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Constitutional Law—Equal Protection: Validity of R.C.W. § 9.87.010(13), Washington's School Loitering Statute—State v. Oyen, 78 Wn. 2d 909, 480 P.2d 766 (1971), vacated mem. sub nom. Oyen v. Washington, 408 U.S. 933 (1972)

R. W. E.

RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—EQUAL PROTECTION: VALIDITY OF R.C.W. § 9.87.010(13), WASHINGTON'S SCHOOL LOITERING STATUTE—*State v. Oyen*, 78 Wn. 2d 909, 480 P.2d 766 (1971), *vacated mem. sub nom. Oyen v. Washington*, 408 U.S. 933 (1972).

Defendants were arrested under authority of R.C.W. § 9.87.010 (13),[1] Washington's school loitering statute, for having distributed anti-Vietnam war leaflets to students on school premises in knowing violation of a school board regulation which required prior approval by the superintendent of nonschool-related handouts.[2] The peaceful distribution occurred prior to morning classes as students were leaving their busses.[3] Defendants subsequently were convicted, although they contended that the statute was unconstitutionally vague and overbroad and as applied violated their right to free speech. On appeal to the Washington Supreme Court, the conviction was affirmed. *Held:* R.C.W. § 9.87.010(13)[4] is constitutional: the statute is sufficiently specific in terms of time, place and tenor to satisfy procedural due process and withstand a vagueness attack; its breadth is justified as a reasonable exercise of the state's police power to safeguard the orderly education of youth; and it was applied evenhandedly so as

1. Washington's school loitering law is a subsection of the state's vagrancy statute, WASH. REV. CODE § 9.87.010 (Supp. 1972), the pertinent part of which reads:

> Every—
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> . . . .
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> (13) Person, except a person enrolled as a student in or parents or guardians of such students or person employed by such school or institution, who without a lawful purpose therefor wilfully loiters about the building or buildings of any public or private school or institution of higher learning or the public premises adjacent thereto—
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> is a vagrant, and shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than five hundred dollars.

None of the defendants belonged to any class exempted by the statute. *See* note 4 *infra* for future disposition of WASH. REV. CODE § 9.87.010(13).

2. *See* Bellingham (Washington) School Board Superintendent's Bulletin No. 5, Aug. 8, 1968.

3. There was no evidence to indicate that defendants instigated violence or caused disruption, 78 Wn. 2d at 912, 480 P.2d at 768; at most, some of the approximately 150 students who witnessed the subsequent arrests expressed their disapproval of defendants with boos and hisses.

4. WASH. REV. CODE § 9.87.010 (Supp. 1972) has been amended by ch. 122, § 29 [1972] Wash. Laws, 2d Ex. Sess., effective Jan. 1, 1974. At that time the school loitering subsection, formerly WASH. REV. CODE § 9.87.010(13) (Supp. 1972), will become new WASH. REV. CODE § 9.87.010(11) with no change in wording.

not to discriminate against the defendants' viewpoints. *State v. Oyen,* 78 Wn. 2d 909, 480 P.2d 766 (1971). On appeal to the United States Supreme Court, the judgment was *vacated and remanded* for further consideration in light of *Police Department of the City of Chicago v. Mosley*[5] and *Grayned v. the City of Rockford.*[6] *Oyen v. Washington,* 408 U.S. 933 (1972).[7]

Mosley and *Grayned* are two United States Supreme Court cases resting on principles of equal protection, an issue that never appeared in the opinion of the Washington court. Since previous constitutional challenges to loitering and kindred laws[8] primarily have relied upon the due process doctrines of void for vagueness and overbreadth,[9] the *Oyen* remand comes as a noteworthy departure from this pattern. As neither *Mosley* nor *Grayned* dealt with loitering laws, application of these precedents to the school loitering statute in *Oyen* demonstrates

5. 408 U.S. 92 (1972).
6. 408 U.S. 104 (1972).
7. The case was subsequently remanded by the Washington Supreme Court to the Whatcom County Superior Court for further proceedings consistent with the United States Supreme Court memorandum opinion, and, as of May 2, 1973, no further action had been taken. Telephone interview with Rand Jack, Corresponding Attorney, A.C.L.U., May 2, 1973.
8. Variously labelled as vagrancy, loitering, disorderly conduct, and breach of the peace, intentionally broad laws directed at inchoate crime form a special body of law characterized by the amorphous nature of its subdivisions. *See* Comment, *Vagrancy and Related Offenses,* 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 291 (1969). WASH. REV. CODE § 9.87.010 (Supp. 1972) provides a typical example. While entitled a vagrancy statute, WASH. REV. CODE § 9.87.010 encompasses disorderly persons (*id.* § 9.87.010(7)) and persons loitering about school premises (*id.* § 9.87.010(13)), as well as fortune tellers, prostitutes, "common" gamblers, drug users and others normally deemed vagrants. It seems to make little difference in terms of either enforcement or judicial treatment whether such related laws are codified separately or under one heading.
9. Impermissible vagueness and overbreadth, doctrines grounded respectively on procedural and substantive due process, have generated a considerable body of law in the loitering-related areas. Many of the relevant cases are collected and discussed in three useful annotations: Annot., 25 A.L.R.3d 836 (1969) (Validity of Loitering Statutes and Ordinances); Annot., 25 A.L.R.3d 792 (1969) (Validity of Vagrancy Statutes and Ordinances); and Annot., 12 A.L.R.3d 1448 (1967) (Vagueness as Invalidating Statutes or Ordinances Dealing with Disorderly Persons or Conduct).

Although the Washington court had never before been confronted with the exact question it encountered in *Oyen,* the constitutionality of state school loitering statutes had been upheld previously in several jurisdictions against challenges based on vagueness and overbreadth. *See, e.g.,* Mandel v. Municipal Court, 276 Cal. App. 2d 649, 81 Cal. Rptr. 173 (1969); *In re* Huddleston, 229 Cal. App. 2d 618, 40 Cal. Rptr. 581 (1964); People v. Johnson, 6 N.Y.2d 549, 161 N.E.2d 9, 190 N.Y.S.2d 694 (1959). For a discussion of potential vagueness and overbreadth problems in the school loitering clauses of Oregon's new criminal code, *see* 51 ORE. L. REV. 624, 634-37 (1972).

For recent Washington discussion concerning vagueness in loitering and vagrancy laws, *see* State v. Fisk, 79 Wn. 2d 318, 485 P.2d 81 (1971) (WASH. REV. CODE § 9.87.010(13) (1965) not unconstitutionally vague); Seattle v. Drew, 70 Wn. 2d 405, 423 P.2d 522 (1967) (Seattle loitering ordinance vague for lack of ascertainable standards).

the willingness of the Burger Court to expand the scope of equal protection review into relatively untested areas of the law. The objective of this note is to critically explore the equal protection problems inherent in R.C.W. § 9.87.010(13) and in the *Oyen* court's construction of that statute in terms of both the strict standard principles enunciated in *Mosley* and *Grayned* and the United States Supreme Court's emerging requirement, under a revitalized rational basis standard, of a more clearly demonstrable connection between a state's goals and the means used to accomplish them.[10]

I. STRICT SCRUTINY AND THE FIRST AMENDMENT

Since *Mosley and Grayned* were dispositive of the *Oyen* appeal, a thorough understanding of these two Supreme Court cases is essential to evaluate the Washington decision and associated statute.

At issue in both *Mosley* and *Grayned* was the constitutionality of antipicketing ordinances which made unlawful any nonlabor picketing carried on within a prescribed distance of a school building while classes were in session.[11] Since the equal protection issue in *Grayned* was tersely resolved on the basis of "the reasons given in *Mosley*,"[12] further discussion of the *Mosley* holding applies equally to *Grayned*.[13]

Writing for the majority in *Mosley*, Mr. Justice Marshall found the petitioner's claim "closely intertwined with First Amendment interests" and concluded that the central deficiency of the Chicago ordinance was its description of allowable picketing in terms of subject

10. For a discussion of the parameters of the current standard, *see* the text accompanying notes 32-37 *infra* and authority cited therein.

11. With the exception of two unimportant words, the ordinances challenged in *Mosley* and *Grayned* were identical. CHICAGO MUNICIPAL CODE ch. 193-1 (i) (1968), the relevant ordinance in *Mosley*, 408 U.S. at 92-93, is set out below:

> A person commits disorderly conduct when he knowingly:
>
> . . . .
>
> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session . . . provided, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . .

See also ROCKFORD, ILL., ORDINANCE CODE ch. 28, § 18.1(i) (1969), the ordinance challenged in *Grayned*, 408 U.S. at 107.

12. 408 U.S. at 107.

13. In addition to holding an antipicketing ordinance unconstitutional on the equal protection-first amendment principles voiced in *Mosley*, *Grayned* sustained an antinoise ordinance as facially constitutional against vagueness and overbreadth attacks. 408 U.S. at 107-21.

matter, impermissible under the Court's strict interpretation of the first amendment.[14] Merging this first amendment holding with fourteenth amendment principles, the majority concluded that since the ordinance treated some picketers differently than others, it also violated the command of the equal protection clause,[15] because "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[16] In response to the city's defense that the ordinance was a legitimate device for preventing school disruption,

14. 408 U.S. at 96, *citing* New York Times v. Sullivan, 376 U.S. 254, 270 (1964):
> Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."

Cf. the concurring opinion of Mr. Chief Justice Burger, who points out that well established exceptions such as libel and obscenity prevent the first amendment from literally meaning that individuals are guaranteed the right to express any thought free from government censorship. 408 U.S. at 102-03.

15. *Id.* at 95. Writing for the majority, Mr. Justice Marshall concluded that in all equal protection cases the crucial question is whether there exists an "appropriate governmental interest suitably furthered by the differential treatment." *Id.* This very general statement of the equal protection test does not fit neatly into the conventional, two-tier analytical framework discussed in the text accompanying notes 18-20 *infra*, and reflects Mr. Justice Marshall's general malaise with the rigid two-tier analysis. *See* Dandridge v. Williams, 397 U.S. 471, 519 (1970) (Marshall, J., dissenting). Mr. Justice Marshall's general test in *Mosley* suggests a continuum where what is "appropriate" or "suitable" may vary in degree according to the type of regulation, classification and state interest involved, and whether or not "protected rights" are affected.

16. 408 U.S. at 96. Mr. Justice Marshall characterized his merger of first and fourteenth amendment principles as the "intersection" between the first amendment and equal protection. Although the terminology may be new, the basic concept is not. The Court previously has combined equal protection analysis of speech issues with considerations of censorship to strike down regulatory schemes which discriminate against a religious group based on the viewpoints of its members; *see* Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951). *See also* the concurring opinion of Mr. Justice Black in Cox v. Louisiana, 379 U.S. 536, 581 (1965), wherein a statute proscribing obstruction of public passages which excepted labor picketers from its prohibition was held violative of the first and fourteenth amendments. The majority in that case felt that the statute lodged unfettered discretion in public officials, allowing them to act as censors and raising an "inherent" equal protection problem along with the clear first amendment threat. 379 U.S. at 557. The gist of the intersection doctrine is that courts will apply the stricter test of the equal protection clause to state classifications which impinge upon first amendment rights (*e.g.*, by discriminating on the basis of content or by chilling free expression). *See* the discussion in the text accompanying notes 20-22 *infra* and authority cited therein. Application of the doctrine is infrequent, since courts commonly resort to provisions of the Consitution (*e.g.*, due process) other than the equal protection clause to safeguard fundamental rights. *See* Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-133 (1969) [hereinafter cited as *Developments*]. First amendment-equal protection has been referred to as an "embryonic concept"; *see* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1492 n.41 (1970). For further discussion of the doctrine, *see also* Kalven, *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1, 29-30.

Mr. Justice Marshall articulated the standard which the challenged law was held to have violated:[17]

> The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. . . . Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression.

The test applied in *Mosley* exemplifies the compelling state interest standard, the strictest brand of review exercised under the two-tier equal protection formulation which emerged from the Warren Court.[18] Partially as a reaction to the past abuses of substantive due process, the Warren Court, under a rational basis standard, applied minimal scrutiny to classifications regulating economic, business and most social matters.[19] However, where the classification involved the sensitive issues of race, alienage or political belief, or where it threatened protected rights to which the Warren Court was so responsive, the Court applied a more exacting standard of review which placed a heavy burden on the state to show that the differentiation was *necessary* to further a *compelling state interest*.[20] This strict standard was invoked

17. 408 U.S. at 101-02, citing Dunn v. Blumstein, 405 U.S. 330 (1972), and Williams v. Rhodes, 393 U.S. 23 (1968). Both of these cases, discussed in *The Supreme Court, 1971 Term,* 86 HARV. L. REV. 50, 104 (1972), are equal protection-first amendment cases wherein the strict equal protection standard discussed in the text accompanying notes 19-21 *infra* was applied.

18. *Mosley* has been subsequently cited as standing for the proposition that classifications affecting first amendment rights will trigger strict review. *See* San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1297 n.75 (1973) (financing schools through *ad valorem* tax on property held not violative of equal protection clause); and Gunther, *The Supreme Court 1971 Term—In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].

For informative commentary discussing the dual standard of equal protection review developed by the Warren Court, *see Developments, supra* note 16; Comment, *Equal Protection and Benign Racial Classification: A Challenge to the Law Schools,* 21 AM. U.L. REV. 736, 739-41 (1972); and Gunther, *supra,* at 8-10.

19. Substantive due process has carried repugnant connotations from the early part of the twentieth century when it was used by the Court to justify subjective intervention into terrain properly reserved for the wisdom of the legislature. *See* Eisenstadt v. Baird, 405 U.S. 438, 467 (1972) (Burger, C.J., dissenting). Minimal equal protection scrutiny is one manifestation of the resultant hands-off attitude toward state economic, business and social regulation.

20. *See* Gunther, *supra* note 18, at 8-10 and 21; and *Developments, supra* note 16, at 1087-133. For a recent statement of the strict compelling state interest standard, *see* Dunn v. Blumstein, 405 U.S. 330, 342 (1972).

Mr. Justice Marshall's use of "tailored" and "substantial governmental interest" to describe the standard applied in *Mosley,* 408 U.S. at 101-02, characteristically avoids

by the presence of whatever the Court designated on an ad hoc basis as a "suspect classification" or "fundamental interest."[21] Strict review was applicable in *Mosley* because first amendment rights have been held to constitute fundamental interests,[22] and the Chicago ordinance abridged these rights by differentiations based on content of expression.

Viewed in the analytical framework of *Mosley*, R.C.W. § 9.87.010(13) does not present as blatant an example of facial content discrimination; its exception of students, parents, guardians and school employees from the statute's prohibition[23] is not parallel to the *Mosley* exception of labor picketers because the basis of the Washington statute's classifications involves a natural relationship to the school rather than the content of expression. Nevertheless, in *Oyen* as in *Mosley*, strict review of statutory classifications was triggered by limitation of defendants' first amendment rights.[24]

By broadly construing the phrase "without a lawful purpose" to encompass those who would remain upon school grounds without authorization or a school-related purpose as well as those who would

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the words of art, "necessary" and "compelling state interest," normally used to delineate the strict standard. But there can be little doubt that the substance of the *Mosley* test was intended to be strict scrutiny, since Mr. Justice Marshall has subsequently cited *Mosley* as authority for that doctrine. *See* San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278, 1330 (1973) (Marshall, J., dissenting). *Cf.* the general equal protection test voiced in *Mosley*, discussed in note 15 *supra*.

21. Strict review has been called the new equal protection. By carving out specific suspect classifications and fundamental interests, the Court transformed the nearly dormant equal protection clause into a potent weapon within these narrowly delineated areas. Thus, suspect classifications such as race (Loving v. Virginia, 388 U.S. 1 (1967)) or alienage (Graham v. Richardson, 403 U.S. 365 (1971)) will trigger the compelling state interest test, as will fundamental interests such as voting rights (Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)), interstate travel (Shapiro v. Thompson, 394 U.S. 618 (1969)) and criminal appeals (Griffin v. Illinois, 351 U.S. 12 (1956)).

22. *See* Dunn v. Blumenstein, 405 U.S. 330 (1972) (voting rights); Williams v. Rhodes, 393 U.S. 23 (1968) (voting rights and freedom of association); Harper v. Bd. of Elections, 383 U.S. 663 (1966) (voting rights). Although *Williams* contained language which generally accorded first amendment rights the protection of strict scrutiny, 393 U.S. at 31, *Mosley* solidified the status of first amendment free speech as an equal protection fundamental interest.

23. *See* WASH. REV. CODE § 9.87.010(13) (Supp. 1972), reproduced in note 1 *supra*.

24. There can be little doubt that defendants' pamphleteering constituted an exercise of first amendment rights of free speech in light of the Supreme Court's reliance on *Mosley* and *Grayned*, both of which involved invalid restrictions on expressive activity —picketing. The rights of freedom of speech and freedom of press embrace the right to carry signs in public places as well as the right to distribute literature in public. For cases wherein the Court invalidated broad permit systems dealing with pamphleteering, *see* Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. Town of Irvington, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

do so with criminal motives,[25] the Washington court established a standard of conduct which limits the activity of all but those of the excepted classes. This differing treatment cannot be sustained under the *Mosley* strict standard,[26] because such a broad classification is not necessary to achieve the avowed statutory purpose of preventing material disruption of the educational system.[27] Blanket exclusion of persons bearing an intimate relationship to the school from the proscriptions of the school loitering statute without regard to whether their intent is disruptive or nondisruptive is arbitrary and does not further the state interest as demanded by the stricter standard.[28] Indeed, the present statute may thwart the vital state interest involved by allowing a parent, guardian or school employee to enter upon school premises with a declared and unlawful intent to disrupt, while stifling the peaceful expression of those seeking, as defendants did, to communicate a political ideal. The failure of R.C.W. § 9.87.010(13) to preserve a rational connection between the state's purpose and the classification used to achieve that end is decisive of the equal protection issue in *Oyen,* obviating any need to resolve the difficult question of whether the state interest involved is a compelling one.[29]

Nor can the statute be made to pass equal protection muster simply by judicially excising all applications of the statute which involve a fundamental interest and thus trigger strict review. Such a curative

25. 78 Wn. 2d at 917, 480 P.2d at 771.

26. But statutory exclusion of students may be validly retained, since a primary purpose of school loitering statutes is to protect this class of persons. *See* note 27 *infra.* Disruption caused by students themselves is conduct that falls within school disciplinary regulation, not a school loitering statute.

27. The *Oyen* court stated the statutory purpose as follows:

> Undoubtedly, it is aimed at maintaining a scholastic atmosphere as well as protecting school properties and preserving the moral and physical safety and well-being of the student body from the intrusion and harassment of degenerates, dope peddlers, pornographers, vandals, troublemakers in general [and others who desire to utilize school premises for purposes detrimental to the educational process].

78 Wn. 2d at 914, 480 P.2d at 768-69. Material disruption of the educational process is the standard evil sought to be averted by school loitering laws. *See, e.g.,* Mandel v. Municipal Court, 276 Cal. App. 2d 649, 81 Cal. Rptr. 173 (1969); People v. Johnson, 6 N.Y.2d 549, 161 N.E.2d 9, 190 N.Y.S.2d 694 (1959).

28. See text accompanying note 20 *supra* and authority cited therein for a discussion of the analytical parameters of strict review.

29. Courts have long stressed the importance of preventing school disruption with adjectives such as "substantial," "legitimate," or "paramount." *See, e.g., Mosley,* 408 U.S. at 99 ("Cities certainly have a substantial interest in stopping picketing which disrupts a school."); Mandel v. Municipal Court, 276 Cal. App. 2d 649, 81 Cal. Rptr. 173 (1969); Newman v. Schlarb, 184 Wash. 147, 152, 50 P.2d 36, 39 (1935). Whether this interest is compelling in the equal protection context remains for future decision.

measure may have been feasible under the minimal scrutiny standard of the Warren Court which vested state legislation with a strong presumption of constitutionality so long as the challenged classification bore a rational relation to *any conceivable* state interest.[30] However, recent developments strongly suggest that this standard of limited review is being replaced by a revitalized and more interventionist rational basis test.[31]

II. AN ANALYSIS OF THE STATUTE UNDER THE RATIONAL BASIS STANDARD

In six instances last Term, the Court upheld equal protection claims or remanded them for consideration without explicit resort to the strict scrutiny formula.[32] These cases marked a definite departure from the lenient brand of review previously applied in the absence of a fundamental interest or suspect classification.[33] A precise delineation of the standard represented by this trend is, of course, impossible given its short existence, but the new cases cannot be dismissed as ad hoc judicial anomalies. The rough pattern emerging from them reveals two primary elements: (1) the Court is less willing to accept any conceivable state interest but instead may require an affirmative

30. The liberality of this ends-oriented test lies in its allowance of any conceivable state purpose to justify the legislative means. A court is thus authorized to speculate as to what a legislature intended and broadly defer to legislative expertise. The practical result was usually something less than minimal review. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (maximum welfare grants); Williamson v. Lee Optical, 348 U.S. 483 (1955) (state regulation of visual care). *See also Developments, supra* note 16, at 1076-87.

31. *See* Gunther, *supra* note 18, at 10-48.

32. *See* James v. Strange, 407 U.S. 128 (1972) (Kansas' method of recouping legal defense fees for indigent defendants invalidated); Jackson v. Indiana, 406 U.S. 715 (1972) (Indiana provision for pretrial commitment of incompetent criminal defendants held discriminatory); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (invalidation of discrimination between legitimate children and dependent unacknowledged illegitimates in distribution of workmen's compensation benefits for death of common father); Humphrey v. Cady, 405 U.S. 504 (1972) (difference in commitment procedures between Wisconsin's Sex Crime Act and Mental Health Act held violative of rational standard); Eisenstadt v. Baird, 405 U.S. 438 (1972) (minimum rationality not found in Massachusetts' scheme concerning distribution of contraceptives); Lindsey v. Normet, 405 U.S. 56 (1972) (Oregon statute requiring posting of double rent bond as prerequisite for appeal of eviction action held to bear no reasonable relationship to any valid state objective); and Reed v. Reed, 404 U.S. 71 (1971) (Idaho probate provision giving men mandatory preference over women when persons of same priority class applied for appointment as administrator held unconstitutional). With the exception of *Lindsey*, these cases are discussed in Gunther, *supra* note 18, at 25-37.

33. *See* text accompanying notes 20 and 21 *supra*.

showing of a real state interest on which to ground the classification;[34] and (2) the requirement of a rational means-ends relationship will be more rigidly enforced than under the former standard.[35] That some potency has been injected into the rational basis test is illustrated by the extraordinary number of recent reversals and remands,[36] which were clearly the exception rather than the rule before. This doctrinal shift represents a departure from the rigid equal protection dichotomy left by the Warren Court[37] and indicates that even if the classification or interest infringed upon fails to slip neatly into one of the categories calling for strict review under the compelling state interest test, it must still undergo meaningful scrutiny under the emerging standard.

34. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 77 (1971), where a unanimous Court held that sex discrimination in a provision of the Idaho probate code was not rationally related to the clear state purpose involved, which was to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. The Court did not attempt to reach beyond the clear state purpose for any conceivable justifying interest. *See also* McGinnis v. Royster, 93 S. Ct. 1055 (1973) (New York parole statute held rationally related to avowed state purpose of fostering rehabilitation. Mr. Justice Powell, writing for the majority, carefully disclaimed any hypothesizing by the Court of a state interest, 93 S. Ct. at 1063: "We have supplied no imaginary basis for this statutory scheme . . . .").

35. *Compare* Goesaert v. Cleary, 335 U.S. 464 (1948) (sustaining a Michigan statute which provided that no woman could obtain a bartender's license unless she was the wife or daughter of the male owner) *with* Reed v. Reed, 404 U.S. 71 (1971), two cases representative of the old and current rational basis standards. The challenged classifications in both concerned differentiations based on sex. After careful examination of alternatives, the *Reed* Court held the Idaho probate preference given males not rationally related to a legitimate state interest, while the *Goesaert* Court accorded only perfunctory examination before broadly deferring to the judgment of the legislature and upholding the bartending classification as being "not without a basis in reason."

36. The trend toward change was begun in the cases cited in note 32 *supra*, but definition of the new standard remains in a state of flux, exacerbated by continued citation of cases decided under the old standard. *Compare* Mr. Justice Powell's use of Dandridge v. Williams, 397 U.S. 471 (1970), a case that relied on any reasonably conceivable state interest, as precedent in San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973), *with* his statement in McGinnis v. Royster, 93 S. Ct. 1055 (1973), *supra* note 34.

A recent case has extended the trend of equal protection intervention without express reliance on strict scrutiny into the present Term. *See* Gomez v. Perez, 93 S. Ct. 872 (1973) (denying illegitimates substantial benefits generally accorded children held unconstitutional, citing with approval Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972)). Whether this doctrinal movement ever solidifies into the complex analytical model suggested in Gunther, *supra* note 18, at 20-25, is still an open question.

37. Dissatisfaction with the old dichotomy between the rational basis and compelling state interest standards began to surface even before the last Term. *See, e.g.*, the dissenting opinion of Mr. Justice Marshall in Dandridge v. Williams, 397 U.S. 471, 520-21 (1970), wherein abandonment of the two-tier approach in favor of a sliding scale formula was suggested. Although not representative of the new rational standard because of first amendment implications, *Mosley* also reflects this discontent. The majority opinion in that case carefully avoided mention of such doctrinal terms as "strict scrutiny" and "compelling state interest," but spoke instead of what was suitable to further an appropriate governmental interest. *See* note 15 *supra*.

Analysis of R.C.W. § 9.87.010(13) under this test yields a result identical to that produced by evaluation of the statute in the *Oyen* context under the *Mosley* strict scrutiny standard.[38] Although a court need not hypothesize a state purpose for enacting the Washington statute because protection of the educational system is a real, explicit state end,[39] broad exclusion of parents, guardians and school employees from the statute's operation fails to bear the requisite rational relation to that end. Rational differentiations drawn by a school loitering statute must converge on the basic motivating standard of intent, or lack thereof, to disrupt materially the educational process. The Washington statute's facial discrimination can meet this standard only if the excepted classes are presumed to be free of this intent, but as discussed *supra,*[40] such a presumption is untenable. In addition to not being necessary to further a compelling state interest, as demanded by strict scrutiny,[41] the Washington statute lacks the clear and rational relation to a legitimate state interest required by the revitalized rational basis test of the Burger Court. The Court would find no more rationality in the Washington statute's classification as a means of preventing school disruption than it found in the discriminatory probate preference for men in *Reed v. Reed*[42] or the biased recouping of legal defense fees from indigent defendants in *James v. Strange*.[43] Thus, a simple remand to the trial court and subsequent discharge of the *Oyen* defendants will not cure the defects inherent in R.C.W. § 9.87.010(13). Serious equal protection problems under the current rational basis standard remain, even after judicially excising applications which trigger strict review.

III. AN ALTERNATIVE

The residual unconstitutionality of R.C.W. § 9.87.010(13) can be eliminated by redrafting or by narrowly construing the statute so as to eliminate the arbitrary classification that gave rise to *Oyen* and to promote the legitimate state interest to be protected. A valid school

38. *See* the discussion in the text accompanying notes 18-21 *supra*.
39. *See* note 29 *supra*.
40. *See* the text accompanying notes 27-29 *supra*.
41. *See* the text accompanying note 20 *supra* for a statement of the strict standard.
42. 404 U.S. 71 (1971).
43. 407 U.S. 128 (1972).

loitering statute should serve the community and state by focusing on inchoate crime in the scholastic environment and smothering disruptive, criminal acts while still in the formative stage. As presently drawn and construed, R.C.W. § 9.87.010(13) falls short of this goal because some persons (members of the excepted classes) are left free to enter upon school premises with even an avowed intent to commit criminal disruption. Thus the defendants in *Oyen,* whose only purpose was to distribute peacefully literature espousing a political cause prior to class hours, were within the ambit of the statute, while a parental group determined to disrupt an authorized plan for bussing students probably would not be.[44] As discussed above, this arbitrariness is fatal under either equal protection standard.

The most obvious remedy which would assure that the statute conforms to its purpose while not overstepping the bounds drawn by current equal protection doctrine, is (1) to eliminate all exclusions except that relating to students of the particular school,[45] and (2) to narrow the prohibited activity to that which is done with an unlawful purpose. The proposed unlawful purpose standard flows from the plain words of the statute,[46] adequately protects the state interest involved by subsuming disruptive intent[47] and does not raise the inference made by

44. Such a group could still be prosecuted for the completed offense under Washington's campus disorder statute, WASH. REV. CODE §§ 28B.10.570-.573 (Supp. 1970), *noted* in 47 WASH. L. REV. 501 (1972). Contrast this statute with WASH. REV. CODE § 9.87.010(13) (Supp. 1972), which is intended to intervene prior to the completed criminal act.

45. *See* note 26 *supra.*

46. "[W]ho without a lawful purpose therefor wilfully loiters . . . ." WASH. REV. CODE § 9.87.010(13) (Supp. 1972). *See* note 1 *supra.*

47. The standard of proscribed disruption will vary depending on the nature of the activity regulated. *E.g.,* a family picnic on schoolgrounds during class hours may be only mildly disruptive, yet be subject to regulation because there obviously are more appropriate locations for such conduct. However, a standard of mild disruption would be inappropriate for a political speaker exercising his right of free expression on or near the schoolyard; the first amendment requires that the standard be narrowed to material and substantial disruption. *See, e.g., Grayned,* 408 U.S. at 118, where the Court held that an anti-noise ordinance was constitutionally applicable to demonstrators voicing racial grievances in front of a school *only* if the proscribed activity *materially* disrupted classwork or involved *substantial* disorder. The Court cited Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing of black anti-war armbands in school permissible even though representative of distracting and (to some) unpopular viewpoints). The *Grayned* Court emphasized that this narrow standard was warranted because "we must weigh heavily the fact that communication is involved." 408 U.S. at 116. Thus, a court would have to be ever mindful of the nature of the activity regulated in determining the level of disruption properly prohibited.

the *Oyen* court that mere failure to obtain permission[48] or lack of a school-related purpose may lead to conviction. Permission may still be used by school authorities as a valid screening device to enforce the statute, but only if denial of permission is clearly grounded upon the statutory standard: unlawful purpose.[49] Coupling this more narrow standard with elimination of the exemption of parents, guardians and employees would produce a constitutional statute which better achieves the vital purpose of a school loitering law.[50]

Beyond the constitutionality of R.C.W. § 9.87.010(13), there lies the broader inquiry of what the *Oyen* remand portends for laws in loi-

48. A permission requirement that is not tied to a definite and reasonable legislative standard may lead to constitutional challenge. Broad permission-granting schemes which lodged unfettered discretion in public officials to control speech-related activities have been deemed unconstitutional by the Court under the equal protection clause (*see, e.g.*, Fowler v. Rhode Island, 345 U.S. 67 (1953), and Niemotko v. Maryland, 340 U.S. 268 (1951)) and under the first amendment (*see, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (ordinance that vested administrative officials with discretion to grant or withhold parade permits upon broad criteria unrelated to proper regulation of public places held violative of first amendment)).

49. Several specific aspects of such a screening system need to be considered. School employees would have implied permission under their employment contracts to be present to carry out their appointed duties. However, at times and under circumstances unrelated to such duties, school employees presumably would need specific permission. For example, a part-time night watchman would not have automatic license to wander about school premises during class hours absent a purpose clearly within the scope of his employment.

With respect to first amendment activities, premising permission on lack of an unlawful purpose avoids lodging unfettered discretion in public officials (*see* note 48 *supra*) so long as the screening system strictly abides by the standard and does not become de facto discriminatory. Such a system constitutes a reasonable prior restraint on speech, since a speaker could be turned away only if he had an unlawful, disruptive purpose. As pointed out in note 47 *supra*, the standard of proscribed disruption for speakers would be necessarily higher than that for non-speech related conduct. The Supreme Court has held that properly limited discretion may be vested in administrative officials to regulate speech-related activities in public places, so long as the regulation is concerned with reasonable time, place and manner and is applied even-handedly. *See* Cox v. Louisiana, 379 U.S. 536, 558 (1965); Poulos v. New Hampshire, 345 U.S. 395 (1953); Cox v. New Hampshire, 312 U.S. 569 (1941). This note will not investigate the limits of the high school campus as a public forum. *See* Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 278 (1970).

50. Presented with a nearly identical factual situation (adult distributing anti-Vietnam war leaflets on high school campus), a California appellate court in Mandel v. Muncipal Court, 276 Cal. App. 2d 649, 81 Cal. Rptr. 173 (1969), provided the saving statutory construction which the *Oyen* court ignored. The questioned statute was very similar to WASH. REV. CODE § 9.87.010(13) (Supp. 1972), reproduced in note 1 *supra*. The California statute provided:

> Every person who loiters about any school . . . is a vagrant, and is punishable by a fine of not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.

CAL. PENAL CODE § 653g (West 1967). In holding that defendant was not within the pro-

tering-related areas such as vagrancy, disorderly conduct and breach of peace.[51] By applying equal protection to vacate a state decision upholding a statute on other constitutional grounds, the United States Supreme Court has demonstrated a willingness to expand the use of equal protection as a tool for rejecting laws which contain classifications that bear only a tenuous relation, if any, to the state interest sought to be furthered. This infirmity is common in loitering-related areas, and the *Oyen* remand provides a warning that such laws are now vulnerable to close constitutional scrutiny on a fresh doctrinal ground.[52] The fact that *Oyen* raised first amendment issues only intensified the level of equal protection review, as evidenced by the strict approach of *Mosley*. But even if protected rights such as free speech are not involved in the application of such laws, they still may be vulnerable to exacting review under recent decisions of the Burger Court.

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hibition of this statute, the appellate court wisely construed the term "loiters" to encompass only that species of lingering engaged in for an unlawful purpose:

> It is only when the loitering is of such a nature that from the totality of the person's actions and in the light of the prevailing circumstances, it may be reasonably concluded that it is being engaged in for the purpose of committing a crime as opportunity may be discovered.

81 Cal. Rptr. at 179. The appellate court concluded that although pamphleteers could not be violent and heedless of the rights of others, the provisions of § 653g could not be constitutionally construed to block the channels of peaceful communications or to stifle peaceful activity. *Id.* at 189. Although *Mandel* was decided on the doctrinal bases of vagueness and overbreadth, the narrowing construction of the appellate court fulfills the requirements of the equal protection clause as well.

51. *See* note 8 *supra* for a discussion of these closely related areas.

52. There is also evidence that these laws are being subjected to closer scrutiny and "less judicial deference" under the more commonly applied vagueness and overbreadth doctrines. *See* Gooding v. Wilson, 405 U.S. 518 (1972) (disorderly conduct statute overbroad), and Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (vagrancy ordinance void for vagueness).