Brief for Appellant at 12.

17. The court stated its belief that more specific language could have been used by the Maryland Legislature, and offered the statutory language considered in Opinion of the Justices, 159 Me. 410, 191 A.2d 637 (1963) and *City of Bismarck*, 177 N.W.2d 530 (N.D. 1970) as a model of their interpretation.

18. Although Giant also raised an equal protection argument based on whether the six employee limitation was an unreasonable classification, it was not pressed in the appeal. The court summarily dismissed this argument relying on *McGowan v. Maryland*, 366 U.S. 420 (1961). *Giant of Maryland v. State's Attorney for Prince George's County*, ___ Md. ___, 298 A.2d 427, 436 (1973). It has been held that arbitrary statutory classifications are not viola-

Maryland Court of Appeals one year earlier in *Rebe v. State's Attorney for Prince George's County*,¹⁹ where two department stores asserted that the unhampered sale in a drugstore of certain goods which they were prohibited from selling indicated a denial of equal protection. In rejecting this contention, the *Rebe* court said:

Since it appears to us that there was ample justification for the legislative determination that tranquility and repose would be more likely assured if small business establishments operated on Sundays, while large ones did not, we find nothing arbitrary or discriminatory in the classification, nor do we think the classification rests, in the language of *McGowan*, "on grounds wholly irrelevant to the achievement of the state's objective."²⁰

With regard to Giant's second contention, *i.e.* that under the exemption clause the bakeshops, delicatessens, and drug departments in its supermarkets are exempt from prosecution under section 534H, Giant argued that, as their bake-goods subsidiary, Heidi, is in direct competition with bakeshops which are allowed to remain open on Sundays, its bake-goods business is severely restricted and economically penalized merely because it chose for its place of business the interior of a non-exempt grocery store. Giant also advanced the logic of this contention with respect to its delicatessen and drug sectors. However, both the Circuit Court and Court of Appeals rejected this claim to exemption, reasoning that, since all of the excluded departments' employees are engaged, managed, and paid by Giant, the structure constitutes a single entity incapable of separation for purposes of Blue Law exclusion.

The opinion of the Court of Appeals reflects its reluctance to declare an act of its legislature constitutionally deficient,²¹ but herein lies its greatest fault: it fails to deal adequately with patent evidence of statutory vagueness. As the issue progressed through the channels of

tions per se of the equal protection clause. *Dandridge v. Williams*, 397 U.S. 471 (1970):

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Id. at 485 (citations omitted).

19. *Rebe v. Prince George's State's Attorney*, 262 Md. 350, 277 A.2d 616 (1971).

20. *Id.* at 358, 277 A.2d at 619-20. Although *Giant* strenuously questioned what *specific* "ample justification" existed in the legislature's despotic determination that six employees per shift is the level of chaotic infraction of the day of rest that communities could not endure, the Court of Appeals decision failed to answer their query.

21. After a thorough review of the decisions of Maryland courts, the writer notes a special reluctance of the Maryland courts to declare acts of the Maryland Legislature void for vagueness. *See, e.g., Lashley v. State*, 10 Md. App. 136, 142, 268 A.2d 502, 506 (1970); *Hunt v. Montgomery County*, 248 Md. 403, 414, 237 A.2d 35 (1958).

justice, no less than five men of certainly *more* than common intelligence, including four public officials²² (or bodies) and the defendant,²³ offered no less than five different interpretations as to the applicability of the penalties to the defendant. A criminal statute which frustrates a good faith attempt by a defendant to determine the criminality of his conduct and conform to the letter of the law violates the constitutional guarantee of due process.

Paradoxically, the Court of Appeals took notice²⁴ of this divergence of opinion, but, after offering a reflexive recitation of the man of "common intelligence" standard as the method of determining whether the statute is void for vagueness, brought forth *yet another* enlightened interpretation of the statute.²⁵

Another patent inconsistency also exists in the Court of Appeals' decision. The court construed the legislative intent to be contrary to allowing Giant's multi-million dollar business to remain open on the designated day of rest, yet by its construction it permits the billion dollar Southland Corporation, through its fifty-seven 7-Eleven Stores,²⁶ to operate in the county unrestricted by the calendar. As a product of this construction, the single entity of the Southland Corporation in Prince George's County derives an unwarranted bonanza from permitted Sunday sales, despite the fact that its operation violates this construed legislative intent.

To establish a cause of action under the equal protection clause, the statute in question must create an arbitrary classification that disregards any valid public purpose.²⁷ The arbitrary nature of § 534H is shown by the fact that it is directed punitively at larger stores, while creating a comparative bonanza for those of smaller physical dimensions. It is not

22. Opinions as to the interpretation of the law, and the applicability to defendant were offered by Circuit Court Judge James H. Taylor, Brief for Appellant at E.49; Montgomery County Executive James Gleason, Brief for Appellant at E.34; The State's Attorney for Montgomery County, Brief for Appellant at E.30; as well as the Court of Appeal's interpretation.

23. *Amicus curiae* briefs were offered in support of the Prince George's County State's Attorney by Montgomery County and by Safeway Stores and S. S. Kresge Company in support of Giant's contentions.

24. — Md. —, 298 A.2d 427 (1973).

25. In effect, by proposing that the definition of "any one shift" includes "any regular shift," the court was stating that they alone were men of common intelligence, and, in so doing, established as a point of law that the lower court judge, the State's Attorney, and a neighboring county executive, as well as the defendant, were men incapable of formulating a reasonable interpretation. In so doing, the Court of Appeals has summarily enlarged an act under the guise of judicial interpretation. The Supreme Court has condemned such action by state tribunals in saying, "judicial enlargement of a Criminal Act by interpretation is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce v. United States*, 314 U.S. 306, 311 (1944). In *United States v. Weitzel*, 246 U.S. 533 (1918), Mr. Justice Brandeis warned of such an enlargement: "Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive." *Id.* at 543.

26. Brief for Appellant at E.24.

27. *Schilb v. Kuebel*, 404 U.S. 357 (1971); *McDonald v. Board of Election*, 394 U.S. 802 (1969).

beyond contemplation that a food store exist²⁸ which sells the same products as Giant, in the same square footage, with the same supermarket atmosphere, but which, because of a different operating scheme, is able to employ six or less employees per shift on a regular basis. In effect, this constitutes invidious discrimination within a class. While previous Maryland holdings have granted the legislature a wide latitude in classifying commodities and businesses for Sunday closing statutes, it would be a fundamental denial of equal protection if an ordinance is allowed to stand which invidiously discriminates between those in the same business who properly belong in the same class.²⁹

The attempt by the Court of Appeals to claim the *Rebe* decision to be stare decisis of the equal protection argument is faulty in its failure to recognize a significant distinction between the two cases: *Rebe* asserted discrimination along product lines, while *Giant* asserted discrimination between merchants of the same trade.

Paragraph B of the Prince George's County Blue Law excludes some specified sellers of goods of necessity from Sunday commerce prosecution, including drug stores whose principal business is the sale of drugs and related items, delicatessens whose principal business is the sale of delicatessen and related food items, and bakeries and bakeshops. In considering whether a department store section may remain open on Sunday, the Supreme Court of Maine, under a statute similar to that of Prince George's County, allowed departments to remain open if they were in direct competition with the stores permitted by statutory exception. The court stated:

[T]he department store is not penalized for its size. It is not forced to close because some of its business taken alone would not be non-exempt or because the store as a whole does not come within the fair meaning of any category described in the statute. The department store may thus compete on Sundays with the exempt store; but not with the closed store . . .³⁰

Applying the logic of the Maine decision to the *Giant* problem it would follow that Giant could compete, without a bar on the number of employees, with allowed drug, delicatessen, and bake-goods stores by keeping the corresponding areas of its markets open on Sunday. In the remaining areas, the department stores would be expected to comply with the requirement of only six employees per shift, and could therefore fairly compete with previously exempted businesses. This

28. Consumer Supermarkets and Jumbo Food Stores would meet this contemplation. See Brief for Appellant at E.24.

29. *West v. Winnsboro*, 252 La. 605, 211 So. 2d 665, 672 (1968). See also 16 AM. JUR. 2d, *Constitutional Law* § 503, at 881-82 (1964).

30. *State of Maine v. Karmil Merchandising Corporation*, 148 Me. 450, 466, 186 A.2d 352, 362 (1962).

logic would further the purpose of the exemption, *i.e.* to provide the consumer with the necessities of life on Sunday, without arbitrarily designating only the "Ma and Pa" corner store as the sole source of supply.

Presently, the requirement that consumers purchase their Sunday necessities at the corner shop creates "an economic state in which the complaining store's competitors, selling identical products at higher prices, will gain an advantage at the ultimate expense of the consumer."³¹ The Court of Appeals' ruling forces the consumer to pay the higher prices³² of the neighborhood convenience stores by denying him the "discount" shopping of the supermarkets, and, in so doing, disregards the public welfare.

The Prince George's County Blue Law is antiquated, unjust, and legally incomprehensible. The terminology employed in the statute no longer operates in the medium intended by the legislature. For example, the term "drug store" has long since been unsusceptible of definition. The Court of Appeals was quick to assert that, as seventy-five per cent of Giant's sales are derived from food³³ and food-related products, it did not qualify as a drug store. However, the modern drug store is but a misnamed departmentalized shopping mecca whose trade thrives on everything from pencils to paperbacks. One prominent drug chain, whose advertising proudly claims it to be much more than a drug store, remains faithful to this assertion by earning seventy-eight per cent of its income from non-drug products.³⁴ Yet the "drug stores" bustle in the shadow of Giant's Sunday silence.

Even disregarding these inequities of legal application, it remains apparent that the Prince George's County Blue Law runs against the grain of the most fundamental constitutional guidelines as to prohibitory sanctions.³⁵ For this reason, Article 27, § 534H should be renounced and repealed forthwith.³⁶

Steven H. Oram

31. Letter from Joseph B. Danzansky, President of Giant of Maryland, Inc.; John Bell, Vice President, Safeway Stores, Inc.; John Hechinger, President Hechinger Company; and Earl R. Halterman, Jr., President, Scott's Corporation to the Honorable Margaret E. Schweinhaut, Chairman, Montgomery County Senate Delegation, January 19, 1973, on file with the *University of Baltimore Law Review*.

32. The parties stipulated as to the higher prices of convenience stores, *e.g.*, 7-Eleven Stores and High's Dairy Stores. *See*, Brief for Appellant at E.27.

33. Brief for Appellant at E.54.

34. Brief for Appellant at E.99.

35. On the question as to whether a citizen may compel enforcement of a Sunday Blue law by writ of mandamus, *see* *Graham v. Gaither*, 140 Md. 330. 117 A 858 (1922).

36. On February 28, 1973, the Prince George's County legislative delegation voted in caucus to table consideration of bills designed to amend or repeal the County's Blue Law. This action will apparently prevent the repeal of or loosening of the Blue Laws during the 1973 Session of the Maryland Legislature. *The Washington Post*, Mar. 1, 1973, § B, at 13, Col. 2.