THE SUPREME COURT

1970-1971 Term

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INTRODUCTION

Because of an increasing number of requests for analyses of individual Supreme Court decisions or series of decisions, the American Law Division began, with the 1967-1968 Term of the Court, preparing reviews of selected Court actions and dispositions of cases. This is the fifth report of the series on the 1970-1971 Term.

References are made to the previous reports by citation to 1967-68 (or 1968-69 or 1969-70) Report, followed by the page reference. Citation to previous reports on this Term are signaled by supra and the page reference.

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TABLE OF REPORTED CASES

Cases Previously Discussed

During the period covered by this report, we issued separate memoranda on seven issues concerned in decisions of the Court. These memoranda are collected and reproduced in the appendix. The issues covered were:

Group Legal Services and the First Amendment -- The Court reaffirmed previous decisions and held that provision of legal services to its members by a union is the kind of associational activity protected by the First Amendment and not subject to barring by the States. United Transportation Union v. State Bar of Michigan, 39 L. W. 4428 (April 5, 1971).

Loss of Citizenship -- Departing from recent cases a divided Court held that a person who acquired United States citizenship by birth abroad of an American parent may subsequently be deprived of that citizenship for failing to comply with statutory conditions on retention of citizenship. Rogers v. Bellei, 39 L. W. 4354 (April 5, 1971).

Desegregation of Urban Schools -- The Court established guidelines to govern the desegregation process in urban areas in which the racial separation had been brought about or maintained by state action and approved extensive busing and other affirmative action. Swann v. Charlotte-Mecklenburg Board of Education, 39 L. W. 4437; Davis v. Board of School Comm. of Mobile, 39 L. W. 4447. The Court also struck down attempted state restrictions on the process. North

Carolina State Board of Education v. Swann, 39 L. W. 4449; McDaniel v. Barresi, 39 L. W. 4450 (April 20, 1971).

Abortion -- In its first ruling on the abortion controversy the Court upheld against vagueness attacks the District of Columbia law but construed it broadly so as probably to immunize a larger number of abortions from prosecution than had been protected previously. United States v. Vuitch, 39 L. W. 4464 (April 21, 1971).

Referenda and the Poor -- The Court held that the action of a State in requiring a mandatory referendum in the community on the question of building low-income housing in that community, while not requiring or even permitting a referendum with regard to other types of publicly-assisted housing construction or other types of public subsidies, was not a singling out of the poor for a disadvantaging which violated the equal protection clause. James v. Valtierra, 39 L. W. 4488 (April 26, 1971).

Capital Punishment -- The Court held that due process was not violated by statutory capital penalty structures which provided for the decision on the issue of guilt and the issue of punishment in the same trial and which did not provide standards for the jury. McGautha v. California, 39 L. W. 4529 (May 3, 1971).

Obscenity -- Reaffirming a prior landmark, the Court has held that obscenity is not within the protection of the First Amendment and that its commercial dissemination may be suppressed by government. The cases left uncertain the extent of governmental

power to proceed against purely private possession of pornography. United States v. Reidel and United States v. Thirty-Seven Photographs, 39 L. W. 4518, 4523 (May 3, 1971).

CRIMINAL LAW AND PROCEDURE

During this period the Court handed down several opinions dealing with questions of criminal law and procedure, some important, some of limited significance.

Federal Criminal Jurisdiction

Unlike the States or any unitary government, the United States does not have a general criminal jurisdiction. The basic responsibility for the day-to-day maintenance of order in the society is constitutionally one for state and local government. But federal law enforcement has assisted and supplemented local authorities in the performance of that local responsibility in varying degrees. The degree has varied, in fact, from slight, in the early days, to pervasive today. Thus, a consultant's report to the National Commission on Reform of Federal Criminal Laws notes that "[f]ederal criminal jurisdiction . . . now touches at least indirectly upon practically all types of substantive criminal activity."[198/]

Being a government of delegated powers and not being vested with plenary police powers, as are state governments, the Federal Government must look to one of the powers expressly or impliedly granted in the Constitution as the basis for a criminal statute. Of all

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198/Abrams, "Consultant's Report on Jurisdiction," in National Commission on Reform of Federal Criminal Laws, Working Papers (Washington: 1970), vol. 1, 33, 36 (emphasis in original omitted).

the bases, the most common one has been the grant in Article I, §8, cl. 3 of power to regulate interstate commerce. Thus, the United States has been able to proceed against organized prostitution (not to mention weekend larks), kidnapping, car theft, many types of fraud, and incitements to riot, in all those cases where the participants have either traveled across state lines or used the mails or some other facility of interstate commerce.[199/]

The history of the use of the commerce clause is one of expansion, of greater and greater utilization of the power to reach more and more activities which the Federal Government wishes to suppress or to regulate. That expansion continues, and would continue under proposals of the National Commission on Reform of Federal Criminal Laws;[200/] this Term again it was sustained by a decision of the Supreme Court.

In Perez v. United States, 39 L. W. 4484 (April 26, 1971), the Court, in an opinion by Justice Douglas with Justice Stewart dissenting, sustained the constitutionality of the 1968 "loansharking"

199/Abrams, op. cit., n. 1, 33-67; cf, Killian, Federal Registration of Firearms and Licensing of Firearms Owners -- A Consideration of Two Constitutional Problems, American Law Division, LRS, August 19, 1968 (A - 257), pp. 1-22. On the matter of federal criminal jurisdiction generally, see Schwartz, "Federal Criminal Jurisdiction and Prosecutors' Discretion," 13 L. & Contemp. Prob. 64 (1948).

200/Abrams, op. cit., n. 1; National Comm. ..., Study Draft of a New Federal Criminal Code (Washington: 1970), pp. xxviii-xxxii, 10-23; National Comm. ..., Final Report (Washington: 1970), 11-26. But compare, Liebmann, "Chartering a National Police Force," 56 A. B. A. J. 1070 (1970).

law as applied, where there was no evidence offered of an interstate commerce connection in the particular case.

The statute, Title II of the Consumer Credit Protection Act, 82 Stat. 159, 18 U. S. C. §891 et seq., outlawed "extortionate credit transactions" which were defined as those characterized by the use or threat of use of "violence or other criminal means" in enforcement. Federal jurisdiction was premised on a statement of findings in which Congress specifically noted that organized crime was interstate and international in character, that a substantial part of the income of organized crime was generated by extortionate credit transactions, and that such transactions "are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."

The premise, then, was that the evil, the deleterious effects on interstate commerce, stemmed from a whole class of activities. That being so, Congress has the power to regulate the entire class, including those separate individual acts which cannot be shown to have an effect on interstate commerce themselves. A divided Court of Appeals sustained the conviction in this case on that basis, rejecting as irrelevant the defendant's argument that the prosecution had not in his case shown nor attempted to show any effect on interstate commerce. 426 F. 2d 1073 (C.A. 2, 1970).

Justice Douglas' opinion upheld the constitutionality of the application of the statute in this case, and necessarily of the statute generally, on that theory. Many decisions of the Court, the Justice wrote, had sustained the validity of congressional regulation of a class of activities affecting interstate commerce and the regulation of units of that class by assuming that if the class had the requisite effect the individual units alone or in the aggregate did. And it was within the power of Congress to regulate individual activities with only intrastate effect if Congress should determine that the aggregate of such activities, the class, did have an interstate effect and it was necessary therefore in regulating the effect of the class to sweep within the scope of the regulation all the individual activities. Thus, in Wickard v. Filburn, 317 U.S. 111 (1942), the power to regulate wheat production intended solely for the producer's own consumption on his own farm was held reachable because such production supplied the need of the producer which otherwise would be satisfied by his purchases in the open market. United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100 (1941); Katzenbach v. McClung, 379 U.S. 294 (1964).

Because loan sharking, though purely intrastate, may in the judgment of Congress affect interstate commerce, the power existed here. Justice Douglas reviewed the evidence before Congress which could have convinced it of the interstate effects of loansharking as an integral part of organized criminal activity. That evidence, the

Justice continued, clearly refuted defendant's claim that all that was involved in this case "is a traditionally local activity. It appears, instead, that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations."

Justice Stewart's brief dissent objected that Congress could not authorize the prosecution and conviction of any person in the absence of proof of interstate movement, use of interstate facilities, or a showing that interstate commerce was affected. Barring one of these factors, such conduct was within the sole jurisdiction of the States.

The Court has accepted for review next Term a case which raises much the same issue as Perez but with additional complications. United States v. Bass, 434 F. 2d 1296 (C.A. 2, 1970), cert. granted, No. 1285. Involved is a 1968 law, enacted by Congress as part of the Omnibus Crime Control and Safe Streets Act. The statute, 18 U.S.C. §1202(a), prohibits any person convicted of a felony from "receiv[ing], posses[ing], or transport[ing] in commerce or affecting commerce" any firearm. The difficulty which has divided the lower courts is whether the commerce language qualifies only transporting or whether it qualifies receipt and possession as well. Although the majority of the courts passing on the question have held that no proof need be made of a commerce connection with regard to receipt and possession, the

Court of Appeals in this case held that the commerce language modifies all three acts and that the statute would be unconstitutional if it authorized the Federal Government to prosecute for receipt and possession without making any commerce showing. Unlike the statute in Perez where Congress had substantial evidence of the interstate effect of loan sharking, the statute here was a floor amendment on which there had been no hearings and no findings.

In Rewis v. United States, 39 L. W. 4363 (April 5, 1971), a similar constitutional question was not reached because of the Court's construction of the statute. The law in question, 18 U.S.C. §1952, penalizes anyone who "travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce" in order to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on" of gambling activities. Rewis and Williams operated a numbers game in a small Florida town close to the Georgia border. They and two Georgia residents who had crossed the border to place bets were convicted of violations of the statute quoted above. The Court of Appeals, 418 F. 2d 1218 (C.A. 5, 1970), reversed the convictions of the customers, holding that the law was not violated by the interstate travel of persons who were mere customers of a gambling operation. But the court sustained the conviction of Rewis and Williams on the basis that operators of gambling establishments are responsible for the interstate travel of their customers.

In an opinion for a unanimous Court, Justice White not participating, Justice Marshall reversed. He agreed with the lower court that the law did not apply to customers. But similarly he could not agree with the lower court that merely operating a gambling business which was frequented by out-of-state customers violated the statute; the language of the law did not support an interpretation. The Government had argued, however, that the statute was violated when an operator of such an establishment could reasonably foresee that customers will cross state lines to do business. This argument was also rejected as not supported by the language of the statute. It might well be, continued Justice Marshall, that some active encouragement of interstate travel by customers might violate the act; "there may be occasional situations in which the conduct encouraging interstate patronage so closely approximates the conduct of a principal in a criminal agency relationship that the Travel Act is violated." But defendants were not convicted under such a theory and the Government had offered no evidence to sustain it. The convictions were reversed.

Federal Regulation of Firearms and Destructive Devices

United States v. Freed, 39 L. W. 4424 (April 5, 1971), illustrates a basis for federal criminal jurisdiction as an alternative to the commerce power. Congress has the power to levy taxes and it has used this power both to raise revenue and, more important, to regulate activities as to which its jurisdiction would not otherwise extend. Because the Supreme Court has refused to question the Federal Government's power to tax activity which is unlawful, cf. License Tax Cases, 5 Wall. (72 U. S.) 462 (1867), the practice has been to levy a tax and require registration and reporting on such activities as gambling or the manufacture and transfer of certain firearms, for example. If the activity is illegal, the reporting and registration will furnish evidence which the relevant jurisdiction may use to convict for the substantive violation; if the individual, for this or another reason, fails to register and report the Federal Government will indict him for his refusal. See United States v. Kahriger, 345 U. S. 22 (1953); Lewis v. United States, 348 U. S. 419 (1955).

Recent cases, however, while not at all questioning the use of the taxing power to obtain criminal jurisdiction, struck down the Government's power to "whipsaw" individuals engaged in illegal activities by holding that the Government could not compel them to incriminate themselves by filing requirements which revealed evidence of prosecutable offenses. Marchetti v. United States, 390 U. S. 39

(1968); Grosso v. United States, 390 U. S. 62 (1968)(Gambling Tax Act); Haynes v. United States, 390 U. S. 85 (1968)(National Firearms Act), 1967-68 Report, pp. 294-305; Leary v. United States, 395 U. S. 6 (1969)(Marijuana Tax Act), 1968-69 Report, pp. 308-21. But cf. Minor v. United States, 396 U. S. 87 (1969)(sellers of heroin and marijuana), 1969-70 Report, pp. 91-94. Therefore, in revising the National Firearms Act in 1968, Congress undertook to retain the registration and reporting requirements by prohibiting the use of such information obtained therefrom in criminal prosecutions.[201] The new law provides that information or evidence provided in compliance with the act cannot be used, directly or indirectly, as evidence against the registrant or applicant "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence." 26 U.S.C. §5848.

Freed and Sutherland were indicted for possession of hand grenades which had not been registered pursuant to the law.[202] The trial judge granted pretrial motions to dismiss the indictments on

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201/There was not present the issue whether "testimonial" immunity is enough to satisfy the self-incrimination clause or whether "transactional" immunity is required. See supra, pp. 119-25, esp. id., 124.

202/The Act covers only designated classes of firearms and destructive devices, sawed-off shotguns and rifles, machine guns, bombs, rockets, and grenades. 26 U.S.C. §5845.

the ground that the law was unconstitutional because it failed to accord full protection against self-incrimination and the indictment was defective because it did not require that possessors be aware that the firearms possessed were unregistered.

In an opinion by Justice Douglas, the Court reversed; Justice Brennan concurred separately. With regard to the issue of self-incrimination, Justice Douglas wrote, the statute accorded adequate protection. Insofar as federal law was concerned, a transferor of a covered device must obtain the requisite information and file an application to be permitted to transfer the device; if he did so and approval was granted, possession was legal under federal law. Full compliance with the law made one quite within federal law.

Insofar as state law was concerned, the statute provided that none of the information furnished could be used in a subsequent criminal prosecution for prior or concurrent offenses. Defendants argued that they were accorded no protection against use of incriminating evidence for any future offenses which might be completed. But, said Justice Douglas, the self-incrimination clause does not go so far as to "suppl[y] insulation for a career of crime about to be launched." But this statement is combined with acknowledgment by the Government that no information supplied by registration is ever made available to any other federal agency or to any state or local agency, so that use of such information by an agency in prosecuting for a crime committed after registration is impossible as a practical matter anyway.

The problem of scienter, of guilty knowledge, is a difficult one in criminal law.[203] Basically, the issue revolves about the concept of mens rea or "guilty mind." There are two closely related ideas in the concept: the first is that conduct is criminal only if the actor is aware of the facts making it so and the second is that there must be awareness of wrongdoing.[204] This general concept of culpability is variously stated in criminal statutes, in terms like "willful," "willfully and unlawfully," "with intent to," or some such form. But the exceptions to the mens rea requirement have increased greatly, especially in the area of regulatory legislation involving public health, safety, and welfare. Thus, today some offenses must be prosecuted by showing a guilty mind or guilty knowledge while others need not be. Compare Morrisette v. United States, 342 U.S. 246 (1952); Lambert v. California, 355 U.S. 225 (1957); United States v. Dotterweich, 320 U.S. 277 (1943).

Justice Douglas' opinion rejects the scienter argument and trial court action on the basis that the statute is a "regulatory measure in the interest of the public safety, which may well be

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203/American Law Institute, Model Penal Code (Tent. Draft. No. 4, 1955), §2.02, pp. 123-32; Weinreb, "Consultant's Comment on Basis of Criminal Liability; Culpability; Causation," in National Commission on Reform of Federal Criminal Laws, Working Papers (Washington: 1970), 105-141; National Comm...., Final Report (Washington: 1970), 27-31.

204/1967-68 Report, pp. 124-35, and sources cited, id., p. 130 n. 65.

premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." Thus, the rationale is that ignorance of a specific law furnishes no excuse when one should know from the nature of his act that it is quite likely subject to regulatory legislation; if, however, the act is one which is not the kind which should alert the doer to possible legal consequences ignorance may well excuse an omission or an act. Here, therefore, there was no need in the indictment to allege that the hand grenades were possessed knowing that they were unregistered.

Justice Brennan's concurrence was primarily addressed to this second issue. His conclusion was that the language of the statute and the legislative history did indicate that Congress had dispensed with the requirement of proof of intent in connection with the status of the hand grenades as being unregistered and that this was permissible because "the likelihood of governmental regulation of the distribution of such weapons [as are covered by the Act] is so great that anyone must be presumed to be aware of it."

The decision thus sustains the Act against the two most substantial arguments presented against it.

Federal Registration - The Remains of Marchetti-Grosso

As noted supra, pp. 441-42, in Marchetti and Grosso, the Court struck down a federal registration system whereby the Federal Government compelled gamblers to pay a tax on their earnings from

gambling activities and to register and provide detailed information about their gambling activities, information which was made available to law enforcement authorities. While the Court did not cast doubt on the ability of the Government to continue to tax earnings from gambling, whether such activities were legal or illegal, it did hold that gamblers could refuse to furnish the evidence without legal liability by claiming their privilege against self-incrimination.

Whereas Freed, supra, concerned the squaring of these past decisions and others with new enactments, in two other cases the Court was confronted with the effect of Marchetti-Grosso on other criminal statutes related to the ones struck down. United States v. United States Coin and Currency, 39 L. W. 4415; Mackey v. United States, 39 L.W. 4372 (April 5, 1971). While both cases involved issues of retroactivity which are dealt with infra, pp. 472-93, they concerned other issues as well.

Of the two cases, Mackey was the most restricted to the retroactivity controversy. Mackey was a gambler who over a five year period filed his monthly wagering statements as required by law. In 1963 he was indicted for willfully attempted to evade payment of his income taxes. At his trial the prosecution presented the 60 wagering statements and offered expert testimony to show that the gross amount of wagers reported, less the expenses of operation, was greater than the profits reported on his annual

income tax returns. He was convicted and the conviction was sustained on appeal. 345 F. 2d 499 (C.A. 7, 1965), cert. den. 382 U. S. 824 (1965). Following the decisions in Marchetti-Grosso, he filed a post-conviction relief application seeking to void the prior conviction on the ground that the use of the wagering statements had been barred by the self-incrimination clause as interpreted by the Court in Marchetti-Grosso. He was rebuffed in the lower courts. 411 F. 2d 504 (C.A. 7, 1969).

Dividing seven-to-two, the Court affirmed, holding that Mackey was not entitled to have his conviction set aside. Applying the strict standards of retroactivity developed by them, infra, pp. 472 - 93, Justice White, in company with the Chief Justice and Justices Stewart and Blackmun, held that Marchetti-Grosso was to have no retro-active effect and so did not affect Mackey's conviction. Justice Harlan concurred under his view that retroactivity should not ordinarily be extended to cases on collateral relief. Justice Brennan, with Justice Marshall, concurred without regard to whether Marchetti-Grosso applied, arguing that those cases held that a claim of self-incrimination would be a valid defense for a prosecution for a refusal to file the required statements and that the self-incrimination clause would compel the granting of immunity from prosecution to anyone who had nonetheless filed the statements under threat of prosecution if the prosecution were for the offenses required to be reported about, but that the Government, having the power to collect taxes even on proceeds from

Grosso was retroactively to be applied to Angelini's situation, though of course the Justices agreed on the result for the different reasons underlying their different views on retroactively.[205] Justice White dissented in an opinion which the Chief Justice and Justices Stewart and Blackmun joined.

The Government had presented the argument that even if Marchetti-Grosso were retroactive, the forfeiture proceeding was still valid because the guilt or innocence of wrongdoing of Angelini was wholly irrelevant to the question whether the money should be forfeited so that his constitutional defense against conviction of an offense did not extend to defeating the forfeiture. Since the statute authorizes seizure and confiscation of money being used or intended to be used for illegal purposes it is the character of the money, its "guilt" so to speak, which is the decisive factor. "If we were writing on a clean slate," Justice Harlan noted, "this claim that §7302 operates to deprive totally innocent people of their property would hardly be compelling.... However, as our past decisions have recognized, centuries of history support the Government's claim that forfeiture statutes similar to this one have an extraordinary

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205/Angelini's conviction had become valid prior to the time of the Marchetti-Grosso decision, United States v. Angelini, 346 F. 2d 278 (C.A. 7, 1965), cert. den. 382 U.S. 838 (1966), so that by the standards of a majority of the Justices he could not have taken advantage of those decisions to set aside his conviction by collateral relief. Cf. Mackey v. United States, supra.

illegal activities and having the power to enforce the collection through adequate reporting requirements, was not precluded from using the information gained from such reporting in prosecutions undertaken to remedy an evasion of the tax-paying requirements. In other words, the two Justices thought the relevant question was what the compelled information was being used for. Justices Douglas and Black dissented, arguing that all the Court's decisions should be fully retroactive and that Mackey was as entitled to the benefits thereof as was Marchetti and Grosso.

Coin and Currency involved a different issue and resulted in a much closer decision. In addition to criminal conviction for failure to register and pay the wagering tax, federal law additionally provides for the forfeiture of "any property intended for use in violating the provisions of the internal revenue laws...." 26 U.S.C. §7302. One Angelini was convicted of failing to register and pay the tax; thereafter the Government instituted forfeiture proceedings against the $8,674 which Angelini had in his possession when he was arrested and which was being used or was intended for use in his gambling operation. The Court of Appeals held that the intervening Marchetti-Grosso decisions afforded Angelini the defense of his claim against self-incrimination to defeat the forfeiture proceeding. 393 F. 2d 499 (C.A. 7, 1968). Five-to-four the Supreme Court agreed.

In an opinion by Justice Harlan, with which Justices Black, Douglas, Brennan, and Marshall joined, it was decided that Marchetti-

broad scope..... Traditionally, forfeiture actions proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing."

Thus, continued the Justice, history did support the breadth of the Government's claim. But it was also held in Boyd v. United States, 116 U.S. 616, 634 (1886), that forfeiture proceedings instituted because of offenses committed by someone though formally civil were by nature criminal so far as the Fifth Amendment is concerned. Too, such a broad reading as that of the Government would as well raise constitutional problems in connection with the eminent domain power, e. g., the taking of property without adequate compensation.

But the Court need not go into that, Justice Harlan concluded, because the entire statutory structure belied the seemingly broad language of §7302. Thus, a provision of the customs laws, 19 U.S.C. §1618, made specifically applicable to forfeiture cases under the tax laws, 26 U.S.C. §7327, allows the owner of property to reclaim his property from the Secretary of the Treasury by proving that the "forfeiture was incurred without willful negligence or without any intention on the part of the petitioner ... to violate the law...." Thus, "when the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon

those who are significantly involved in a criminal enterprise."[206/] Thus, Angelini could raise his privilege against self-incrimination and defeat the forfeiture.

The dissent, which is dealt with more fully in the section on retroactivity, infra, pp. 472-93, argued that at the time Angelini failed to register and pay taxes the Court's decisions were clear that he had no constitutional defense either against a criminal prosecution or a forfeiture proceeding and the dissent would not permit one to be raised now since he had simply violated a law clearly constitutional at the time.

206/Such a reading is contrary to that of a majority of the lower court decisions and probably as well of the history of forfeiture, which, of course, Justice Harlan states. Note, "Forfeiture of Property Used in Illegal Acts," 38 Notre Dame Law. 727, 735-36 (1963); Note, "Forfeitures - Civil or Criminal?" 43 Temple L. Q. 191 (1970).

The Wired Informer and the Fourth Amendment

I

Adhering to several previous decisions which had been placed in doubt by more recent rulings, a divided Court has sustained a police-investigative tactic against Fourth Amendment objections. The tactic involves using an informer, wired to record on his person or to broadcast for recordation or overhearing, to engage a criminal suspect in conversation or a transaction in the hopes of obtaining incriminating admissions. The constitutional objection was that the use of such wired informers should be circumscribed by a warrant requirement just as ordinary searches for evidence are so circumscribed. The Court held, however, that such electronic surveillance when one of the parties agrees to it is not within the bounds of the Fourth Amendment. United States v. White, 39 L.W. 4387 (April 5, 1971).

II

White was an alleged dealer in narcotics. Federal agents persuaded one Jackson, apparently a regular informer, to enter into a series of transactions with White relating to the purchase of narcotics. Eight meetings took place, in Jackson's house or in his car, once in White's home, once in White's place of business, and a couple of meetings on street corners. Each time Jackson had strapped to his body a "radio kel set" which broadcast to federal narcotics agents stationed nearby and these agents overheard, but apparently did not record, all of Jackson's conversations with White. Additionally, when White came to Jackson's house an agent was hidden in a closet and overheard the conversations without benefit of electronics.

At White's trial, Jackson was unavailable, having disappeared, and the federal agents were permitted to testify about what they had overheard. The Court of Appeals held this to be error, that the "bugging" without prior judicial authorization through a warrant violated the Fourth Amendment 405 F. 2d 838 (C.A. 7, 1968). The Supreme Court reversed. Justice White delivered the opinion of the Court which was joined by the Chief Justice and Justices Stewart and Blackmun. Justice Black and Brennan concurred; Justices Douglas, Harlan, and Marshall dissented.

III

Appreciation of the meaning and importance of White requires an explication of three lines of decisions by the Court.

(A)

The first line of cases, well illustrated by Hoffa v. United States, 385 U.S. 293 (1966), holds the Fourth Amendment inapplicable to the governmental use of informants and confidential agents in the conduct of criminal investigations.[207] Defendant was on trial for certain Taft-Hartley labor law violations. Partin, a Teamster functionary in jail in Louisiana charged with certain federal and state criminal violations, either volunteered or was induced to attach himself to Hoffa's entourage in Nashville during the trial; Partin was released on bail and during the course of the proceedings a number of charges against him were dismissed. He did manage to associate himself with Hoffa during the trial and was present during many conversations and discussions. The trial ended in a hung jury. Partin's reports to federal

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207/Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs," 60 Yale L.J. 1091 (1951); Note, "Judicial Control of Secret Agents," 76 Yale L.J. 994 (1967).

authorities resulted in the return of an indictment charging Hoffa and several associates with endeavoring to bribe several of the jurors sitting at the trial.

Among Hoffa's contentions on appeal was that Partin's testimony of his conversations represented a violation of the Fourth Amendment, because it was the product of a search and seizure without authorization of a warrant.[208] The argument in essence was that Partin spent much of his time in Hoffa's presence for a period of two months specifically in order to overhear and thus to "seize" incriminating admissions and that such use of informers did require prior judicial authorization. But the Court, while reaffirming its prior holdings that entry by deception as well as by force may give rise to an unreasonable search[209] and that verbal as well as tangible evidence may be illegally seized,[210] rejected Hoffa's claim on the ground that "no interest legitimately protected by the Fourth Amendment" had been invaded. The purpose of the Fourth Amendment, Justice Stewart wrote for the Court, is to protect persons in their reliance on the security and privacy of their surroundings. That Partin had heard only conversations directed to him or knowingly carried on in his presence indicated to the Court that Hoffa had relied not on the security

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208 /For an exploration of the Fourth Amendment and citation to sources, see 1967-68 Report, pp. 67-95.

209 /In Gouled v. United States, 255 U.S. 298 (1921), the police agent gained access to defendant's premises by deception and carried away tangible evidence.

210 /Silverman v. United States, 365 U.S. 505 (1961); Wong Sun v. United States, 371 U.S. 471 (1963).

of his hotel room but on his "misplaced confidence" in Partin. But, concluded Justice Stewart, the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Id., 302.

Thus, the use of informers or confidential agents who by deception obtain certain types of evidence[211] is not an investigative technique subject to the requirements of the Fourth Amendment: police need not justify the use to a disinterested magistrate by presenting facts which indicate to him the presence of probable cause to believe that a crime has been or is being committed and that evidence may be obtained through the use of the informer. If the rule were otherwise, the narcotics agents would have had to seek judicial authorization before they sent their agent calling on White the first time to make contact in order to buy narcotics, just as they would have had to seek judicial authorization to have themselves entered White's residence and searched for narcotics.[212]

(B)

The second line of cases is briefly described.[213] In Olmstead v. United States, 277 U.S. 438 (1928), a five-to-four majority held that electronic surveillance - telephone wiretapping in that case - was not within the proscription of the Fourth Amendment's ban on unreasonable searches and seizure, since aural transmissions could not be "seized." The premise - that words could not be seized - was whittled down by the Court over time and some

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211/Supra, n. 209.

212/None of the dissenters in White appeared to advocate the placing of Fourth Amendment limitations on the use of informers and confidential agents in the absence of some form of electronic surveillance.

213/The story is told in 1967-68 Report, pp. 96-103, 327-37; 1968-69 Report, pp. 154-88.

electronic surveillance, accomplished by physical intrusion, was brought under Fourth Amendment standards. Finally, in Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967), Olmstead was discarded. Electronic surveillance was a search and seizure which had to meet Fourth Amendment specifications; prior judicial authorization would have to be obtained in order to carry it on, provided, that is, that the surveillance was of conversations about which the utterer had a reasonable expectation of privacy.

(C)

We are now brought to the third line of cases and the change which Katz might or might nor have wrought in it. In On Lee v. United States, 343 U.S. 747 (1951), the Court narrowly upheld the admissibility of the testimony of a narcotics agent who related incriminating admissions by On Lee to a former associate in the course of two conversations. The agent overheard the conversations because the former associate was wired to broadcast the conversations. Relying on the fact that On Lee had invited the wired informer into his store, Justice Jackson for the Court perceived no wrongful entry; because Olmstead had held that words could not be seized the mechanical interception of the conversations did not violate the Fourth Amendment.

In Lopez v. United States, 373 U.S. 427 (1963), a defendant was charged with attempting to bribe an Internal Revenue Service agent to conceal tax liabilities. The agent on the first attempt accepted the proffered money and reported to his superiors. He was instructed to "play along" and go to the next meeting with Lopez; the agent was equipped with a pocket radio wire recorder. The meeting took place, Lopez again offered money, and his

incriminating statements were recorded. The agent testified at the trial about the bribe offers and the recording was admitted into evidence. The Court decided that the agent, having been where he was by invitation, could lawfully have testified about the conversations and the recording device was used to obtain the most reliable evidence possible to corroborate the agent's testimony. The majority opinion accepted On Lee as authority and relied on it.

Then in Osborn v. United States, 385 U.S. 323 (1966), a companion to Hoffa, the Court relied on a much narrower ground to uphold an electronic surveillance that seemed clearly covered by On Lee and Lopez. Osborn was one of defendant Hoffa's attorneys. He retained Vick, a Nashville policeman he has used previously, to make background investigations of the potential jurors. Before accepting employment with Osborn Vick had agreed with federal agents to keep them informed of any "illegal activities" he might observe. Vick told Osborn that one of the members of the jury panel was his cousin and Osborn told him to approach the man and offer him money to vote for an acquittal if he should wind up on the panel. Vick reported the conversation to federal agents who reported the matter to the two federal judges in that district. After considering Vick's sworn statement relating to the conversation the two judges in writing authorized FBI agents to equip Vick with a recorder and send him back to Osborn so that such a serious matter could be resolved by something more substantial than the conflicting testimony of an informer and a purportedly upright attorney. Conversations were recorded which were incriminating.

Speaking through Justice Stewart, the Court upheld the procedure as being fully in compliance with the Fourth Amendment. Left unclear, however, was whether the procedure was required by the Fourth Amendment. The decisions in Berger and Katz made necessary a consideration whether On Lee and Lopez were still good law and Congress' decision in its wiretap legislation to exempt this sort of situation from its coverage made certain the decision would be constitutionally based.[214/]

IV

Justice White's plurality opinion proceeds on the basis that Lopez and Hoffa are good law in the sense that a government agent may by deception obtain the confidence of a law violator, induce him to engage in conversations in which he may make incriminating admissions, and report to the authorities what was said either from memory or by recording of the conversation or both. "If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom

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214/For consideration of the issue, see Greenawalt, "The Consent Problem in Wiretapping and Eavesdropping," 68 Colum. L. Rev. 189 (1968); Kitch, "Katz v. United States: The Limits of the Fourth Amendment," 1968 Sup. Ct. Rev. 133 (Kurland ed.). In 1968 Congress enacted a comprehensive electronic surveillance statute, outlawing private tapping and bugging and generally requiring warrants for law enforcement electronic surveillance. P.L. 90-351, Title III, 82 Stat. 212, 18 U.S.C. §2510 et seq. But 18 U.S.C. §2511(2)(c) exempts from the warrant requirement an interception by one of the parties to a conversation or when one of the parties has consented to the interception.

the defendant is talking and whose trustworthiness the defendant necessarily risks." Thus, though Katz may in a sense have spoken of the reasonable expectation of privacy as being constitutionally protected, the expectation that one's associate is an informer who will orally report or will record or will broadcast one's revelations is not protected; the risk, rather, is one the wrongdoer must assume. And additionally, Justice White noted, the fact that the conversation is recorded or is broadcast to be overheard by regular law enforcement officers makes the evidence more probative, less subject to misrepresentation or misreporting, and less likely to be disavowed later.

The court below erred for another reason, Justice White noted. The Court's decision in Katz was not retroactive, Desist v. United States, 394 U.S. 244 (1969), and since the surveillance here took place prior to the decision even if Katz had overruled On Lee and Lopez the defendant would not have been entitled to the benefit of the overruling.

Justice Black concurred in the result based on his views in Katz, supra, 364, that electronic surveillance is not subject to the Fourth Amendment.

Justice Brennan concurred in the result solely on the retroactivity issue. In his view, with regard to the wired informer issue, both On Lee and Lopez were no longer sound law; "current Fourth Amendment jurisprudence interposes a warrant requirement not only in cases of third-party electronic monitoring (the situation in On Lee and in this case) but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect, which was the situation in Lopez."

Justice Douglas in dissent argued that On Lee and Lopez were the product of another era of law when common law notions of trespass furnished the guidelines for judging the propriety of electronic surveillance. He would instead apply the privacy formulations of Berger and Katz to require that whenever government used electronic devices to investigate the activities of its citizens it must comply with the Fourth Amendment and seek a warrant.

Justice Harlan in dissent undertook a lengthy survey of the development of Fourth Amendment doctrine since On Lee and Lopez designed to demonstrate that the former case had been substantially undermined by changes in doctrine. In his view the issue was not to be resolved by assessing assumptions of risk or expectations of privacy but by a judicial resolution of the impact of an investigative technique upon the security of the citizenry. Electronic surveillance of the sort revealed here was of a type likely to smother spontaniety in society at large since it could be used, in the absence of a probable cause requirement, against anyone, wrongdoer or innocent alike. The loss in individual privacy was too high a price to pay to relieve police of the burdens of complying with the Fourth Amendment and seeking warrants.

Justice Marshall merely noted his agreement with Justices Douglas and Harlan.

V

The decision in White rather precariously resolves the issue there presented; it may be that the result will become embedded in constitutional doctrine or it could as well be that future decisions will reject it. The Justices in essence are divided four-to-four on the issue now and it is only Justice Black joining with one side on the basis of his continuing rejection

of Katz which led to the prevalence of one side over the other. Thus, changes in the Court's composition or the presentation of this issue in new clothing could either confirm or reject the doctrine here struggled with.

In the next Term of the Court the leading electronic surveillance issue seems likely to concern the power of the Government, acting in the person of the Attorney General by delegation from the President, to authorize electronic surveillance of persons without complying with t he warrant requirements of federal law if it is certified that such persons pose an internal security threat to the country.[215/] The argument has had a mixed reception in the lower courts to date and the Government is appealing the first decision by a Court of Appeals panel, rejecting the contention.[216/] The arguments of the differing Justices in White no doubt indicate the probable lack of unity on this issue.

Beyond this question the Court will probably be confronted at some point with cases raising the problems whether Congress' enactment of an electronic surveillance statute represents compliance with the Court's decisions

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215/ 1968-69 Report, pp. 184-87. See Theoharis & Meyer, "The National Security' Justification for Electronic Eavesdropping: An Elusive Exception," 14 Wayne L. Rev. 749 (1968);

216/ The case now pending before the Court on the Government's appeal is United States v. Sinclair, 321 F. Supp. 1074 (D.C.E.D. Mich. 1971), aff'd sub nom. United States v. United States District Court, No. 71-1105 (C.A. 6, April 8, 1971), pet. for cert. pending, No. 1687, in which both the District Court and the Court of Appeals rejected the Government's claim. The claim was also rejected in United States v. Smith, 321 F. Supp. 424 (D.C.C.D. Cal. 1971), pending on appeal (C.A. 9). The claim was upheld in United States v. Dellinger, Crim. No. 69-180 (D.C.N.D. Ill. Feb. 20, 1970), pending on appeal (C.A. 7), and United States v. O'Neal, Crim. KC-CR 1204 (D.C.D. Kan. Sept. 1, 1970). The power of the President to authorize warrantless electronic surveillance in foreign intelligence cases has been upheld in US v. Clay, 430 F. 2d 165 (C.A. 5, 1970), cert. granted on another issue, 400 U.S. 990 (1971), and United States v. Butenko, 318 F. Supp. 66 (D.C.D.N.J. 1970), appeal pending (C.A. 3).

in Berger and Katz or whether the statute in whole or in part departs from those standards too much to be approved.[217] The range of questions that can be presented from such a complicated statute should ensure the Court's continuing involvement with the application of Fourth Amendment standards to wiretapping and bugging.

217/See Schwartz, "The Legitimation of Electronic Eavesdropping: The Politics of 'Law and Order,'" 67 Mich. L. Rev. 455 (1969); Spritzer,"Electronic Surveillance by Leave of the Magistrate: The Case in Opposition," 118 U. Pa. L. Rev. 169 (1970).

The Fourth Amendment and the Scope of Warrantless Searches

I

In Chimel v. California, 395 U.S. 752 (1969), the Court overruled two previous decisions and severely restricted the area which police could search without a warrant and incident to a lawful arrest. The prior decisions, Harris v. United States, 331 U.S. 145 (1947), and United States v. Rabinowitz, 339 U.S. 56 (1950), held that when police lawfully arrest a person the search incident to that arrest must be judged by a standard of reasonableness which is to be determined by "no fixed formula" but through evaluation of the "facts and circumstances of each case." Id., 339 U.S. 63. The Court in those cases specifically rejected the contention, briefly accepted in Trupiano v. United States, 334 U.S. 699 (1948), that the acquisition of a search warrant where practical was a necessary condition for reasonableness. The nebulous standard of reasonableness set forth in Rabinowitz permitted subsequent decisions upholding quite wideranging searches of entire houses without warrants as an incident to arrest and was said by some to permit the police to choose where they arrested a suspect so that they could search the premises without a warrant.[217/]

Chimel was arrested in his home on an arrest warrant charging the burglary of a coin shop. The police searched the entire house, finally uncovering in the attic and the garage evidence linking Chimel to the burglary.

217/See generally, Note, "Scope Limitations for Searches Incident to Arrest," 78 Yale L. J. 433 (1969). Cf. Chimel v. California, supra, 767; Williams United States, 418 F. 2d 159, 160-61 (C.A. 9, 1969), aff'd, 39 L.W. 4365, 4366 n. 1 (April 5, 1971).

In an opinion by Justice Stewart, the Court, with Justices Black and White dissenting, held that warrantless searches incident to a valid arrest are no longer to be considered reasonable under the Fourth Amendment unless their scope is limited to the arrestee's person and the area within his "immediate control" into which the arrestee might reach a weapon or destructible evidence.

The basic underlying issue in Chimel, and a host of other cases, is one that has divided the Justices and scholars: whether the warrant clause of the Fourth Amendment states an independent requirement that a warrant must be obtained before a search, absent a few specialized circumstances, or whether the prior acquisition of a warrant is only one factor relevant to a judgment of the reasonableness of a search.[218/] The issue is not a mere debating point but on its resolution turns quite practical decisions, such as whether the Government need seek a warrant in order to legitimate electronic surveillance in national security cases,[219/] whether administrative inspection of housing for fire code violations must be by warrant,[220/] whether a welfare caseworker needs a warrant to enter the home of a welfare recipient,[221/] whether a "stop and frisk"

218/See 1967-68 Report, pp. 70-72 (citing sources); Note, op. cit., n. 217, 436-41; Note, "The Fourth Amendment and Housing Inspections," 77 Yale L.J. 521,524 n. 13, 529 n. 35 (1968). But see Wyman v. James, 400 U.S. 309, 318-24 (1971), supra, pp. 156-57, 162-64.

219/ Supra, n. 216 and text.

220/Camara v. Municipal Court, 387 U.S. 523 (1967).

221/Wyman v. James, supra, n. 218.

on the street is valid.[222] Though there have been exceptions,[223] the Court in recent years has emphasized the importance of the warrant procedure and the basic worth of justifying an intended search to a neutral magistrate before he issues a warrant.[224]

Justice Stewart's approach in Chimel was to emphasize the "crucial part" which the warrant requirement plays in the approach of the Fourth Amendment to the invasion of privacy and property of citizens. The warrant requirement, he noted, serves to prevent unlawful searches that might otherwise be conducted by over-zealous police officers. But the Court did not move from this to adoption of the suggested requirement that a search warrant must always be obtained whenever there is time to do so; rather, following on the Court's analysis in Terry v. Ohio, 392 U.S. 1, 19 (1968), the Court indicated that the warrant requirement could be best served inthe case of searches incident to a lawful arrest by limiting the search to the narrowest scope consistent with the justification for initiating the search without a warrant. The Court saw only two justifications: the need of officers to protect themselves should the arrestee have access to a weapon and the need to prevent the destruction of evidence. Thus, the search would be limited to the area within the arrestee's immediate control.

222/Terry v. Ohio, 392 U.S. 1 (1968), 1967-68 Report, pp. 67-95.

223/Wyman v. James, supra, n. 218.

224/Note, op. cit., n. 217, 436-41.

II

The Court did not decide whether Chimel was to be given retroactive application and in other cases decided the same day and in the following Term did not need to reach that question. This Term, in Williams v. United States, 39 L.W. 4365 (April 5, 1971), infra, pp. 472-93, the Court held Chimel not retroactive.

III

The same day that it overruled Harris and Rabinowitz the Court reversed two other cases in which evidence had been obtained by searches which the Court held exceeded the scope permissible under Harris and Rabinowitz. In Von Cleef v. New Jersey, 395 U.S. 814 (1969), defendant had been convicted of maintaining a rather quirky brothel which specialized in sadism and masochism. Arrested on the third floor of her 16-room house by police with an arrest warrant but no search warrant, she objected to admission of evidence obtained from a search of the entire house. The Court held that the scope of the search had been too broad and that the seizure of thousands of items-books, magazines, catalogues, mailing lists, private correspondence, photographs, drawings, and film - was beyond the limitations set in Kremen v. United States, 353 U.S. 346 (1957), in which police had carted away the entire contents of a building.

In Shipley v. California, 395 U.S. 818 (1969), the Court voided a conviction based upon evidence seized from defendant's house following his arrest as he left his car in an unattached garage some 15 or 20 feet from the house. "[T]he Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside

his home and then take him inside for the purpose of conducting a warrantless search." Id., 820 (underlining by Court). A similar situation was involved in Vale v. Louisiana, 399 U.S. 30 (1970) in which the police with an arrest warrant for defendant had his mother's house under observation. They saw a car stop in front of the house and the driver blow the horn. Vale came out, talked with the driver, re-entered the house, and then returned, his actions indicating furtiveness and fear of being observed. At this point officers approached. Vale, observing them, began walking rapidly toward the house and the driver of the car hurriedly swallowed something. Both were placed under arrest, Vale on the front steps of the house. The officers entered the house and discovered that no one else was there, but at this moment the defendant's mother and brother arrived. The officers searched the house, discovering a cache of narcotics. The Court held the search unreasonable.

In the two cases in which the Court did decide the retroactivity cases, Williams v. United States and Elkanich v. United States, 39 L.W. 4365 (April 5, 1971), it was there generally assumed that the searches incident to a lawful arrest were valid by pre-Chimel standards. In both, defendants were arrested in their homes and rather extensive searches of the houses turned up the incriminating evidence, narcotics in Williams' case and marked money received from a government agent for the purchase of narcotics in Elkanich's case.

IV

An issue present in several of these cases, one relied on by the dissents, relates to the destruction of evidence, either the threatened destruction or destruction in process, which is cited as establishing the

reasonableness of a wide-ranging search without a warrant. The Court's development or limitation of this possible exception to the Chimel restriction on the scope of a warrantless search has substantial implications for a related issue - the much controverted "no-knock" entry to search.

It will be recalled that in Chimel the Court accepted two justifications for a warrantless search pursuant to a lawful arrest: the possibility that the arrestee might have a weapon with which he could endanger arresting officers and the possibility that he might destroy evidence. Thus a search of his person and the area within his area within his immediate control into which he might reach was permissible. In his Chimel dissent, Justice White argued that the arrest of a person may create "exigent" circumstances which justify a search of the entire premises. "[A]ssuming that there is probable cause to search premises at the spot where a suspect is arrested, it seems to me unreasonable to require the police to leave the scene in order to obtain a search warrant when they are already legally there to make a valid arrest, and when there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search." Supra, 395 U.S. 774. In the particular case, the Justice argued, Chimel's wife was present and could have removed and destroyed the evidence which police were seeking.[225/]

225/"It is doubtful that the Chimel majority's emphasis on the 'central part' played by the warrant requirement is compatible with this expansion of the 'emergency' exception to the warrant requirement. The Court's underlying premise seems to have been that significant risk of the destruction of evidence - by bystanders or other friends of the arrestee - is acceptible in order to maximize the use of the warrant process." "The Supreme Court, 1968 Term," 83 Harv. L. Rev. 60, 165-66 (1969).

Again in Vale v. Louisiana, supra, the dissenters, Justice Black for himself and the Chief Justice, argued that the presence of defendant's mother and brother made quite likely the destruction of evidence if officers were required to leave to obtain a search warrant. Supra, 399 U.S. 36-41. But the majority, speaking through Justice Stewart (and with Justice White assenting this time) noted that, aside from the search incident to arrest, now limited in scope by Chimel, there are only " a few specifically established and well-delineated" exceptions to the warrant requirement for a search of a dwelling. Id., 34. The exception relevant to our consideration here, the destruction of evidence, was phrased quite restrictively. "The goods ultimately seized were not in the process of destruction."[226/] Id., 35.

If the destruction-of-evidence exception is to be limited to the narrow situation in which the evidence is in the process of being destroyed rather than "likely" to be destroyed if notice of entry is given or rather than if the officers "reasonably" believe the evidence "will" be destroyed if they give notice, the assumption underlying two recent federal enactments that "no-knock" warrants authorizing entry without notice into premises is

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226/The quoted sentence extends beyond the three cases cited to support it. Schmerber v. California, 384 U.S. 757 (1966), concerned extraction of blood to determine alcohol content. Though the evidence was, of course, in the process of destruction the decision was written in terms of "threatened" destruction. Id., 770. United States v. Jeffers, 342 U.S. 48, 52 (1951), spoke of "imminent" destruction. McDonald v. United States, 335 U.S. 451, 455 (1948), utilized both the "in the process of destruction" and the "likely to be destroyed" language.

undermined.[227] Whether the Court in Chimel and Vale was consciously constructing a doctrinal objections to "no-knock" or whether the language is to be restricted to the particular factual situations there under consideration we cannot know until the appropriate case comes up for consideration.

V

The final case in this series is Hill v. California, 39 L.W. 4402 (April 5, 1971). Police officers having probable cause to arrest Hill for armed robbery went to his apartment and were admitted by one who closely resembled Hill. Despite the claims of the person that he was Miller, not Hill, the officers arrested him and searched the apartment obtaining incriminating evidence. The officers had neither a search warrant nor an arrest warrant. The man in the apartment turned out to be Miller after all.

In an opinion for the Court, Justice White sustained the conviction which was based in large part on the evidence seized from the apartment. The search exceeded in scope the search permitted by Chimel but Chimel was not to be given retroactive application and was therefore of no assistance to Hill. Justice White found that the officers' reasonable belief that Miller was Hill was adequate to justify the arrest - "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment" -

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227/Doyle, No-Knock: Unannounced Forcible Entry, Historically, in the States and in the Federal District of Columbia Court Reform and Criminal Procedure Act of 1970 and Comprehensive Drug Abuse Prevention and Control Act of 1970, American Law Division, LRS, December 16, 1970 (70-311 A); and see, Note, "Police Practices and the Threatened Destruction of Tangible Evidence," 84 Harv. L. Rev. 1465 (1971).

and the search was reasonable as an incident to arrest. "Here there was probable cause to arrest Hill and the police arrested Miller in Hill's apartment, reasonably believing him to be Hill. In these circumstances the police were entitled to do what the law would have allowed them to do if Miller had in fact been Hill...."

Justices Harlan and Marshall dissented on the retroactivity isse but otherwise concurred in the Court's opinion. Justice Douglas did not participate.

An issue raised on appeal for the first time by Hill was that the admission as evidence of pages from his diary in which he wrote of committing the robbery in question violated his self-incrimination rights.[228/] Because he had not presented the issue below, Justice White noted, the Court would not consider it. Hill may, however, in petitions for post-conviction relief under state law and subsequently for federal habeas corpus relief urge the Fifth Amendment issue as ground for collateral relief.

228/For a brief description of this issue, see supra, p. 66.

Retroactivity-The Court as Law-Maker

I

In a series of five decisions all rendered on April 5, 1971, the Court applied previously-stated principles to determine the retroactive effect of cases which had broadened the protection afforded criminal defendants by the Fourth Amendments. United States v. United States Coin & Currency, 39 L.W. 4415, and Mackey v. United States, 39 L.W. 4372, dealt with the retroactive effect to be given the standards protecting the privilege against self-incrimination set forth in Marchetti v. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968), 1967-68 Report, pp. 294-305. Williams v. United States, and Elkanich v. United States, 39 L.W. 4365, and Hill v. California, 39 L.W. 4402 dealt with the retroactive application of search and seizure standards detailed in Chimel v. California, 395 U.S. 752 (1967)

II

The years of the 1960s saw many changes in constitutional interpretation by the Supreme Court. A noteworthy area was in the application of the application of the Bill of Rights relating to criminal procedure to the States. Though these guarantees originally restrained federal and not state action, almost all have now been incorporated into the Fourteenth Amendment's Due Process Clause, which does restrain the states.[229/] In Mapp v. Ohio, 367 U.S. 643 (1961) the Court applied the "exclusionary rule" to the states by way of enforcing the Fourteenth Amendments guarantees: evidence obtained in contravention of the defendant's rights is inadmissible at trial.

229/For a discussion of due process "absorption" see 1967-68 Report, pp. 54-56.

Concurrently with the extension of protection of constitutional rights from abridgment by state action has come an expanded interpretation of the scope of review available in habeas corpus proceedings.[230/] Together these two expanded doctrines required the Court to face one of the most controversial aspect of its criminal law decisions -- whether the rules would apply to those defendants tried and convicted before the rules were announced.

The principles under which the Court has undertaken to limit the retroactive effect of some of its interpretations of the Bill of Rights were first set forth in Linkletter v. Walker, 381 U.S. 618 (1965), a habeas corpus case of a petitioner whose conviction had become final in 1960 prior to the Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961). Mapp applied to the states an "exclusionary rule" then applicable in the federal courts: evidence seized in violation of the Fourth Amendment must be excluded in state as well as in federal criminal trials, Mapp overruled the Court's decision in Wolf v. Colorado, 338 U.S. 25 (1949), refusing to apply the exclusionary rule to the states at that time. Wolf had also made clear that the Fourth Amendment's ban on "unreasonable" searches and seizures is applicable to the states through the Fourteenth Amendment's Due Process Clause. The Mapp decision itself was retroactive to the extent that it overturned Miss Mapp's conviction; "a ruling which is purely prospective does not apply even to the parties before the court." Linkletter, supra. 621-22. Furthermore, prior to Linkletter the

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230/1967-68 Report pp. 233-45.

Court had applied Mapp to cases pending on direct review at the time Mapp decision was announced.[231] Thus in Linkletter the Court was "concerned only with whether the exclusionary principle enunciated in Mapp applies to state court convictions which had become final before rendition of our opinion." Id., 622.[232] A review of case law involving retroactive effect of changes in statutory law and in non-constitutional common law revealed to the Court a pattern of giving effect to the change of law in cases on direct review, but revealed "no set principle" for collateral attack on judgments made final before the change of law. Ibid. Using the phrase "retrospective effect" in the context of collateral review, the Court concluded that "the Constitution neither prohibits nor requires retrospective effect" and proceeded to establish a threefold approach in order "to weigh the merits and demerits in each case" of retroactive application. Id, 629. First, the Court looks to the history of the rule to determine its "purpose and effect," and "whether retrospective operation will further or retard its operation." Ibid. Finding the primary purpose of the Mapp exclusionary rule to be deterrence of illegal police

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231/These cases are Ker v. California, 374 U.S. 23 (1963); Fahy v. Connecticut, 375 U.S. 86 (1963); and Stoner v. California, 376 U.S. 483 (1964). None of the three discussed the possibility that Mapp might apply only prospectively; in Ker the Court characterized the case as "the first ... arriving here since our opinion in Mapp which would afford suitable opportunity for further explication of that holding...."

232/The Court defined as "final" those cases in which "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Mapp v. Ohio." Linkletter, supra., p. 622.

conduct--a purpose which cannot be furthered retroactively -- the Court looked to the two other factors--the extent to which reliance had been placed on the Wolf rule, and the possible effect retroactive application of the new rule would have upon "the administration of justice and the integrity of the judicial process." States had relied upon Wolf in entering final judgments, and retroactive application of Mapp would tax the administration of justice to the utmost. In conclusion the Linkletter Court distinguished retroactive application of rules about coerced confessions -- rules relating to the "fairness of trial" and the "very integrity of the fact-finding process" and stated that "though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it." Id., 639-40.

Other cases cited by the Court in Linkletter had applied new rules retroactively in habeas corpus proceedings. Eskridge v. Washington Prison Board, 357 U.S. 214 (1958), applied Griffin v. Illinois, 351 U.S. 12 (1956) to overturn a conviction which had become final in 1935 after the indigent defendant had been denied a free trial transcript to support an appeal. Gideon v. Wainwright, 372 U.S. 335 (1963), which held that indigent criminal defendants charged with a felony in state courts must be afforded counsel, was itself a collateral attack on a final judgment, as was Jackson v. Denno, 378 U.S. 368 (1964), involving a coerced confession. The Griffin, Gideon, and Jackson rules can all be considered as bearing directly on the reliability of the guilt-determining process.

Habeas corpus relief has not always been available to attack final criminal convictions reached under procedures later thought unfair and

unreliable.[233] The writ, which tests in civil proceedings the legality of imprisonment, originally would issue only if the convicting court had lacked jurisdiction: "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullityif the court has general jurisdiction of the subject, although it should be erroneous." Ex parte Watkins, 28 U.S. (3 Pet.) 193, 203 (1830). Two cases elaborated principles which had gradually been applied to expand the scope of habeas corpus. Fay v. Noia, 372 U.S. 391, and Townsend v. Sain, 372 U.S. 293. The latter proclaimed that a hearing on habeas corpus must be held if, among other reasons, "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing," Id., 313. Fay described the writ as "a mode for the redress of denials of due process of law" Id. 402.

> (R)estraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction. Id. 409

The possible implications of the broadly-stated Fay v. Noia interpretation of habeas corpus, especially in view of the fact that res judicata does not operate in habeas corpus to bar an individual from alleging separate grounds for relief in a series of separate petitions,[234] could indeed be far-reaching in the area of criminal procedure. The Court's decisions applying constitutional criminal procedure restraints to the states, based as they are on the Due Process Clause of the Fourteenth Amendment, are often termed of "fundamental importance." In Mapp itself, the right to privacy protected

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233/Supra., n. 230.

234/See 1970-71 Report, p. 52.

from unreasonable searches and seizures was deemed "no less important than any other right carefully and particularly reserved to the people"; just as the freedom from convictions based on coerced confessions, the right was said to be intimately related to the "perpetuation of 'principles of humanity and civil liberty.'" Id., 367 U.S. 657. Attempts to limit these Fourteenth Amendment cases, even those seeking collateral attack of final judgments, faced the Court with a problem:

> It would seem that since the new rules have a common ground in the concept of ordered liberty, defined as proceeding from the conscience of mankind, they would by definition be of universal application 235/

In its next term the Court took occasion to consider the degree of retroactivity to be accorded its decision in Griffin v. California, 380 U.S. 609 (1965) which held that prosecutorial comment upon the failure of a defendant in a state criminal trial to take the stand and testify violated that defendant's privilege against compulsory self-incrimination. Tehan v. United States ex rel. Shott, 382 U.S. 406 (1965), involved a petition for a writ of habeas corpus based on Griffin. The opinion of the Court in Tehan, written by Justice Stewart, followed Linkletter, and apparently expanded the prospective limitation. Although unable to find a "single and distinct purpose" for the Griffin rule, the Court looked to the "basic purposes that lie behind the privilege against self-incrimination." These purposes were said to relate "to preserving the integrity of the judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load,'" and "do not relate to protecting the innocent from conviction." Id., 415. Although Griffin had related prosecutorial comment upon a defendant's silence

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235/Traynor, "Conflict of Laws in Time: The Sweep of New Rules in Criminal Law," 1967 Duke L.J. 713.

to the "inquisitorial system of criminal justice," the test of retroactivity established in Tehan was whether the absence of the Griffin rule would present a "clear danger of convicting the innocent." Id., 416.

Tehan also stressed the reliance placed on pre-Griffin law by the six states allowing prosecutorial comment on a defendant's silence. Twining v. New Jersey, 211 U.S. 78 (1908), overruled by Malloy v. Hogan, 378 U.S. 1 (1964), had held that the privilege against self-incrimination is not protected in state courts by the Fourteenth Amendment, and had therefore not reached the issue of whether prosecutorial comment on a defendant's silence is a violation of that privilege. Adamson v. California, 332 U.S. 46 (1947), had upheld Twining by a 5 to 4 vote, and suggested that a majority of the Justices would have found that prosecutorial comment on a defendant's silence violated the privilege if the privilege were applicable. The process of incorporating specific guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and applying identical standards to the states and the federal government, had begun with the First, Fourth, and Sixth Amendments. It is thus debatable whether, at the time Shott's conviction became final in May of 1963, the state courts might have anticipated the Malloy v. Hogan decision of a year later. The Malloy decision was announced with emphasis on continuity:

> We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. Decisions of the Court since Twining and Adamson have departedfrom the contrary view expressed in those cases. Id., 378 U.S., 6

The Tehan opinion, on the other hand, though recognizing that there had been "dissenting voices" on the Court, declared that there had been "not the slightest deviation" from Twining prior to the Malloy case. Id., 412.

Furthermore, the Court in Tehan found that the effect of a retroactive application of Griffin upon the "administration of justice" in those six states which had relied upon Twining would be "very grave indeed." Id., 418. In those states it might be expected that most if not all prosecutors would have commented on a defendant's failure to take the stand, and that "those reaping the greatest benefit" from retroactive application would be those guilty of serious crimes and serving "lengthy sentences imposed many years before Griffin." Ibid. The older the cases, the less likelihood there would be of a successful retrial, since some witnesses and evidence would now be unattainable. In short, the guilty should not be set free by a rule not even "an adjunct to the ascertainment of truth" bearing on guilt or innocence. Id., 416.

A week after its decision in Miranda v. Arizona, 384 U.S. 436 (1966), which set forth rules to be followed by police in custodial interrogation of criminal suspects, the Court in Johnson v. New Jersey, 384 U.S. 719 (1966), considered the retroactive effect to be given the Miranda rules, and those announced earlier in Escobedo v. Illinois, 378 U.S. 478 (1964). The rules announced in Johnson involved a major extension of the prospective limitation:

> We hold that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that Miranda applies only to cases in which the trial began after the date of our decision one week ago. Id., 721.

Johnson itself was a habeas corpus petition from a judgment which had become final before either Excobedo or Miranda. The Court chose, however, not to rely upon the Linkletter and Tehan holdings and the distinction, maintained by those holdings if not by some of the general language, between cases still on direct appeal and cases of collateral attack upon a final judgment. Those cases, as Johnson itself might have, left remaining "the question ... whether Escobedo and Miranda shall affect cases still on direct appeal when they were decided." Id., 732. For considerations of "fair notice" to law enforcement officials, and because of the "unjustifiable burden of the administration of justice" which application of Escobedo and Miranda to cases still on direct appeal would impose, the Court decided to apply the new rules only to trials begun after the rules were announced. This choice of cutoff date has been termed "baffling except in terms of expediency."[236] If the purpose of the rule is to deter illegal police conduct, or to prescribe procedures by which future police interrogations might better insure protection of the rights of the accused, then it would seem that "unfair notice" to those policemen who conduct interrogations would dictate that the rules apply to only to interrogations conducted after announcement of the new rules. Trials begun after those decisions might have to judge police conduct which had occurred prior to the decisions.

Once again the characterization made by the retroactivity decision of the rights at stake diminished somewhat the characterization originally made by the Court. A major thrust of Miranda and Escobedo was to emphasize the often-decisive nature of the custodial interrogation in the process of criminal

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236 /Traynor, op. cit. n. 235, 727.

justice: "it is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system." Miranda, supra, 471. However, for purposes of determining retroactivity, the old distinction between pre-trial interrogation and commencement of a trial -- a distinction which "would exalt form over substance" (Excobedo, supra 486) -- was resorted to.

One possible explanation for the Court's choice of cutoff dates in Johnson might be a hesitancy to destroy altogether the incentive offered attorneys and their clients to argue for change in the law. The incentive, of course, is reversal in their own cases; a purely prospective decision would have let stand Miranda's conviction. Miranda was but one of four defendants granted relief by the Miranda opinion, as the Court treated similarly those cases before it. However, there had been 125 other cases that term raising the same issues, and the Court had granted certiorari in only the four.[237/] If the Court in Johnson had based its decision on a policy of encouraging defendants to raise novel issues, surely it would not have excluded these 125 defendants, who actually had raised the issues, from the benefit of the decision. The Court's cutoff date offers little incentive for future litigents if the chances of securing Supreme Court review are less than 4%.

Thus the primary policy behind the refusal to apply Miranda-Escobedo principles to cases still on direct on appeal must relate to the avoidance of burdening "administration of justice" in the states. New trials would have been required. While the evidence would usually not be as stale as it would

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237/"The Supreme Court, 1965 Term," 80 Harv. L. Rev. 91, 141 n. 60 (1965).

be in most cases already final, a substantial number of convictions might have had to be reversed for lack of evidence other than that obtained through unconstitutional procedures of custodial interrogation.

During the 1966 Term the Court held in United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), that the Sixth and Fourteenth Amendments guarantee an accused the right to counsel at a police identification lineup. The cases thus presented the Court with considerations similar to those presented by Escobedo and Miranda. The lineup stage of a criminal proceeding, as the custodial interrogation stage, is "critical" in preserving "the defendant's basic right to a fair trial.":

> ... the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification. Wade, supra, 232.

Decided the same day as Wade and Gilbert was Stovall v. Denno, 388 U.S. 293 (1967), a collateral attack on a final judgment. Stovall limited the counsel-at-lineup rule to the Wade and Gilbert cases and to cases in which the identification procedures were conducted after that date of June 12, 1967. Johnson v. New Jersey was relied upon in Stovall, which again considered the rule's relation to the "truth-determining process" in terms of "probabilities." Id., 298. Conceding that his opinions for the Court in Wade and Gilbert had identified the lineup confrontation as a "critical stage," Justice Brennan's opinion of the Court minimized the lineup's importance in the context of retroactivity. Although there had been "injustices in the past which could have been averted by having counsel present at the confrontation for identification," nevertheless

> ... the certainity and frequency with which we can say ... that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application .... Id., 299.

Stovall was more straightforward than Johnson had been in setting forth the factors entitled to most weight. The cutoff date chosen in Stovall was consistent with a policy of giving "fair notice" to policemen engaged in conducting lineups. Furthermore, the distinction between collateral attack and direct review is "unsupportable" because "(w)e regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance." Id., 300.

Wade and Gilbert were not made entirely prospective because "sound policies of decision-making, rooted in the [cases and controversies] command of Article III," dictate that "constitutional adjudications not stand as mere dictum." Id., 301. A court's power is to decide cases and controversies, and its decision "is entitled to binding effect as a pronouncement of law only to the extent that the rules of law ... were necessary to the resolution of the conflict presented."[238/] The Court's brief reference to Article III thus suggests a basic issue underlying the criminal law decisions and their retroactive application -- the issue of whether the Court is indulging more in legislative than in judicial rule-making. Traditionally, legislation has

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238/Note, "Prospective Overruling and Retroactive Application in the Federal Courts," 71 Yale L.J. 907, 930 (1962).

prospective application only and judicial decisions are given retroactive effect.[239] In its efforts to temper the impact of its decisions through prospective limitation, the Court has appeared to many to have been tending toward legislative rulemaking and away from the "sound principles of decision-making" it adverted to. Ordinarily "concern about possible retroactive imposition of harm would ... tend to restrain a court from adopting new law that is neither reflective of current community standards nor adequately foreshadowed by prior judicial developments."[240] Thus in Miranda the Court stated:

> We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings .... That case was but an explication of basic rights that are enshrined in our Constitution .... Supra, 384 U.S., 442[241]

It is only "new" rules significantly changing prior law, and perhaps not "adequately foreshadowed by prior judicial developments" for which retroactive application to cases still on direct review might be considered to impose an unreasonable "burden on the administration of justice." Consideration of limiting that retroactivity is in and of itself an acknowledgement of a break

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239/Traynor, op. cit. n. 235, 714. Justice Black set forth the same considerations in his opinion in James v. United States, 366 U.S. 213, 224 (1961): "...one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application. ... (P)rospective lawmaking is the function of Congress rather than of the courts."

240/Mishkin, "Forward, The Supreme Court 1964 Term: The High Court, the Great Writ, and the Due Process of Time and Law," 79 Harv. L. Rev. 56,70 (1965).

with the past in formulating new rules --- "important new safeguards," as the Johnson Court characterized Miranda and Escobedo. Supra, 384 U.S., 730.[242/]

The process of case-by-case adjudiation, in which decisions are "foreshadowed by prior judicial developments" also serves to encourage lower courts to anticipate further developments. The prospective limitation, however, has a "deeply conservative impact on the lower courts.[243/]

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court... to do justice to each litigant on the merits of his own case. 244/

United States v. Wade presented just such a situation. The Court of Appeals for the Fifth Circuit had reversed Wade's conviction because he had been denied counsel at his lineup. 358 F. 2d 557 (1966).

Along with the case and controversy requirement, the Stovall Court cited "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law," supra, 388 U.S., 301, as militating against a purely prospective rule which would deprive Wade and Gilbert of the benefits

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242/A further dichotomy was similarly introduced in that same sentence of Johnson. Because the "new safeguards" could be utilized as part of an "involuntariness" claim by those defendants not granted review by the Court, the prospectivity limitation would not work a great injustice. Yet it was the inadequacy of the "involuntariness" procedures which had prompted the Miranda decision, based as it was on considerations fundamental to our system of justice.

243/Kitch, "The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition," 1969 Sup. Ct. Rev. 155, 193 (Kurland id.).

244/Desist v. United States, 394 U.S. 224, (1968)(dissenting opinion of Justice Harlan).

of their efforts. As discussed above in the context of the Johnson limitation of Miranda, it is questionable how much incentive such a holding imparts.

> When a defense counsel faced with a trial strategy choice knows that an anticipated rule can help his client only if the case is the lucky one that actually goes to the Supreme Court, he must prefer strategies that do not rely on such rules. 245/

Following Stovall, the Court in DeStefano v. Woods, 392 U.S. 631 (1968), held that the rule announced in Duncan v. Louisiana, 391 U.S. 145 (1968), applying the Sixth Amendment right to jury trial in criminal cases to the states by way of the Fourteenth Amendment, was to be applied only to trials begun after the date of Duncan, and similarly, that the right to jury trial for serious criminal contempts, announced in Bloom v. Illinois, 391 U.S. 194 (1968), would be given prospective effect with the exception of the litigants in that case. 246/

The Court's next major decision involving prospective limitation of a criminal law decision came in Desist v. United States, 394 U.S. 224 (1968), which declined to apply to a federal case still on direct review the principles set forth in Katz v. United States, 389 U.S. 347 (1967), holding that electronic surveillance can constitute an unreasonable search and seizure even in the absence of a physical trespass. Desist followed the threefold test first set forth in Linkletter, and limited application of Katz to the petitioner

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245/Kitch, op. cit., n. 243, 192.

246/See 1967-68 Report, pp. 54-66.

in that case and to cases in which the electronic surveillance had been conducted after Dec. 18, 1967, the date Katz was announced. The opinion of the Court in Desist, written by Justice Stewart, is notable for its conclusion that Katz announced principles sufficiently novel to necessitate prospective limitation. While acknowledging that these had been "growing dissatisfaction with the physical trespass theory," the Court in Desist pointed out that the cases establishing that theory, Goldman v. United States, 316 U.S. 129 (1942); and Olmstead v. United States, 277 U.S. 438 (1928), had not been overruled until Katz even though they had been "modified." Supra, 218.

> (H)owever clearly our holding in Katz may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future. Ibid.
>
> We have concluded ... that, to the extent Katz departed from previous holdings of this Court, it should be given wholly prospective application. Id., 246/

IV

The Court's three 1971 cases denying retroactive effect to the rule announced in Chimel v. California, 395 U.S. 752 (1969), followed and applied the analysis of Desist. Williams v. United States, and Hill v. California as Desist had been, involved cases still on direct review. Elkanich v. United States was a collateral attack upon a final judgment.

The rule announced in Chimel limited the permissible scope of a warrantless search incident to a lawful arrest to searches of the arrestee's person and to that area within his immediate contro. Supra, pp 463 - 65. The searches in Hill, Elkanich, and Williams did not meet the Chimel standards, but were undertaken prior to the decision, rendered June 23, 1969. Chimel

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246/See 1967-68 Report, pp. 54-66.

expressly overruled United States v. Rabinowitz, 339 U.S. (1950), and Harris v. United States, 331 U.S. 145 (1947), the "rationale of which would allow the searches and seizures in this case." The rationale had "been relied upon less and less in our decisions," and the time had come to overrule those cases. Supra, 766, 768.

Justice White wrote the opinion of the Court announcing the Williams and Elkanich decisions, and also the separate opinion of the Court in Hill. The former opinion was joined by the Chief Justice and by Justices Stewart and Blackmun. Justice Brennan filed a concurring opinion. Justice Harlan's votes concurring in Elkanich and dissenting in Williams were explained in his concurring opinion in Mackey. Justice Marshall also concurred in Elkanich and dissented in Williams and indicated agreement with Justice Harlan's distinction between direct and collateral review.. Justice Douglas did not participate in the three cases, and Justice Black concurred in the results only because he considers Chimel wrongly decided. The Hill opinion was joined by Justices Brennan, Stewart, and Blackmun. Justice Harlan, referring to his concurring opinion in Mackey, and joined by Justice Marshall, filed a brief opinion dissenting from the holding on non-retroactivity.

Following Desist's "sound approach to retroactivity claims in Fourth Amendment cases," the Court found it unnecessary to the furthering of the deterrent purpose of the exclusionary rule to give retroactive effect to Chimel. Once again the Court could "find no constitutional difference between the applicability of Chimel to those prior convictions which are here on direct appeal and those involving collateral proceedings." An attempted rebuttal of Justice Harlan's position was undertaken, without, however, any discussion of the underlying purposes of allowing collateral attack on final

judgments in criminal cases. To Justice White and the majority, their approach is "no more legislative, and no less judicial, than that of Mr. Justice Harlan." The Court has "no authority to upset criminal convictions at will," and the Constitution is silent on the issue of retroactivity.

Justice Black, "while adhering to his dissent in Linkletter," voted to affirm the convictions because he believes Chimel to have been wrongly decided. That dissent in Linkletter reflected approval of the expanded scope of habeas corpus established by Fay v. Noia, and his belief that judicial, as opposed to legislative, decisions are to be applied retroactively. Fay v. Noia "did not ... seriously disrupt the administration of justice," but "merely opened up to collateral review cases of men who were in prison due to convictions where their constitutional rights had been disregarded." Supra, 381 US., 651 247/

Justice Stewart, while joining the Court's opinions, indicated also that he believes the issue presented by Elkanich "is not one cognizable in a proceeding brought under 28 U.S.C. 2255," providing for collateral review.

United States v. United States Coin & Currency, and Mackey v. United States both dealt with the retroactive effect of the Marchetti and Grosso cases holding that the privilege against self-incrimination protected individuals refusing to file gambling tax forms, with incriminating information. Coin & Currency and Mackey reached opposite results, explainable in terms of the different fact situations and the differing approaches of the Justices to the problem of retroactivity.

247/But see Justice Black's dissent in Kaufman v. United States, 394 U.S. 217 (1969).

In Mackey, a 7 to 2 decision affirming the denial of post conviction relief to a petitioner convicted of income tax evasion in a trial at which the government introduced wagering tax forms filed by the petitioner, there was no majority opinion. Justice White wrote the opinion announcing the Court's judgment; it was joined by the Chief Justice and Justices Stewart and Blackmun, and refused to apply Marchetti and Grosso retroactively. Justice Harlan concurred because the case involved collateral attack on procedural and not substantive grounds. Justice Brennan, joined by Justice Marshall, concurred on the basis of their belief that with or without application of the Marchetti and Grosso principles, the Fifth Amendment does not prevent the use of wagering forms in a prosecution for income tax evasion.

In Coin & Currency, a 5 to 4 decision applying Marchetti and Grosso principles to overturn a forfeiture judgment still on direct appeal, Justice Harlan wrote the opinion of the Court, joined by Justices Black, Douglas, Brennan, and Marshall. Justice White's dissent was joined by the Chief Justice and by Justices Stewart and Blackmun.

Part I of the Court's opinion in Coin & Currency held that the forfeiture proceedings against "property intended for use in violating the provisions of the internal revenue laws" (26 U.S.C. 7302) are "in their nature criminal for Fifth Amendment purposes."

Part II of the opinion dealt with retroactivity, and distinguished Linkletter, Tehan, Johnson, and Stovall as cases involving implementation of a "procedural rule." Instead, the Marchetti and Grosso cases "dealt with the kind of conduct that cannot constitutionally be punished in the first instance" -- that conduct being to remain silent in the face of the statutory requirement to submit incriminating information. If retroactive effect must

be given "new rules which substantially improve the accuracy of the fact-finding process" and thereby raise the question whether innocent individuals had been wrongly punished under old rules, then a fortiori retroactive application must be given when the fact of wrongful punishment is indisputable.

Justice Black concurred inthe opinion "as far as it goes," but indicated "(h)e would now go further and overrule Linkletter ... and its progeny." Justice Brennan joined the Court's opinion and added his own concurring opinion attempting to rebut points made in the dissent.

Describing the majority reasoning as "a beguiling verbalism," Justice White's dissent emphasized "the interest in maintaining the rule of law and in demonstrating that those who defy the law do not do so with impunity." The dissent further analogized to the effect of legislative repeal of a criminal statute, which often does not reverse valid convictions under the repealed statute. Finally, the dissent relied on Linkletter and its progeny for the proposition that new interpretations of the Bill of Rights need not necessarily be given retroactive effect.

Justice White's plurality opinion in Mackey reiterated the threefold analysis set forth in the Linkletter - Stovall line of cases. Marchetti and Grosso had overruled United States v. Kahriger, 345 U.S. 22 (1953), which had upheld a prosecution for failure to register and pay the gambling tax.

> Until Marchetti and Grosso, then, the registration and gambling tax provisions had the express approval of this Court; the Fifth Amendment provided no defense to a criminal prosecution for failure to comply.

The same factors which weighted the "probabilities" against retroactive application of the new protection afforded the privilege against self-incrimination in Johnson and Tehan operated to deny retroactive operation in Mackey.

Justice Harlan's lengthy opinion concurring in Mackey and Elkanich and dissenting in Williams set forth a full explication of his views. The most basic question, according to Justice Harlan, concerns whether the case is before the Court on direct review or on collateral attack of a final judgment. The retroactivity decision should then be made in view of the different judicial functions to be served by the two types of review. On direct review the function is to decide cases and controversies in accordance with the then-governing law. That law necessarily includes the Constitution.

> We cannot release criminals from jail merely because we think one case is a particularly appropriate one in which to apply what reads like a general rule of law of in order to avoid making new legal norms through ... dicta. ... Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitutes an indefensible departure from his model of judicial review.

The judicial function in deciding cases on collateral attack of a final judgment is, in Justice Harlan's view, more limited. The "collateral" remedy, as its name implies, "is not designed as a substitute for direct review." The scope of the writ has been expanded by the Court to the point where Justice Harlan assumes the Court must now inquire into "every constitutional defect in any criminal trial" unless the error was "harmless" or the defendant waived his rights. Because it is arguably still an open question whether the Court should apply the law in effect when the conviction became final or the current constitutional law, however, Justice Harlan would opt for the former in most cases. The choice of these two alternatives reflects his view that there is no basis for applying the law in effect at other times, such as the time of an illegal search or the time of trial. "Finality in the criminal law is an end which must always be kept in plain view." Because attention must

sometime shift its focus to how a "prisoner can be restored to a useful place in the community," and because relitigation of large numbers of old cases necessarily slows down the process by which others are tried for the first time, the interest in finality is substantial. Given the purposes of collateral attack, Justice Harlan would confine consideration of constitutional claims to interpretations existing at the time the conviction became final, unless the issue raised is one of "substantive due process," or unless the procedures attacked are now thought to deny values "implicit in the concept of ordered liberty."

V

The Court has handed down a lengthy set of opinions in elaborating the prospectivity rules first announced in Linkletter, but the rules if not the rationale appear simply stated. Interpretations of the Bill of Rights relating to criminal law are apparently to be limited to prospective application if the interpretations are arguably "new," or at least were announced in a case overruling an earlier decision of the Court. The present Court does not appear to change this line of analysis. If all of the Justices agree that a case properly presents a question of retroactivity under Linkletter, five Justices appear firmly committed to the threefold Linkletter test which usually operates to deny retroactivity; these five are the Chief Justice, and Justices Brennan, Stewart, White, and Blackmun. Justices Black and Douglas appear committed to retroactive application, and Justices Harlan and Marshall would differentiate between cases on direct and collateral review.

BRIEFLY NOTED

(1)
Conscientious Objection
Maturation of Claim

In Ehlert v. United States, 39 L.W. 4453 (April 21, 1971), the Court was met with a controversy arising out of the processing of selective service registrants. The Act, 50 U.S.C. App. §456(j), recognizes religious-based conscientious objection to participation in war in any form as a reason for exemption from combatant training and service.[248] Ordinarily, the decision whether one qualifies as a conscientious objector is one for the local draft board to make, with appeals up through the system.[249] The problem in Ehlert arises because a registrant, after his board has classified him as available for military service, may develop, or may claim to have developed, a belief which may qualify him for conscientious objector status, a belief which he had not previously held or not held strongly enough for him to present his claim to the board.

Last Term, in Mulloy v. United States, 398 U.S. 410 (1970), the Court held that a draft board must reopen a registrant's classification and reconsider his classification when the registrant presents new information which establishes a prima facie case for a new classification, when the new information is presented prior to the time the registrant is mailed his notice. The importance of reopening the question of classification is that it

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248/The statute is treated, with court decisions, in Killian, Conscientious Objection and the Constitution - Welsh v. United States and Beyond, American Law Division, LRS, August 14, 1970 (70-212A); and see supra, pp. 314-38.

249/Id. pp. 20-27

gives the registrant the right to appeal an adverse decision of the board up through channels, an opportunity he does not have when the board simply refuses to reopen.

Ehlert presented the same issue, in the context of a registrant who presents his claim for reopening after he has been mailed an induction notice. In an opinion by Justice Stewart, the Court held that the board was not required to reopen and that the registrant must submit his claims to the military and seek either discharge or assignment to noncombatant activities as an in-service objector. The draft system has a right, Justice Stewart wrote, to establish reasonable time limitations on presentation of claims and it was not unreasonable to require that claims for a new classification be filed in advance of induction notices. But it was not permissible to leave such a claimant in a "no-man's-land," the Justice continued; he must be afforded the opportunity to press his claim in the military and he must not be given combatant training or duties while his claim is under consideration. It was on the representation of the Justice Department and the military services that these requirements were observed that the Court's ruling was based, the Justice concluded; if the contrary were true, a wholly different case would be presented.

Justice Douglas dissented on the basis that the hostility of the military mind to conscientious objectors made necessary the passing on such claims by civilians.

(2)

Hearing Before Termination of Unemployment Compensation

In California Department of Human Resources Development v. Java, 39 L.W. 4491 (April 26, 1971), the Court affirmed a lower court decision voiding

the procedure followed by California, and most other States, in the administration of its unemployment compensation program. 317 F. Supp. 875 (D.C.N.D. Calif. 1970). The initial determination that one is entitled to receive unemployment compensation payments is made after an eligibility interview and payments are then begun. If the previous employer, however, upon learning of the decision files an appeal, payments are stopped until an appeals board assembles the requisite information and makes a new determination. If payments are resumed there has been usually a hiatus of from seven to ten weeks during which the claimant receives no payments, although at the end he is given a lump sum payment for the total.

The lower court had found the procedure in violation of both federal statutory requirements and of due process as outlined in Goldberg v. Kelly, 397 U.S. 254 (1970), 1969-70 Report, pp. 196-210, in which the Court held that welfare recipients are entitled to a hearing before payments are cut off. In an opinion by the Chief Justice, the Court did not reach the due process issue, finding instead that the state procedure violated the statutory requirement that an administrative system must be "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. §503(a)(1).

It was Congress' purpose in enacting the Social Security Act provisions underwriting state-administered unemployment insurance programs, the Court found, to ensure that those unemployed through no fault of their own should be afforded substitute payments as soon as administratively feasible in order that they might be free to seek other employment without being burdened with a hand-to-mouth subsistence existence and in order that the economy might be stabilized through maintenance of basic purchasing power. The question then was the point at which administrative feasibility was reached.

Under California procedure an unemployed person files for compensation. An eligibility interview is scheduled for three weeks later. Copies of relevant parts of the application forms are sent to the former employer for verification, the most important issue generally being the reason for termination of employment. The employer is asked to furnish facts relating to the claimant's eligibility. The referees are authorized to seek out additional information as well. The interview then takes place and the referee must consider all relevant materials in deciding eligibility. If the decision is in favor of the claimant's eligibility the former employer may appeal and benefits are suspended. The employer's interest in the matter is that the amount he is required to pay into the state fund is computed by the amounts paid to former employees. An employer is not charged, however, for payments made to former employees if they are subsequently ruled ineligible.

Administrative feasibility, the Chief Justice wrote, is clearly the point after the eligibility interview. The vast number of eligibility decisions made at this point are never challenged and of those that are challenged less than half are reversed. The employer has received notice of the claim and is obligated in advance of the hearing to report facts bearing on eligibility. If he does not he cannot very well complain if payments are continued when he files an appeal, especially since he is not charged with payments made during this period if his appeal is sustained. Thus, once the eligibility determination is made payments should be started and should not be suspended or terminated unless the eligibility decision is reversed.

Justice Douglas submitted a brief concurring opinion

(3)

Hearsay in Administrative Proceedings

In Richardson v. Perales, 39 L.W. 4497 (May 3, 1971), the Court held that the written reports of physicians who have examined a claimant may constitute "substantial evidence" to support an adverse finding before a hearing examiner, notwithstanding the hearsay character of the reports, even though the Government does not produce the doctors for cross-examination and the reports are controverted by the claimant's witnesses, where the claimant has the right to subpoena the doctors to appear.

Under the Social Security Act, monthly payments are available to disabled workers. Many of the half-million yearly applications are granted administratively without a hearing, others after a hearing solely on the claimant's evidence, and others go to full and controverted hearings and appeals up through the system and into court. The Act makes the system's findings conclusive upon judicial review "if supported by substantial evidence." 42 U.S.C. §405(g). In controverted cases it is the practice of the system to require the claimant to be examined by doctors named by it. These doctors are generally not produced at the subsequent hearing, only their written reports. Hearing examiners may have the assistance of a "medical advisor," a doctor retained by the system who testifies at the hearing. He will commonly explain the meaning of the written reports of the doctors and, though he will never have examined the claiment, will often venture a medical opinion about his claim based on the written reports.

In this case, Perales suffered an injury which he claimed left him totally disabled. His claim was supported by his attending physician and controverted by the reports of two doctors who had previously treated him and by the reports of three doctors who had examined him upon designation of the system. A "medical advisor" testified and gave his opinion. The district court and the Court of Appeals held that the rejection of Perales' claims were not supported by "substantial evidence" when all the controverting evidence was hearsay. 288 F. Supp. 313 (D.C.W.D. Tex. 1968), aff'd, 412 F. 2d 44, adhered to on rehearing, 416 F. 2d 1250 (C.A. 5, 1969). The Supreme Court reversed.

The Court's opinion, by Justice Blackmun, determined that the Social Security Act and due process were satisfied by the hearing examiner's reliance on hearsay so long as the claimant was afforded the opportunity, as he is under the Act, to cause the adverse doctors to be subpoenaed on his own. Hearsay may well constitute "substantial evidence." Additionally, the Court saw nothing wrong in the practice of using a "medical advisor" inasmuch as the hearing examiner was a layman and the reports often delved into quite complicated medical knowledge.

Justice Douglas dissented in an opinion which Justices Black and Breenan joined. They would not permit hearsay to form the basis for "substantial evidence" and would require the production of doctors at the hearing. In their view, the evidence of doctors retained at government fees or with other interests in defeating a claim should always be tested by cross-examination.

(4)

Banks and Investment Trusts - And Standing Again

The principal question in Investment Co. Institute v. Camp and National Assn. of Securities Dealers v. SEC, 39 L.W. 4406 (April 5, 1971), was whether a commercial bank should be allowed to commingle investment accounts which it handles on a managing agency basis and operate the commingled fund in competition with mutual fund companies, but an issue of standing formed a subsidiary and perhaps in the long run a more important issue.

The banking issue arose thusly. Banks for years have managed investments for individuals, either as trustees or on a managing agency basis. They have been permitted to commingle small trust accounts into a common trust fund which they could invest as a unit. However, prior to 1962, the Federal Reserve Board would not permit national banks to commingle managing agency accounts - in which the bank acts as an investment adviser and custodian - on the basis that the various provisions of federal banking law do not permit banks to engage in such large scale investment dealings. After jurisdiction was transferred to the Comptroller of the Currency, the ruling was changed, the investment funds were permitted, and the SEC issued favorable rulings exempting such funds from certain securities regulations. These suits followed.

In an opinion by Justice Stewart, the Court held that federal law, the Glass-Steagall Act, did not permit the operation of such funds because Congress had determined on the basis of experience gained prior to and during the Depression that such operations created conflicts of interests and obligations in the banking community, led to dislocations both in banking and

in the securities markets and worked against sound banking practices generally. Justices Harlan and Blackmun dissented. Because he had participated in the cases as a Circuit Judge, the Chief Justice did not participate.

The standing question arose because it was objected that the mutual fund industry, simply because the banking operation would be in competition with it, had no judicial interest to assert so that it could challenge the legality of the bank funds in court. But in Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968), the Court adopted a dictum of Justice Brandeis to the effect that a plaintiff whose interest it is one of the purposes of a statute to protect in whatever degree is entitled to seek judicial review, while one lacking that condition is not so entitled even though he has suffered economic or other injury. Then in Assn. of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), 1969-70 Report, pp. 157-68, the Court held that a suit should not be dismissed because of lack of standing if the plaintiff can show injury in fact and if he "is arguably within the zone of interests to be protected." Id., 153.

The holding left unclear whether this postponed until trial the standing question or whether the standard of standing had been liberalized. Arnold Tours v. Camp, 400 U.S. 45 (1970), appeared to suggest the latter. This decision, though it is still uncertain, appears to confirm that impression. Thus, while as a preliminary matter it might be arguable that the mutual fund industry is within the zone of interests protected by the banking law restrictions on the activities here concerned, the Court's exploration of the reasons underlying the congressional prohibition did not disclose any suggestion that Congress was concerned about protecting the Mutual Fund industry; it was

rather protecting banking. But once the Court determined that the mutual fund industry had standing as an initial matter it passed on to the merits without ever again considering the question of standing in the light of its discoveries about congressional purpose.

The expansion of standing, if indeed that is what it is, thus comes close to giving any competitor standing to challenge the actions of another competitor on the grounds that the latter is exceeding its authority or is violating restrictions or prohibitions on its operations. What we would have then would simply be a requirement of injury in fact and a requirement of an "arguably" protected interest which the mere fact of being a competitor could satisfy.[250] Whether this is in fact where the Court's explication of the law of standing has taken it must await further decision.

250/"[The arguably protected interest language] may mean that intention to protect may be deduced simply from a regulatory limitation favorable to a class seeking review unless the statute is read as limiting the class to be protected. The upshot may be that only when a statute is read to define in a limiting way the class to be protected will the non-protected plaintiff be barred." Jaffe, "Standing Again," 84 Harv. L. Rev. 633, 634 (1971).

(CRS-503)

The Supreme Court 1970-71 Term

A Brief Summary and Review of Decided Cases

XXII

United Transportation Union v. State Bar of Michigan

Group Legal Services and the First Amendment

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April 9, 1971

INTRODUCTION

The American Law Division, Congressional Research Service, has prepared for congressional use surveys and analyses of selected Supreme Court decisions and actions over the past several years. In order to make these reports more useful and available sooner than in the past, we will now prepare a brief report on noteworthy cases and make it available as soon as possible after the case is decided. These reports will then be incorporated, either as written or expanded, in periodic summaries of the Court's Term.

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Group Legal Services and the First Amendment

The Court has held invalid as inhibiting the exercise of the First Amendment rights of speech, petition, and assembly a state court injunction limiting the provision of legal services to its injured members by a union. United Transportation Union v. State Bar of Michigan, No. 434, April 5, 1971. In order to correct a situation in which some of its members bringing actions for damages under the Federal Employers Liability Act, governing the tort rights of railroad workers, had had to pay up to 40 per cent to 50 per cent of their recovery to private attorneys who had represented them, the union maintained a legal counsel department which recommended certain attorneys who would charge no more than 25 per cent of the recovery and which defrayed the costs of getting clients together with attorneys and of investigation of accidents.

Operation of the system brought the bar associations of many States into action against it. Basis for such a response was the tradition going far back into common law of restricting or prohibiting commercial trafficking in rights of action and in preserving a personal client-attorney relationship.[1/] Thus, the bar associations, while not objecting to "group legal services" in principle, strongly objected to any system in which potential litigants were referred to or recommended to selected and favored members of the bar.

1/See 1967-68 Report, pp. 215-20, and sources cited.

Decision in this case was pretty well governed by prior decisions and represented another instance in a line of cases in which the Court seems not clearly yet to have decided whether the right of association is an independent right protected by the First Amendment or whether it is an adjunct or indispensable subpart of the rights of speech, petition, and assembly.[2/]

Association first rose to constitutional status in a series of cases in which the Court denied several southern States the power to prohibit or curtail activities by the National Association for the Advancement of Colored People. In NAACP v. Alabama ex rel. Patterson, 357 U. S. 449 (1958), the State in the course of an effort to apply a foreign corporation registration statute to the NAACP obtained an order compelling the organization to produce various records and papers including a list of names and addresses of all its members in Alabama. The Supreme Court unanimously reversed a contempt citation founded on the Association's refusal to comply. For the Court, Justice Harlan said:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group associations, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly....It is beyond debate that freedom to

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2/The pertinent portions of the First Amendment provide: "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment protects against state deprivation of these rights as an aspect of "liberty" to which the due process clause applies. 1967-68 Report, pp. 54-66, 136-38. On association see Thomas I Emerson, The System of Freedom of Expression (New York: 1970), 425-33.

> engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.... Supra, 460.

While this language treated the right of association as derivative of the named First Amendment rights, other portions of the opinion, id., 461, 463, treat it as an independent, protected right of First Amendment status.

The Court was not always as unanimous in the cases following on this decision and association fluctuated from independent to derivative right, but the general effect was to restrict substantially the power of government to infringe it. Bates v. City of Little Rock, 361 U. S. 516 (1960); Shelton v. Tucker, 364 U. S. 479 (1960); Louisiana ex rel. Gremillion v. NAACP, 366 U. S. 293 (1961); NAACP v. Alabama ex rel. Flowers, 377 U. S. 288 (1964). The case which brought the doctrine into the context with which we are now concerned was NAACP v. Button, 371 U. S. 415 (1963), in which the State of Virginia sought to prohibit as "solicitation" the operation of the NAACP legal offices in furnishing counsel to persons to carry on litigation attacking alleged racial discrimination. Over the dissents of Justices Harlan, Clark, and Stewart, the Court held that litigation, at least in the context of efforts to seek redress for governmental discrimination, was a form of political expression, protected by the First Amendment.

Then, in Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U. S. 1 (1964), and United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217 (1967), 1967-68 Report,

pp. 215-20, the Court upheld against attack union arrangements for legal services for their members. In the Virginia case, the union advised members to seek legal advice before settling injury claims and recommended particular attorneys; in the Illinois case, the union retained attorneys on a salary basis to represent members.

The Transportation Union case had been pending since 1959 in the Michigan courts. The trial court had finally entered an injunction taken verbatim from the injunction issued by the Virginia courts on remand of Button. The Court in an opinion by Justice Black, with the Chief Justice and Justices Douglas, Brennan, and Marshall concurring, set aside the challenged portions of the injunctions. Justices Harlan, White, and Blackmun dissented in part but agreed as to one or two of the injunction provisions. Justice Stewart did not participate.

The first restriction imposed by the injunction challenged in Transportation Union was against "giving or furnishing legal advice to its members or their families." Only Justice Harlan voted to uphold this restriction. Because the clause was not limited by its terms to a prohibition on legal advice by non-lawyers, the other participating justices considered it overbroad.

The second section of the decree, held invalid by Justice Black and those joining in his opinion, but thought valid by Justices Harlan, White, and Blackmun, enjoined the union from providing to any attorney information about injuries to union members. Such an order would restrict communication between an injured member's attorney and the union's accident investigator, and would require that the investigator's information be obtained through the member.

To the extent that it prohibited compensation to union representatives for the cost of transporting union members to attorneys' offices, the section of the decree prohibiting union members from accepting compensation for "solicitation of legal employment for any lawyer" was held invalid by the Court majority.

Because the prohibitions in the decree against the union sharing in legal fees were not supported in the record by evidence that the union was so sharing, or would do so in the future, the Court majority found those provisions unjustified.

All eight participating Justices agreed that the state could not enjoin union control over, or participation in the determination of, fees charged by legal counsel. This decision followed from the United Mine Workers case, in which that union's employment of an attorney on a salary basis was upheld.

Not discussed in the Court's opinion was another section of the decree which prohibited the union from suggesting to members "that a recommended lawyer will defray expenses of any kind or make advances for any purpose." This restraint was held invalid along with the others under review. To Justice Harlan, however, the clause presented a "close question" of interpretation under the Trainmen decision, and should have been upheld.

The question of the status of association as a right is left very much in the position in which the case found it. Justice Black at different points refers to "the First Amendment guarantees of free speech, petition, and assembly [which] give railroad workers the right

to cooperate in helping and advising one another...." and to the fact "that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." Thus, it appears that for the present at least the right of association is a derivative of the rights of speech, petition, and assembly.

Whether its positioning makes any appreciable difference with regard to its governance of questions of constitutional law is a matter of discussion, but in any event we must await the delineation of more aspects of the right of association, especially in the context of political rights, to be able to determine the future shape of the doctrine. A beginning along this line was Williams v. Rhodes, 393 U. S. 23 (1968), 1968-69 Report, pp. 1-12.

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(CRS-511)

The Supreme Court 1970-71 Term

A Brief Summary and Review of Decided Cases

XXIII

Rogers v. Bellei
The Constitution and the Loss of United States Citizenship

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April 23, 1971

INTRODUCTION

The American Law Division, Congressional Research Service, has prepared for congressional use surveys and analyses of selected Supreme Court decisions and actions over the past several years. In order to make these reports more useful and available sooner than in the past, we will now prepare a brief report on noteworthy cases and make it available as soon as possible after the case is decided. These reports will then be incorporated, either as written or expanded, in periodic summaries of the Court's Term.

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The Constitution and the Loss of United States Citizenship

I

The Court has continued the close division of recent years in cases concerning expatriation and denaturalization, holding five-to-four that a federal statute divesting the citizenship of any dual national United States citizen who failed to live here continuously for a period of five years between age 15 to 28 was valid and enforceable. The decision reversed a trend of recent years of requiring absolute vesting of citizenship which could only be lost by voluntary renouncement. Basis for the majority conclusion was a reading of the Fourteenth Amendment's citizenship clause which distinguishes between persons naturalized in this country and persons who acquired citizenship by some process outside the country. Rogers v. Bellei, No. 24, April 5, 1971.

II

Bellei was born in Italy in 1939 of an Italian father and a mother who was a citizen of the United States. By the law of Italy, Bellei was a citizen of that country and by our laws he became a United States citizen as well, subject to the five year

residence provision,[1] which he never met. He visited his maternal grandparents here on five separate occasions and he traveled several times on an American passport. When he turned 18 he registered for military service in the United States but was deferred throughout his period of eligibility because he was employed in NATO defense programs. Despite several warnings that unless he complied with the residence requirement, his citizenship would be revoked, he made no effort to comply.

Following notice of loss of citizenship pursuant to the statute, Bellei brought an action to have the law held invalid and to enjoin the enforcement of it. A district court so ruled, in accordance with its understanding of recent precedents, and the United States appealed. 296 F. Supp. 1247 (D.C.D.C. 1969). In an opinion by Justice Blackmun, which the Chief Justice and Justices Harlan, Stewart, and White joined,

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1/The statute, 8 U.S.C. § 1401, presently reads:

"(a) The following shall be nationals and citizens of the United States at birth:

.....

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years...."

"(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously present in the United States for at least five years: Provided, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years."

the Court reversed. Justices Black, Douglas, Brennan, and Marshall dissented.

III

A full understanding of the significance of the majority and dissenting opinions must begin with an historical review of the status of citizenship throughout our legal history.[2] We must begin with the fact that the Constitution of 1789 did not within itself define or determine citizenship. It, for example, required Representatives to have been citizens for at least seven years, Article I, § 2, cl. 2, Senators for at least nine years, Article I, § 3, cl. 3, and the President to be either a natural born citizen or a citizen at the time of the adoption of the Constitution, Article II, § 1, cl. 5. And it authorized Congress to enact a uniform rule of naturalization. Article I, § 8, cl. 4.

The silence of the Constitution with regard to citizenship was no oversight but rather reflected the decision of the framers to avoid one of the burning issues of that day: the status of the Negro.[3]

2/See generally, John P. Roche, The Early Development of United States Citizenship (New York: 1949); I-mien Tsiang, The Question of Expatriation in America Prior to 1907 (Baltimore: 1942); Gordon, "The Citizen and the State: Power of Congress to Expatriate American Citizens," 53 Geo. L. J. 315 (1965); Roche, "The Expatriation Cases: 'Breathes There the Man with Soul So Dead....?'" 1963 Sup. Ct. Rev. 325 (Kurland ed.); Roche, "Loss of American Nationality: The Development of Statutory Expatriation," 99 U. Pa. L. Rev. 25 (1950); Duvall, "Expatriation under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship," 56 Va. L. Rev. 408 (1970).

3/John P. Roche, op. cit., n. 2.

And in fact it was the citizenship of the free Negro, Dred Scott, which was the focal point of that famous decision which did as much as any other factor to precipitate the Civil War.

The first Congress enacted legislation pursuant to its naturalization powers, prescribing the manner in which aliens could be naturalized. 1 Stat. 103 (1790). The law also provided that children of United States citizens who were not born within the United States were to be considered natural born citizens so long as the father had been resident in the United States.

Three efforts, in 1797, 1817, and 1818, to provide some avenue by which United States citizens could voluntarily expatriate themselves, renounce their citizenship and assume that of another nation, foundered upon what was then apparently the overwhelming view that national citizenship derived from state citizenship and that provision for expatriation was properly a matter for state action.[4/] As the slavery controversy grew in intensity, the abolitionists urged the view that national citizenship was primary and determinative of rights.[5/] The Dred Scott case, Scott v. Sandford, 19 How. (60 U. S.) 393 (1857), took a restrictive view of national citizenship and held, among other things, that Negroes, slaves or free descendants of slaves, could never be citizens of the United States, although individual States could make them citizens of those States.

4/Roche, op. cit., n. 2, 1963 Sup. Ct. Rev., 329.

5/Jacobus tenBroek, Anti-Slavery Origins of the Fourteenth Amendment (New York: 1951), 71-94.

In the aftermath of the Civil War, Congress adopted for the first time a general definition of citizenship. First in the Civil Rights Act of 1866, 14 Stat. 27, § 1, and then in the first sentence of the first section of the Fourteenth Amendment, Congress provided: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[6/] But aside from overruling Dred Scott and establishing a uniform rule of determination of citizenship, what did this sentence extend to?

As it passed the House, the first section of the proposed Fourteenth Amendment did not contain such a sentence.[7/] As passed by the House and reported in the Senate, the first section began: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...." The principal Senate sponsor in a lengthy floor speech expounded on the privileges or immunities of citizenship which the clause would protect, assuming rather expressly that since § 1 of the Civil Rights Act of 1866 made Negroes citizens there would be no question on that score. Cong. Globe, 39th Cong., 1st Sess. (1866), 2764-67. Other members of the Senate raised the fear that Dred Scott might come back to eviscerate the section through

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6/The Civil Rights Act of 1866 contained only the formulation "born in the United States" with no reference to naturalized citizens, reflecting no doubt the narrow intent to change Dred Scott.

7/The story is summarized in Horace Flack, The Adoption of the Fourteenth Amendment (Gloucester, Mass.: 1965 reprint), 83-92.

a restrictive interpretation of who might be a citizen. Thus, Senator Wade proposed that in place of the phrase "citizens of the United States" the phrase "persons born in the United States or naturalized by the laws thereof" be substituted. Id., 2768. After a caucus of supporters of the proposed constitutional amendment, Senator Howard proposed a series of revisions in the text, the first of which added a new sentence at the beginning of section 1, reading: "All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside." Id., 2869. Senator Fessenden subsequently moved to insert "or naturalized" following the word "born" and this amendment was accepted without debate. Id., 3040.

The debates on the citizenship clause are limited, but there emerges a fairly clear understanding with regard to purpose and effect. The "courts have stumbled on the subject" and to forestall a narrowing construction of the privileges or immunities due to citizens it was best to place beyond the reach of those who might yet take over the Government one day and assert a different view, a clear definition of citizenship should be spelled out in the Constitution. Id., 2768-69. The sponsors repeatedly asserted that "this section will leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government." Id., 3031.

Whether the framers of the Fourteenth Amendment meant that citizenship once vested could not be taken away by government without the voluntary assent of the individual cannot be answered from the

debates. There was no allusion to such a possible meaning of the first sentence and hence no affirmation or denial. There is an ambiguous colloquy between Senator Howard and another Senator with regard to the possibility of adding an exception of "Indians not taxed" to the first sentence. Senator Howard objected on the basis that simply by taxing its Indians a State could in effect naturalize them. Then followed the colloquy:

> Mr. Clark. ... Suppose the State of Kansas, for instance, should tax her Indians for five years, they would be citizens.
>
> Mr. Howard. Undoubtedly.
>
> Mr. Clark. But if she refuse to tax them for the next ten years how would they be then? Would they be citizens or not?
>
> Mr. Howard. I take it for granted that when a man becomes a citizen of the United States under the Constitution he cannot cease to be a citizen, except by expatriation or the commission of some crime by which his citizenship shall be forfeited.
>
> Mr. Clark. If it depends on taxation.
>
> Mr. Howard. The continuance of the quality of citizenship would not, I think, depend upon the continuance of taxation.
>
> Mr. Clark. But still he would be an "Indian not taxed."
>
> Mr. Howard. He has been taxed once. Id., 2895.

Howard's views faced two ways, it can be seen, toward a vesting of citizenship which would not be revoked by a change of circumstances but also toward a status which could be lost either voluntarily or as punishment. With regard to punishment, he may have had in mind two

recent acts of Congress, one successfully vetoed by the President and the other law when the Fourteenth Amendment was referred to the States, which would have deprived certain persons of citizenship, those who served in the Confederacy and those who deserted from the Union military.[8/]

In any event, it was not until 1907 that Congress enacted a general measure providing for the legal effect of expatriation to attach to certain acts.[9/] In three separate naturalization acts, however, in 1855, § 1, 10 Stat. 604, 1802, § 4, 2 Stat. 153, and 1795, § 3, 1 Stat. 414, the provision of the first naturalization act was repeated, whereby a child born abroad of a father who was an American citizen was entitled to United States citizenship but not a child born to a mother who was an American citizen but whose father was a citizen of another country. The 1907 Act, § 6, 34 Stat. 1229, provided that such children who were citizens because of the prior statutory provisions, meaning a child of an American father, must, if they remained resident outside the United States, upon reaching the age of 18 take an oath at a consulate that they intended to become a resident and take the oath of allegiance.

8/13 Stat. 490. Roche, op. cit., n. 2, 1963 Sup. Ct. Rev., 343.

9/34 Stat. 1228. Among the grounds for expatriation were naturalization in a foreign state, swearing allegiance to a foreign state, resumption of foreign residence by a naturalized citizen, marriage of an American woman to an alien, service in the armed forces of a foreign state, employment in the service of a foreign state, voting in a foreign election, treason, and renunciation. These were carried over for the most part into the 1940 and 1952 Acts and some have been declared unconstitutional. For the law prior to Bellei, see Duvall, op. cit., n. 2.

A 1934 law, § 1, 48 Stat. 797, removed the restriction of paternal citizenship, making possible receipt of American citizenship through the mother as well, and instituted the five-year continuous residence requirement. Subsequent statutes maintained these provisions.

IV

The judicial interpretation of citizenship and congressional power over it has been a fluctuating matter. In the early days, the subject of expatriation and Congress' power over it was studiously avoided by the Court with the exception of Chief Justice Marshall's famous dictum in Osborn v. Bank of the United States, 9 Wheat. (22 U.S.) 737, 827 (1824). The issue there was not naturalization but rather the right of the bank to bring its suit for equitable relief in the courts of the United States. Osborn has argued that the fact that the bank had been chartered under the laws of the United States did not make any legal issue involving the bank one arising under the laws of the United States, creating federal court jurisdiction; buttressing his argument, Osborn contended the contrary argument was like suggesting that the fact that persons naturalized under the laws of Congress had an automatic right to sue in federal courts, unlike natural born citizens. The Chief Justice rejected the analogy as an inappropriate one and then said: "The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." Whether the Chief Justice meant any more than that Congress could not exercise its naturalization powers to confer on naturalized citizens greater rights than natural born citizens

had is not clear; many subsequent Courts and commentators have read the sentence to mean that the naturalization power may only be used to naturalize not to denaturalize. "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away." United States v. Wong Kim Ark, 169 U. S. 649, 703 (1898).

But in MacKenzie v. Hare, 239 U. S. 299 (1915), the Court sustained the constitutionality of that provision of the 1907 law which expatriated an American woman marrying a foreigner, attaching his citizenship to her, but providing that if the marriage were subsequently dissolved she could regain her citizenship. Basis for the decision was that the attributes of sovereignty possessed by the United States included the power to govern relations with other countries and since retention of United States citizenship by a woman married to a national of another country might create embarassing situations Congress could provide that such a voluntary, knowing act as contracting marriage was sufficient to terminate citizenship.

In 1958 there began a series of decisions which led to Bellei. A five-to-four majority of the Court sustained the constitutionality of a provision of law which divested the United States citizenship of one who voted in a foreign election. Perez v. Brownell, 356 U. S. 44 (1958). Perez was a dual national, born here of Mexican parents. For the Court, Justice Frankfurter found the congressional power to denaturalize in this situation in its power to regulate foreign affairs. Therefore, it could reduce to a minimum the frictions between nations that arose out

of matters touching their dignity and interests. Since voting could exacerbate intercourse between nations and since it was a voluntary act on Perez' part, the congressional provision of denaturalization was reasonable and rational.

The dissent argued that Congress possessed no power to divest American citizens of their citizenship and that even if it did the act of voting was not such an act as denoted a voluntary renunciation of citizenship.

The same day, another five-to-four majority, Justice Brennan having changed sides, held unconstitutional a statute providing that deserters from the armed forces during wartime were to lose their citizenship. Trop v. Dulles, 356 U. S. 86 (1958). For the majority, Chief Justice Warren wrote that such expatriation visited upon deserters for punishment violated the cruel and unusual punishment clause of the Eighth Amendment. The Chief Justice also referred to his dissent in Perez which denied Congress the power to take citizenship away. The dissent rejected the cruel and unusual punishment ground and found that Congress could rationally have concluded that a refusal to perform service in wartime was a sufficient indicia of renunciation of citizenship as to result in it.

In Kennedy v. Mendoza-Martinez, 372 U. S. 144 (1963), another five-to-four majority struck down a provision of law expatriating one who left the jurisdiction of the United States during a national emergency and stayed away to avoid military service. Basis for the decision was that automatic forfeiture of citizenship without a hearing

or any sort of administrative or court review violated the Fifth Amendment's due process clause.

A five-to-three majority, in Schneider v. Rusk, 377 U.S. 163 (1964), voided a provision of law which expatriated a naturalized citizen who returned to his native land and resided continuously there for a period of three years. The majority did not think it a constitutionally permissible assumption to treat naturalized citizens differently from native-born citizens and since the latter could not lose their citizenship by residing abroad for three years the former could not either.

Finally, in Afroyim v. Rusk, 387 U.S. 253 (1967), a five-to-four majority overruled Perez v. Brownell, supra, and held that Congress had no power to expatriate a citizen without the citizen's assent. The first sentence of sec. 1 of the Fourteenth Amendment was held to take all such power from Congress. Justice Harlan's dissent argued that the framers of the Fourteenth Amendment had never intended any such result; he would have found in Afroyim's voluntary act of voting in Israel a voluntary renunciation of United States citizenship as provided by statute.10/

It was thus with a checkered judicial history that the Court reached Bellei.

V

After reviewing the statutory pattern and the prior cases,

10/ Duvall, op. cit., n. 2; Gordon, op. cit., n. 2; Roche, op. cit., n. 2, 1963 Sup. Ct.

Justice Blackmun for the majority observed that had Bellei been born prior to May 24, 1934, he would have had no claim to United States citizenship at all, since the statute in effect until that date provided for derivative citizenship from the father but not from the mother and it was Bellei's mother who was the United States citizen. The statutory change from that date which applied to one like Bellei born in 1939 provided for derivative citizenship from the mother but imposed a condition subsequent, five years continuous residence in the United States between the age of 14 and the age of 28. Bellei's claim was a statutory one then and he could not avail himself of the Fourteenth Amendment argument on which Afroyim had rested for the very simple reason that the first sentence of § 1 did not apply to him. "The central fact...is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei."

The constitutional definition of citizenship having no application to Bellei, Justice Blackmun continued, the statutory authority of Congress was paramount. Much precedent recognized that generally citizenship by birth was favored in the law and that acquisition by descent or other means was dependent solely upon statutory recognition. For long periods, Congress had withheld citizenship from persons in Bellei's position and from other persons as well. No alien had any right to United States citizenship except insofar as he complied fully

with the congressional scheme for achieving it. Congress could well have withheld citizenship from Bellei altogether until he fulfilled the residence requirement; instead it had granted citizenship conditioned upon fulfillment of the requirement. Unless Congress was constitutionally restricted from so conditioning its grant, its statute prevailed.

Justice Blackmun could perceive no such constitutional limitation. The concern with dual nationality evinced by the congressional scheme was certainly a rational one and the means of dealing with the concern were rational. There was nothing arbitrary or unfair in placing the choice on Bellei. Neither could the Justice perceive why a condition precedent was constitutionally without complication whereas the same thing imposed as a condition subsequent raised such problems. Finally, since Bellei had his Italian citizenship, there was no problem of constitutional limitation on a congressional creation of a stateless being.

Justice Black's dissent contended that the majority was substituting its standards of what was "fair" and "not arbitrary" for the fixed standard of the Fourteenth Amendment. In his view, Afroyim and Schneider, which he considered overruled by the majority, stood for the proposition that all American citizens were alike protected against congressional deprivation of citizenship without assent. While Bellei was not born in the United States, he was naturalized in the United States in the sense that Justice Black saw it, naturalized "into" the United States. Citizenship was acquired by either of two processes, he thought, by birth or by naturalization. "[N]aturalization when used in

its constitutional sense is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than by birth in this country. All means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization." The majority's interpretation, he concluded, was excessively technical and devoid of the spirit with which the Constitution should be read.

Justice Brennan's brief dissent denied that the place of naturalization had any significance for purposes of Fourteenth Amendment protection.

VI

Bellei is undoubtedly not the last word on this subject. Many of the congressional enactments like those struck down in Afroyim, Schneider, and Mendoza-Martinez are still on the books and they will no doubt be applied and challenged. It seems clear that the Bellei majority does not accept the Schneider-Afroyim rationale and it is possible that if confronted with one who is a "first-sentence-Fourteenth-Amendment" citizen who has run afoul of a denaturalization provision those cases would be overruled. But the close division over recent years would indicate that even if this should occur there is unlikely to be any measurable amount of stability in the law.

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The Supreme Court 1970-71 Term

A Brief Summary and Review of Decided Cases

XXIV

Swann v. Charlotte-Mecklenburg Board of Education

Desegregation and the Urban School

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Desegregation and the Urban School

I

In one of its most far-reaching decisions of the Term, the Court has unanimously set out standards instructing school administrators and lower court judges about the goals and the means of accomplishing the termination of dual school systems where they continue to exist. With the application of the standards to be primarily in the urban systems of the South, the Court has made clear that school boards have an affirmative duty to arrange all aspects of their school policies--assignment of pupils, assignment of faculties and staffs, transportation, school construction, building closings and zoning of attendance areas--so as to remove the racial identifications of all schools in the system. Not every isolated school need be changed from a one-race or nearly one-race characteristic school but if there be such schools the system bears a heavy burden of showing that the result is not attributable to official action. School populations need not bear racial ratios like that of the population at large and once the dual system is destroyed no affirmative obligation remains on officials to maintain any particular balance so long as the instability of racial patterns is wholly attributable to private reorderings of residential and other factors uninfluenced by official action. Swann v.

Charlotte-Mecklenburg Board of Education, No. 281, April 20, 1971.[1/]

II

State-compelled racial segregation in public schools was held to be a violation of the equal protection clause of the Fourteenth Amendment in Brown v. Board of Education of Topeka, 347 U. S. 483 (1954), involving cases arising in Kansas, South Carolina, Virginia, and Delaware. After hearing new argument directed to the relief which should be granted, the Court remanded the cases to the district courts so that the carrying out of its mandate could be adjusted to the particularities of each school district. Brown v. Board of Education of Topeka, 349 U. S. 294 (1955). "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." Id., 300. The Court directed that the lower federal courts "require that the defendants make a prompt and reasonable start toward full compliance" with the Brown ruling. Ibid. It might be that "[o]nce such a start has been made," some additional time would be needed because of problems arising in the course of

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1/The other cases before the Court were Charlotte-Mecklenburg Board of Education v. Swann, No. 349, a cross-appeal with the principal case; Davis v. Board of School Comm. of Mobile County, No. 436, another urban school desegregation standards case; North Carolina State Board of Education v. Swann, No. 498, an appeal from a three-judge court decision voiding a state anti-busing law; and McDaniel v. Barresi, No. 420, an appeal from a state court injunction against effectuation of a desegregation plan. All these cases are considered in the course of this report. Still another case, Moore v. Charlotte-Mecklenburg Board of Education, No. 444, a cross-appeal in the anti-busing case, was dismissed because both parties sought the same relief and there was no controversy between them. For a lengthy review of these cases in the lower courts, see 1969-70 Report, pp. 279-94.

compliance and the lower courts were to allow it if on inquiry delay were found to be "in the public interest and [to be] consistent with good faith compliance...to effectuate a transition to a racially nondiscriminatory school system." Id., 300-01. But in any event the lower courts were to require compliance "with all deliberate speed." Ibid.[2/]

The history of school desegregation litigation since 1955 is long and involved. For the first several years, the Supreme Court stood by while the lower federal courts dealt with such issues as pupil assignment laws, transfer policies, exhaustion of state administrative remedies. Only with regard to the resistance to court-ordered desegregation in Little Rock, Arkansas, did the Court step in, Cooper v. Aaron, 358 U. S. 1 (1958), unanimously rejecting the attempt of the State to "interpose" its authority between that of the federal courts and school boards.

But in Griffin v. Board of Supervisors of Prince Edward County, 377 U. S. 218 (1964), the Court indicated that "[t]here has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held [in Brown] had been denied Prince Edward County Negro children." Id., 229. This comment, directed toward the closing of public schools in Prince Edward County made more explicit comments

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2/The judicial history of these cases from 1955 to 1969 is traced in Killian, A Study of School Desegregation Decisions of the Fourth Circuit Court of Appeals During the Service of Judge Clement F. Haynsworth, Jr., American Law Division, LRS, September 8, 1969 (AP 109), a study much broader in scope than its title suggests.

in Court opinions the year before indicating that the Justices were growing impatient over the progress achieved under the Brown mandate. Watson v. City of Memphis, 373 U. S. 526, 530 (1963); Goss v. Board of Education of Knoxville, 373 U. S. 683, 689 (1963). And in Bradley v. School Board of the City of Richmond, 382 U. S. 103, 105 (1965), the Court said: "Delays in desegregating school systems are no longer tolerable."

Full scale consideration by the Court of the means of desegregation and the obligations of school systems came in Green v. School Board of New Kent County, 391 U. S. 430 (1968), in which the plaintiffs challenged the operation of a freedom of choice system which had left the schools of the rural county still divided between "white schools" and "Negro schools." The Court unanimously held the freedom of choice plan in effect to be inadequate to achieve the goal demanded by Brown--the development of a unitary, nonracial system of public education. The system condemned by Brown, the Court held, was one which was clearly delineated part white, part Negro; the Brown mandate required school boards to effectuate a transition from that kind of dual system to a unitary one. Id., 435. The time allowed by the second Brown decision was to permit a period in which the initial break from the existing pattern could be made; the time now had come, the Court continued, to achieve the goal.

> The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth

> Amendment as universally requiring "compulsory integration...." But that argument ignores the thrust of Brown II....Brown II was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. Id., 437-38.

The test of freedom of choice, as of any plan, Justice Brennan wrote, was whether it resulted in a system with none of the characteristics of a dual system. School boards must present to overseeing district courts "a plan that promises realistically to work, and promises realistically to work now." Id., 439 (emphasis in original). In New Kent County, no white child attended the "Negro school" and only 15 per cent of the Negro pupils were attending the "white school." "In other words, the school system remains a dual system." Id., 441. Freedom of choice having failed, it was the obligation of the school board to formulate a more promising way, such as zoning, which would work "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." Id., 442.

Last Term, without discussing standards, the Court rejected several efforts to slow down the speed with which desegregation was to be accomplished. Alexander v. Holmes County Board of Education, 396 U. S. 19 (1969); Carter v. West Feliciana Parish School Board, 396 U. S. 290 (1970); Northcross v. Board of Education of Memphis, 397 U. S. 232 (1970), 1969-70 Report, pp. 37-51, 131-41.

III

For much of the period between 1955 and 1970, the school systems dealt with by the lower federal courts and by the Supreme Court were rural-small town systems, in which desegregation plans could be formulated simply by the drawing of attendance zones and assigning all pupils within each zone to the school serving that zone. This resulted in desegregation throughout the system typically because there was no residential segregation in the systems and neutral zoning resulted in interracial assignments. The New Kent County system at issue in Green, for example, was composed of two school units on opposite sides of the County, so that a north-south line with zone assignments could effectively desegregate both units.

In the cities, desegregation plans involving zones, freedom of choice, transfers, and other devices had resulted in some desegregation but they had left many schools with all-white or all-Negro populations, or largely so, with the issue then arising whether school boards were under an obligation to do away with such schools and achieve an actual desegregation or integration of every school in the system.

The question of faculty assignments, staffs, athletic systems, and the like had been generally resolved previously, the Court requiring that in regard to such matters school boards must do away with all-white or all-Negro faculties, staffs, athletic systems, and the like. United States v. Montgomery County Board of Education, 395 U. S. 225 (1969); Rogers v. Paul, 382 U. S. 198 (1965); Bradley v. School Board of City of Richmond, 382 U. S. 103 (1965); United States v. Jefferson County Board of Education, 380 F. 2d 385 (C.A. 5, 1967) (en banc).

Thus, the question was squarely presented in Charlotte-Mecklenburg, North Carolina, and in Mobile, Alabama, and the lower courts answered it somewhat differently.

(A)

Pursuant to a school board plan judicially approved in 1965, Swann v. Charlotte-Mecklenburg Board of Education, 243 F. Supp. 667 (D.C.W.D.N.C.), aff'd, 369 F. 2d 29 (D.A. 4, 1965), certain all-Negro schools were closed, the City and County were zoned with assignments to schools within each zone but transfers permitted under a freedom of choice plan. Following the Supreme Court's decision in Green, supra, plaintiffs filed petitions to require a revision of the plan to achieve greater desegregation.

There followed a series of hearings and memorandum opinions, 300 F. Supp. 1358, 1381, 306 F. Supp. 1291, 1299 (D.C.W.D.N.C. 1969), in which the district court determined that the pupil racial ratio in the entire system was roughly 79 per cent white to 21 per cent Negro. Very few Negroes lived in the County and over 95 per cent of the City's Negro population was concentrated in the northwest quadrant of the City with the schools in that area having a pupil enrollment 95 to 100 per cent black. The southeast quadrant of the City, like the entire county, was almost wholly composed of white residents and the schools in the other two quadrants of the City were predominantly white, containing only a few Negro transfers. The faculties in each school reflected the racial composition of the pupil population. Approximately two-thirds of the system's Negro school children attended schools readily identifiable as "Negro schools."

The court concluded that the residential segregation existing in the City could not legally be called de facto. It found federal, state, and local involvement in the encouraging and fostering of residential patterns through urban renewal, zoning, city planning, school site selection and construction and other actions; it further found that the school board was aware of and took into account the residential patterns in making otherwise neutral school administration decisions. Because the residential patterns were so much a product of official action the concept of de facto segregation was legally of no moment in evaluating the duty of the board to desegregate the schools.

The board was directed to submit a new plan and the district court appointed an academic expert to draw up an alternative plan. Thereafter, 311 F. Supp. 265 (D.C.W.D.N.C. 1970), the court revised the school board plan by incorporating the expert's revisions and directed that every school in the system should start toward a goal of achieving a student population roughly equivalent to the 79-to-21 racial ratio prevailing in the entire student population. In practice, substantial deviations from this ratio were approved.

The board plan would have desegregated nine of the ten high schools so that the black pupil population would have ranged from 17 to 36 per cent; the tenth school in the county would have had a black pupil attendance of two per cent. The district court accepted this part of the plan with the exception that it required the busing of 300 inner city black pupils to the tenth school, bringing its black attendance up to just over 20 per cent and changing slightly the percentages at several other schools.

The board plan rezoned junior high school attendance areas so that in 20 of the 21 junior high schools black attendance ranged from 0 to 38 per cent; in the 21st, located in the heart of the black residential area, the black attendance would have been 90 per cent. The district court directed the board to choose among four alternative revisions for desegregating the 21st school and the board chose a plan involving rezoning and busing which resulted in projected black attendance at all 21 schools ranging from nine to 33 per cent. The zoning created noncontiguous attendance areas for the assignment of black pupils.

The district court rejected the board's plans for elementary school desegregation. Approximately 31,000 white and 13,000 black pupils attended 76 elementary schools. The board plan rezoned attendance areas, leaving nine schools, attended by from 86 to 100 per cent black pupils, constituting more than half of the black elementary pupils in the system. About half of the white elementary pupils were assigned to 18 schools at which the pupil attendance was from 86 to 100 per cent white. The consultant's plan desegregated 27 elementary schools by zoning; the 34 schools in which zoning was an ineffective method of desegregation were grouped into units consisting of two or three outer city or county schools and one inner city school with cross-busing to transport the pupils. That is, black pupils in grades one through four were transported to white schools and white pupils in grades five and six were transported to black schools. About 9,300 elementary pupils were to be bused.

The Court of Appeals, by a divided opinion, affirmed the district court order with regard to junior and senior high schools but reversed with regard to the elementary school portion. 431 F. 2d 138 (C.A. 4, 1970). The opinion of the Court was by Judge Butzner and was joined by Judges Haynsworth and Boreman. Judge Bryan dissented from much of the majority opinion and would have set aside the district court order entirely but he voted with the Butzner opinion in order to create a clear majority for remanding. Judges Sobeloff and Winter dissented from the portion of the opinion on the elementary schools, preferring to affirm completely.

The majority opinion accepted the district court's findings and conclusions rejecting any concept of de facto segregation in the residential and school attendance patterns in Charlotte-Mecklenburg. The district judge's rejection of the school board plan had therefore been proper, but Judge Butzner could not agree with the conclusion that every school in a system must be integrated. He would opt for a standard of reasonableness: school boards must use every reasonable effort to desegregate all schools but if black residential areas were so large that by using reasonable means not every school could have pupils of both races, that fact must be accepted, although the school board should take other reasonable steps to ameliorate the basic situation. Applying the test of reasonableness, Judge Butzner approved the junior and senior high plan, but he thought it unreasonable to require the school board to undertake a 39 per cent increase in the busing of elementary pupils, with attendant costs and problems. The case would be remanded then so that new plans could be devised.

On the last day of last Term the Supreme Court granted certiorari in Swann. 399 U. S. 926. Further, the Court directed that the district court's order should be reinstated and that further proceedings in the district court were authorized.

Thereafter, the district court held new hearings and issued still another opinion. 318 F. Supp. 786 (D.C.W.D.N.C. 1970). It recounted in detail its previous findings and conclusions, assessed its prior order directing institution of its desegregation plan, reviewed and rejected the school board objections thereto, and reviewed the new plans presented to it, by HEW, by a board majority, by a board minority. The district court specifically found that its previous plan was reasonable and directed the board to choose either it, a revised minority of the board plan, or portions of the two plans. The board voted to acquiesence in the court's prior plan and to put it into effect, without giving up their objections to it.

(B)

The Mobile case, Davis v. Board of School Comm. of Mobile County, No. 436, had a long history in reported opinions.[3/] The case was one of a series of cases following Ellis v. Board of Public Instruction

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3/Previous reports of the case are: Davis v. Board of School Comm., 318 F. 2d 63 (C.A. 5, 1963); Id., 322 F. 2d 356 (C.A. 5), cert. den., 375 U. S. 894 (1963); Id.,333 F. 2d 53 (C.A. 5), cert. den., 379 U.S. 844 (1964); Id., 364 F. 2d 896 (C.A. 5, 1966); Id., 393 F. 2d 690 (C.A. 5, 1968); Id., 414 F. 2d 609 (C.A. 5, 1969); Sub nom. Singleton v. Jackson Municipal Separate School District, 421 F. 2d 1211 (C.A. 5, 1969) (en banc), reversed in part sub nom. Carter v. West Feliciana Parish School Board, 396 U. S. 290 (1970).

of Orange County, 423 F. 2d 203 (C.A. 5, 1970), all by the same three judges.[4] Briefly stated, the Ellis principle was that with regard to student desegregation a plan which accomplishes substantial desegregation will not be rejected if because of residential segregation there remains in the system one or more all-black or substantially all-black schools, so long as a majority-to-minority transfer system,[5] with transportation provided and priority as to space guaranteed, and desegregated faculties and other features mitigate the remaining segregation.

The Mobile system covers the whole of Mobile County, including the City of Mobile. The total area is 1,222 square miles. In a total of 96 schools, there were in September 1969 a total of 73,504 pupils, 58 per cent white and 42 per cent black. Under the plan accepted by the district court, 60 per cent of the pupils were assigned to 12 elementary, three junior high, one combination junior-senior high, and three high schools having all or virtually all-Negro student bodies.

The Court of Appeals disapproved this plan. 430 F. 2d 883

4/In addition to Ellis and Davis, the cases decided by the panel of Judges Bell, Ainsworth and Godbold were: Hilson v. Ouzts, 425 F. 2d 219 (C.A. 5, 1970); Doris v. Montgomery County Board of Education, 426 F. 2d 249 (C.A. 5, 1970); Mannings v. Board of Public Instruction of Hillsborough County, 427 F. 2d 874 (C.A. 5, 1970); Lee v. Macon County Board of Education, 429 F. 2d 1218 (C.A. 5, 1970); United States v. Mathews, 430 F. 2d 56 (C.A. 5, 1970); Hilson v. Ouzts, 431 F. 2d 955 (C.A. 5, 1970); Wright v. Board of Public Instruction of Alachua County, 431 F. 2d 1200 (C.A. 5, 1970).

5/That is, a system in which a student whose race is that of the majority of the school in which he is attending may transfer to a school where pupils of his race are in the minority.

(C.A. 5, 1970). The court instead took up an alternative plan submitted by the United States and modified and approved it. As submitted, the plan, by pairing and grade recasting, reduced from 60 to 28 per cent of the total the number of black pupils who would be in all-black schools. It still left nine all- or virtually all-Negro elementary schools and one similar senior high school. The modifications ordered by the court paired the senior high with another school, desegregating it. The court could not see how residential patterns could overcome the segregation in the eight elementary schools, with 25 per cent of the black pupils in the system, but it noted that the elementary pupils would attend desegregated junior and senior high schools.

On remand, the school board moved the district court for revision, citing statistical errors in the Court of Appeals order, resulting in some instances in some schools being filled beyond capacity. Again the Court of Appeals reversed the district court's order modifying the plan. 430 F. 2d 889 (C.A. 5, 1970). The inaccuracies were recognized and attributed to the school board's refusal to cooperate; space corrections were approved. The district court order desegregating one of the eight schools by rezoning was approved, reducing from 25 to 19 per cent the Negro student population assigned to all-black schools. The Court of Appeals revised the lower court plan further, pairing two additional schools and

reducing from seven to six the all-black schools and from 19 to 17 per cent the black pupils in all-Negro schools.[6/]

IV

The Chief Justice's opinion began with the cautioning statement that the cases all dealt with the dissolution of dual school systems maintained by state action in violation of the equal protection clause. The findings and conclusions of the district court in Swann about official action underlying the residential and school segregation existing in Charlotte-Mecklenburg were noted and the Chief Justice pointed out that these findings and conclusions were accepted by the Court of Appeals. The Court's opinion does not explicitly approve these findings and conclusions but the entire rationale of the opinion obviously proceeds from an implicit approval of them.

The Chief Justice emphasized that under the remand from Brown the lower courts were left free to exercise their best judgments in utilizing equity powers to oversee the terminations of dual systems. In many areas, the factors to be considered had not yielded to states of compliance, but in urban areas the multifaceted matters of residential patterns, size, large numbers of pupils, and unstable demographic factors had led to difficulties. Therefore, it was time for the Court

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6/The actual figures for the 1970-71 school year revealed that the projections of the Court of Appeals were in error. As reported in the Chief Justice's opinion, they showed that nine elementary schools, instead of six, were almost all-Negro and that 64 per cent of the Negro elementary attended these schools. Additionally, it appeared that more than half, instead of none, of the Negro junior and senior high pupils were in all-black schools.

to sketch in some guidelines for the benefits of school boards and lower courts. The guidelines were of necessity tentative and general, since highly diverse situations existed among school systems.

One matter to bear in mind, the Court continued, was that school authorities were not as limited in working out remedial programs as courts were. Thus, a school board might decide that the best answer was a structuring of each school so that the student population reflected within itself the racial ratio of the pupil population of the entire system. "To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy."

Before discussing the principal issues arising in Swann, the Chief Justice emphasized that school boards and lower courts must look beyond pupil assignments in determining whether a unitary system had been achieved. Practices with regard to faculty, staff, transportation, extracurricular activities, and facilities were to be scrutinized to make sure that distinctions were not made which characterized different schools as "white" or "Negro." One very important area, the Chief Justice continued, was that of school construction and school closing. Where school buildings are located will influence population movements; a site in one neighborhood may bring about attendance of pupils of one race whereas a different site would achieve a multiracial student body. Just as school boards operating under dual systems often buttressed them

by choosing sites deep in all-Negro or all-white areas, so unitary systems should be consciously fostered in site choice. The lower courts should be alert "that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the dual system."

The Court then turned to the four principal issues of Swann:

Racial balances or racial quotas--Elimination of a dual system, the Chief Justice noted, was to result in a system in which school authorities excluded no pupil of a racial minority from any school, directly or indirectly, on account of race. Although the elimination of racial discrimination in school attendance might very well contribute to amelioration of conditions of racial prejudice throughout society, the schools could not be called upon to assume that obligation squarely. Therefore, considerations of larger social purposes were generally not to be a factor in the institution of school desegregation plans.

Therefore, a unitary system was not one in which, as one means of working toward a unitary society, the schools were to reflect the racial composition of the community at large. If the district judge in Swann in setting out his 71-to-29 "goal" were to be read "to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

But the Court did not so read the district judge's order.

That order started from an awareness of the racial composition of the whole system as a useful point in devising a remedy. From that starting point, a great variety of individual pupil ratios resulted in the individual schools. No inflexible goal was set or achieved.

One-race schools--"[T]he existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law." Residential concentration is typical of minority racial groups and schools serving the areas of such concentration will reflect it. "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools." Thus, reviewing courts should always begin with a presumption against the regularity of one-race schools so that school boards will bear the burden of showing that one-race schools do not result from present or past discriminatory action on the part of the boards.

In any such situation, it is incumbent on school boards to lessen the impact of any intractible remnant of segregation by maintaining a transfer system under which pupils who are of the race which is in the majority in their school may transfer into a school where their race is in the minority. Free transportation and a guarantee of space must be made so as to make the transfer option effective.

Remedial altering of attendance zones--A court which is considering the abolition of a dual system, the Chief Justice wrote, should be careful not to permit school boards to use superficially neutral

standards of assignment which in fact utilize prior discriminatory practices - in site selection, zoning, and the like. Thus, school attendance zones may be gerrymandered so as to further desegregation. A predominantly white school may be paired with a predominantly black school so that grades are merged and different classes meet in different schools. More than two schools may be grouped to the same effect. Noncontiguous attendance zones may be drawn. All these things may be done with the conscious intent of maximizing desegregation.

"Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems."

Transportation of students - "Desegregation plans cannot be limited to the walk-in school." Approximately 39 percent of the pupils in the United States, the Chief Justice wrote, are

transported by bus to school every day. In both Charlotte-Mecklenburg and in Mobile, large numbers of pupils were daily bused without regard to desegregation plans; elementary pupils were bused in larger proportions than high school students. The plan ordered by the district judge in Swann provided for shorter trips than the trips regularly scheduled by the board. And "[t]he District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record."

Nevertheless, cautioned the Chief Justice, the lower courts should consider all the factors in weighing an order involving busing. The health and age of the children must be taken into account and the trips should not be so long as to impinge on the educational process. But extensive busing is within the remedial powers of the district courts.

These were some of the factors to be used as guidelines by the lower courts, the Chief Justice concluded. Words were inadequate to define clearly the powers and the ways of exercising them which the courts had. "Substance, not semantics, must govern...."

And the district courts should bear in mind that at some point the school systems will be in compliance, operating a unitary system, and the overseeing role will cease. That is, once a unitary system is achieved, no district court should continue to require a school board affirmatively to adjust things year-by-year to assure the maintenance of an integrated system. Once official action

ensuring or influencing separation of races in the schools has been ended and its influences and effects removed, it is no longer the responsibility of the courts.

The district court's order in Swann was affirmed. The Court of Appeals decision in the Mobile case was reversed. That court had given inadequate consideration to the use of zoning and busing to achieve greater desegregation and it should now direct the development of a plan which would undo as much as possible of the remaining segregation.

V

In addition to the issue of standards in Swann and Davis, the Court was faced with a series of challenges to the powers of the federal courts and school boards to take affirmative actions in dismantling dual systems.

(A)

The Charlotte-Mecklenburg school board argued that significant limitations had been imposed on the federal courts in portions of the 1964 Civil Rights Act. In particular, the board pointed to 42 U.S.C. §2000c(b) which provided:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Moreover, argued the board, 42 U.S.C. §2000c-6, which authorized the Attorney General of the United States to institute

desegregation suits, provided that

> nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

But, said the Chief Justice, these provisions were inapplicable in this situation. They were first statements of an intention not to expand the powers of the federal courts but did nothing about existing powers. Second, the legislative history indicated that the sections were intended to make clear that Congress was not authorizing an attack on de facto segregation. The Charlotte-Mecklenburg and Mobile desegregation was de jure and the statutes were of no effect.

(B)

In McDaniel v. Barresi, No. 420, the Georgia Supreme Court, 226 Ga. 456, 175 S.E. 2d 649 (1970), had enjoined a desegregation plan entered into between a county school board and HEW officials. The state court had thought that a plan which expressly took into account the race of pupils in making assignments violated the equal protection clause and that the plan used busing to achieve a racial balance in violation of the above quoted provisions of the 1964 Civil Rights Act. In an opinion by the Chief Justice, the Court unanimously reversed.

A school board charged with affirmatively converting to a unitary system had to take account of race in zoning and in

assigning pupils. Otherwise, it would be operating ineffectively in the dark. Such affirmative noticing of the race of the pupils did not at all offend the equal protection clause, the Chief Justice held.

As for the 1964 Act, it restricted the power of federal officials, not state officials, in the first place, and in the second place, it did not apply to the elimination of de jure segregation.

(C)

During the proceedings in the Charlotte-Mecklenburg litigation, the North Carolina legislature passed an anti-busing law [7/] and actions were brought in state court to enjoin school board compliance with any court-ordered busing. The plaintiffs in the desegregation action thereon sued to void the state law and a three judge federal court held it unconstitutional. 312 F.Supp. 503 (D.C.W.D.N.C. 1970). In North Carolina State Board of Education v. Swann, No. 498, the Court, again in an opinion by the Chief Justice, affirmed.

"[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a

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7/ The portion of the law struck down provided: "No student shall be assigned or compelled to attend any school on account of race, creed, or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary busing of students in contravention of this article is prohibited and public funds shall not be used for any such busing."

unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." The law would obstruct operation of desegregation plans by its limitation on busing and by its prohibition of taking race into account by the school board it would impose a false standard of "neutrality" which would reduce the effectiveness of any remedial plan.

VI

The practical effect of Swann will no doubt be an increase in litigation and an increase in actual desegregation in the southern States. The application of the ruling will no doubt be varied and involved.

By far the more interesting and more judicially significant effect may lie in the effects of the ruling, or the lack of any effects, in the non-southern States where racial segregation in the public schools to date has been termed de facto and not reachable by the federal courts.[8/] It will be recalled that the district judge made findings in Swann which were expressly approved by the Court of Appeals that the segregation existing in the Charlotte-Mecklenburg schools was de jure, the result of official actions by school officials in numerous methods of operating and the result as well of residential patterns which were themselves the result of official actions and not the result of haphazard, undirected demographic movements. The Court did not expressly adopt all the findings and conclusions of the district court in this regard, although it did operate explicitly on the basis that the school segregation was de jure. At one point, the Chief Justice cautioned: "We do not reach in this case the question whether a showing that

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8/ Deal v. Cincinnati Board of Education, 369 F.2d 55 (C.A. 6, 1966), cert. den., 389 U.S.847(1967); Id., 419 F.2d 1337 (C.A. 6, 1966); Downs v. Board of Education,336 F.2d988(C.A. 10,1964),cert. den.,380 U.S. 914 (1965); Bell v. School Board of the City of Gary,213 F.Supp. 819 (D.C.N.D.Ind.), aff'd., 324 F.2d 209 (C.A. 7, 1963),cert. den., 377 U.S. 924 (1964).

school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree."

What the Court is apparently distinguishing by this remark is the status of purely fortuitous racial separation and segregation which is attributable to some form of state action. At numerous points, the Court seems clearly to have pronounced that purely fortuitous separation, not the result by any process established and proved of any sort of official direction and influence, raises no equal protection problems. This conclusion comes through in the Chief Justice's point that educational authorities may well decide to pursue a policy of integrating every school in their systems so that a racial balance reflective of society at large is achieved. Such a step is within their discretion, the Chief Justice continues, but "absent a finding of a constitutional violation, ... that would not be within the authority of a federal court."

We may take it, then, as a given that separation of the races not fostered, encouraged, or influenced by state action is not within the purview of the equal protection clause and not remediable by federal judicial power.

But the opinion contains at several points suggestions that federal courts should scrutinize carefully the process by which racial separation came about to make sure that the segregation

existing is truly de facto. In a case in which the issues all related to pupil assignments, the Chief Justice found it "helpful to begin with a brief discussion of other aspects of the process." These other aspects included faculty and staff assignments, facilities, and extracurricular activities. But they also included several paragraphs devoted to the construction of new schools and the closing of old ones which the opinion denominates "one of the most important functions of local school authorities...." "The result" of the consideration of many factors and the choosing of sites "will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods."

In other words, it may well be that segregation which appears to be the result of residential patterns will in fact have resulted from conscious choice as to school site locations and other decisions made by school authorities; in such an event, could such separation be legally termed de facto?

Further, there remains the Chief Justice's observation that nothing said in this opinion relates to the possibility that residential separation resulting from state action, and as to which there is no official school authority action, might be held to result in de jure school segregation. This cautionary sentence may well result in future efforts to prove that this state of affairs is the case.

There would thus appear to be three possible variations of racial separation in public schools about which there may revolve different constitutional consequences. The first is the type of de jure segregation which existed in these cases, separation as a result of policies and practices of school authorities. The second is segregation which is the result of policies and practices of other officials as to which there is not complicity by school authorities; the Court reserves decision whether such public school segregation is de jure or de facto. The third is segregation which is the result of no officially influenced or arranged practices and it is thus actually de facto and not within the reach of the equal protection clause.

Several lower courts have found de jure segregation of the first type in some northern jursidiction although their findings have reached as well into the second type, treating the two as inseparable.[9/] The only case currently on the Court's docket, awaiting action is one

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9/ Crawford v. Board of Education of City of Los Angeles, No. 822,854 (Sup. Ct. Los Angeles, February 11, 1970); Spangler v. Pasadena City Board of Education, 311 F.Supp.501 (D.C.C.D.Calif.1970); Davis v. School District of Pontiac, 309 F.Supp.734 (D.C.E.D.Mich. 1970).

from Chicago in which the district court and the Court of Appeals found the existent segregation to be a result of the school authority's official policies in student assignment, transportation, school site selection, school organization and grade structure, faculty and staff hiring, promotion, and assignment. United States v. School District 151 of Cook County, 286 F. Supp. 786 (D.C.N.D.Ill. 1968), aff'd, 404 F. 2d 1125 (C.A. 7, 1968), on remand, 301 F. Supp. 201 (D.C.N.D.Ill. 1969), aff'd, 432 F. 2d 1147 (C.A. 7, 1970), pet. for cert. pending, No. 775. A variant possibility for Court action is Porcelli v. Titus, 302 F. Supp. 726 (D.C.D.N.J. 1969), aff'd, 431 F. 2d 1254 (C.A. 3, 1970), pet. for cert. pending, No. 850, in which white teachers in the Newark school system are attacking a faculty hiring, assignment, and promotion policy using race as a prime consideration to achieve a racial balance throughout the school system; the lower courts sustained the voluntary school board policy as not being in violation of the equal protection clause.

The most interesting case, however, has not yet reached the Court, now pending instead in the Tenth Circuit, but it seems certain to come before the Court next Term. With a fact situation involving all three types of school segregation, the legal and constitutional ramifications of the case could be far-reaching.

Arising in Denver, Colorado, it first reached the district court when a newly reconstituted school board attempted to abort the

previous board's plan voluntarily to relieve racial imbalance in the public schools by zoning, busing, and revised assignments. Although holding that under prevailing decisions of the Court of Appeals the prevailing segregation must be labeled de facto, the district court found that the board's recission of the voluntary plan violated the constitutional rights of minority pupils. Keyes v. School District Number One of Denver, 303 F.Supp. 279 (D.C.D.Colo. 1969), on remand, 303 F.Supp. 289 (D.C.D.Colo. 1969), preliminary injunction stayed during appeal, ___ F. 2d ____ (C.A. 10, 1969), stay vacated, 396 U.S. 1215 (1969) (Justice Brennan in chambers).

After a full trial on the merits, the district court ruled again that recission of the voluntary plan to alleviate de facto segregation was unconstitutional,[10/] but denied plaintiffs' claim for relief from the existence of segregation of Negroes and Mexican-Americans on the basis that it was not attributable to official action and must therefore be considered de facto. But the court further found that the schools in which the two minorities were concentrated were generally inferior to other schools, in buildings, faculties, facilities, and educational quality, and that this was a result of school board action, and that this official complicity in the result constituted a violation of the "separate but equal" doctrine of Plessy

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10/ The district court relied on Reitman v. Mulkey, 387 U.S. 369 (1967), in which a divided Court voided a California referendum vote repealing a state open housing law. For discussion and citation to sources, see 1968-69 Report, pp. 45-50. See also, Bradley v. Milliken, 433 F. 2d 897 (C.A. 6, 1970), in which the court voided a state statutory recission of a voluntary plan by a school board to reduce racial imbalance. But consider, James v. Valtierra, No. 154, April 26, 1971, to be discussed in S.C. 1970-26, which limits Reitman to an unknown extent.

v. Ferguson. 313 F.Supp. 61 (D.C.D.Colo. 1970). "Under the old Plessy doctrine ...a school board was under no constitutional duty to abandon dual school systems created by law so long as all schools were equal in terms of the educational opportunity offered. Today, a school board is not constitutionally required to integrate schools which have become segregated because of the effect of racial housing patterns on the neighborhood school system. However, if the school board chooses not to take positive steps to alleviate de facto segregation, it must at a minimum insure that its schools offer an equal opportunity." Id., 83. Submission of plans was directed.

Thereafter, the district court rejected the plans submitted to it and ordered its own plan into operation. 313 F.Supp. 90 (D.C.Colo. 1970). Finding that educational equality could be obtained only if racial separation were reduced, the court ordered several schools desegregated in fact; a system of free transfers for minority pupils with space in the transferee schools being guaranteed was ordered. Finally, a board proposal to undertake compensatory education programs in schools with predominant Negro and Mexican-American student bodies was approved and ordered into effect.

On appeal, the Tenth Circuit stayed the district court's order, holding that it would be inappropriate to compel the school board to implement the plan while an appeal was pending and before the Supreme Court decisions in Swann and Davis were available for the light they cast upon the Denver situation. On April 19, 1971, 39 L.W. 3472, the Supreme Court directed the lifting of the stay and

the processing of the appeal. Noting that the Court of Appeals was awaiting the decision in Swann, the Court said:

> The decisions in those cases having now been announced, it is proper to vacate the stay and remit the matter to the Court of Appeals freed of its earlier speculation as to the bearing of our decision in the Swann cases. We, of course, intimate no views upon the merits of the underlying issues.

It may well be that Keyes will be the next opportunity for the Court to elaborate on the constitutional principles in this area.

POSTSCRIPT

On May 3, the Court took additional action in the school desegregation cases pending on its docket. It denied certiorari in two cases cited in the preceding report. School District 151 of Cook County v. United States, No. 775, and Porcelli v. Titus, No. 850. Further the Court refused to hear an appeal in Deal v. Cincinnati Board of Education, No. 5210, noted supra, p. 24 n. 8, because the papers had not been filed in the time limitations established by the Court's rules. In addition, a series of appeals from the Fifth Circuit dealing with the imposition of desegregation plans in urban areas were refused hearings.

Finally, a three-judge federal court ruling, 318 F. Supp. 710 (D.C.W.D.N.Y. 1970), voiding New York's anti-busing law was summarily affirmed without opinion. Nyquist v. Lee, No. 1354. The Chief Justice and Justices Black and Harlan noted that they would have set the case for oral argument.

(CRS-561)

The Supreme Court 1970-71 Term

A Brief Summary and Review of Decided Cases

XXV

United States v. Vuitch
Abortion and the Constitution

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April 29, 1971

Abortion and the Constitution

I

In its first confrontation with the abortion controversy that has recently claimed public prominence, the Court has sustained the constitutionality of the abortion statute of the District of Columbia against an attack for vagueness. But in upholding the statute the Court gave it a much broader interpretation than it had heretofore been accorded and may have made substantially more difficult the enforcement of the law when an abortion is performed by a licensed physician. This basic decision clears the way for a further resolution, probably next Term, of the several other constitutional arguments directed at statutory limitations on the availability of abortions. United States v. Vuitch, No. 84, April 21, 1971.

II

Dr. Milan Vuitch is a physician licensed to practice medicine in the District of Columbia. Dr. Vuitch apparently had a rather substantial practice in performing abortions, both in the District and in Maryland where he was also licensed.[1/] He was indicted for violating a provision of the D.C. Code which prohibits the performance of an abortion on any woman unless the operation is necessary for the

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1/State v. Vuitch, 10 Md. App. 389, 271 A. 2d 371 (1970), pet. for cert. pending, No. 1533.

preservation of the woman's life or health.[2] Before the defendant was brought to trial, the district court granted a motion to dismiss the indictment, holding that the statute was so vague in its exception of abortions to protect some undefined standard of "health" that it denied defendant's due process of law and did not afford adequate standards for judgment by juries or courts. 305 F. Supp. 1032 (D.C. D.C. 1969). The United States appealed directly to the Supreme Court.[3]

III

"Although abortion and even infanticide at the will of the parents were lawful in some ancient civilizations, religious influence and the gradual shift of authority from the family to the state have led to legislation almost everywhere more or less severely restricting the practice."[4] At the time the Model Penal Code provision for broadening

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2/The statute, 22 D.C. Code §201, provides inter alia: "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; ...."

3/The preliminary issue for the Court was whether it had jurisdiction to hear the direct appeal or whether the Government should first have gone to the Court of Appeals. The Court divided five-to-four in holding that it did have jurisdiction. The Chief Justice, and Justices Black, Douglas, Stewart, and White voted for jurisdiction, while Justices Harlan, Brennan, Marshall, and Blackmun voted against. Justices Harlan and Blackmun then joined the Court on the merits but Justices Brennan and Marshall expressed no views at all on the merits.

4/American Law Institute, Model Penal Code (Tentative Draft No. 9), §201. 11, "Abortion and Related Offenses," commentary at p. 146. The commentary, id., pp. 146-66, provides an extensive historical overview and jurisprudential discussion of the question of limiting abortions.

the grounds on which abortion would be permitted[5] were proposed, the broadening seemed liberal and expansive. But in very recent years, a broad-scale attack has been mounted against any limitation, with the possible exception of requirements that the abortion be performed in licensed hospitals or clinics by licensed physicians. The approach urged has been that the question whether an abortion is to be performed or not is a private decision to be reached between the woman and her doctor.[6]

At first, the campaign was directed to state legislatures and a few States enacted broadly liberal laws. But then opponents of restrictive laws turned to the courts urging a variety of federal constitutional arguments against the validity of these statutes. A first success was scored in the California Supreme Court which held unconstitutionally vague, under federal and state due process clauses, the State's more restrictive law which had been succeeded by a more expansive one. People v. Belous, 80 Cal. Rptr. 354, 458 P. 2d 194 (1969), cert. den., 397 U.S. 915 (1970). The California court and the federal district court in Vuitch also alluded to the broader constitutional arguments,

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5/Id., §201.11(2) made justifiable abortions when there is "substantial risk" that continuation of pregnancy would "gravely impair" the physical or mental health of the mother or that the child would be born with "grave" physical or mental defect or the pregnancy resulted from rape or incest. These provisions were maintained in the final draft. Id., §230.3(2) (Proposed Official Draft, 1962).

6/The writings in this area are extensive and varied. E.g., John T. Noonan, Jr. (ed.), The Morality of Abortion -- Legal and Historical Perspectives (Cambridge: 1970); Daniel J. Callahan, Abortion: Law, Choice and Morality (New York: 1970); Clark, "Religion, Morality and Abortion: A Constitutional Appraisal," 2 Loy. L. Rev. 1 (1969).

but vagueness was the basic ground in both and it was the issue the Supreme Court chose to confront first.

The essential purpose of the "void for vagueness" doctrine is to require a statute to be precise enough to warn individuals of the criminal consequences of conduct which they may undertake. Criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law. United States v. Cohen Grocery Co., 255 U.S. 81 (1921); Lanzetta v. New Jersey, 306 U.S. 451 (1939). But difficulty determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. United States v. Wurzbach, 280 U.S. 396, 399(1930). "Impossible standards of specificity are not required." Jordan v. De George, 341 U.S. 223, 231 (1951). The test is whether the language conveys sufficiently definite warning about the proscribed conduct when measured by common understanding and practices.[7/] Connally v. General Construction Co., 269 U.S. 385 (1926).

7/The most comprehensive survey is Amsterdam, "The Void for Vagueness Doctrine in the Supreme Court," 109 U.Pa.L.Rev. 67 (1960). In recent years the Court has used the doctrine extensively to strike down regulations touching on First Amendment interests -- loyalty oaths, associational inquiries, et cetera.

IV

Justice Black delivered the opinion of the Court which the Chief Justice and Justices Harlan, White, and Blackmun joined. Justice Douglas dissented and Justice Stewart dissented in part. Justices Brennan and Marshall having joined the dissent of Justice Harlan on the jurisdictional question, supra, n. 3, did not take part in the decision on the merits.

Justice Black observed that the district court had felt constrained to hold the statute void because it seemed to require the physician to bear the burden of proving that the abortion he had performed was within the exception made by the statute and because the word "health" was so ambivalent and uncertain. But courts should, the Justice continued, construe statutes if at all possible to sustain their constitutionality; that action was possible here.

The first assumption of the district court, that the burden was on the physician to show that the abortion was necessary to preserve the woman's life or health, was an erroneous interpretation of the statute. "Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth

Amendment."[8/] The better view, the Justice asserted, was to hold that the statute did not outlaw all abortions, only those not necessary to preserve the mother's life or health and it is a general rule that when a statute incorporates an exception to its general proscription the burden is on the prosecution to plead and prove that the defendant is not within the exception.

As for the word "health" which the district court had thought ambiguous and as to which that court had wondered whether mental health was included within the word, Justice Black noted that subsequent cases to the district court's decision in Vuitch had clearly construed the word to include mental health and even as to patients with no prior history of mental defects. Such an interpretation seemed to the Court to accord well with the present concept of health as indicating soundness of both body and mind.

So viewed, the word "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." While the existence of a prohibitory abortion statute might conceivably

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8/The Model Penal Code, supra, nn. 4, 5, made justification for an abortion an affirmative defense. See the discussion of burden of proof and defenses in National Commission on Reform of Federal Criminal Laws, Working Papers (Washington: 1970), vol. 1, pp. 11-26. Cf. In re Winship, 397 U.S. 358, 364 (1970): "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 1969-70 Report, pp. 253-58.

permit some jurors who opposed all abortions to vote to convict regardless of the evidence as Justice Douglas had suggested in dissent, there were ways to ameliorate the possibility of lawless acts by juries, Justice Black observed. Normal challenges to jurors on examinations for prejudice could reduce the danger. "And of course a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt."

Although there had been other issues raised on appeal, they were not properly before the Court, the Justice indicated, and the case would be remanded for further proceedings.

Justice White, concurring, indicated that he would object to any construction that permitted "abortions on request." The statute seemed clearly to him to proscribe all abortions "not dictated by health considerations" and he would so read it. Without elaborating on their individual views, Justices Harlan and Blackmun noted that they joined Justice Black's discussion of the merits, following their dissents on the jurisdictional issue, inasmuch as the majority of Justices on the jurisdictional issue disagreed among themselves on the merits.

Justice Stewart, dissenting in part, would have "extend[ed] the reasoning of the Court's opinion to its logical conclusion." He would hold that the judgment of a licensed physician in deciding to perform an abortion was a nonreviewable medical decision that the abortion was "necessary for the mother's life or health." All

physicians performing abortions would be immunized therefore from the operation of the statute.

Justice Douglas based his dissent on his view that the issue of abortion was so freighted with religious and ethical concepts that a doctor making a medical judgment of the necessity of an abortion could never be sure that a judge and jury would not "second-guess" him adversely on inadmissible grounds. The vagueness of the "health" standard, the question of how "necessary" an abortion may be, how imminent and severe the hazard to the woman's health, in what way mental health might be impaired by an unwanted pregnancy, all these and other questions indicated that no precise prohibition was possible, much less it not having been done in the statute at hand.

V

The effect of the Court's decision in the District of Columbia will probably be to make quite difficult the successful prosecution of a physician for having performed an abortion. The fact that the burden is on the prosecution to show, by the criminal standard of beyond a reasonable doubt, that a particular abortion was not within the statutory exception will mean at the least that prosecution cases must be far more complex, much more involved in medical and psychiatric considerations than heretofore. Henceforth, the prosecution must present in its case in chief medical evidence controverting any possibility that a particular abortion was medically justified; the defendant physician will only be required to raise a

reasonable doubt in the minds of the jurors that his reasons for undertaking the operation were medically justified.

Additionally, the opening up of the mental health issue will increase the complexity of the justification issue several times over and could well approach the phychiatric complications of the typical trial in which insanity is a claimed defense. Juries will be faced with questions of a highly sophisticated and nebulous nature; for example, does the stigma and possible humiliation attaching to the bearing of a child out of wedlock approach the degree of harm to mental health which would justify the termination of such a pregnancy?

It seems likely, then, that the Court's decision will result in fewer indictments and trials for violation of the abortion statute simply because of the complications and uncertainty which the decision has introduced.

VI

But of course more extensive constitutional attacks on state abortion laws are pending on the Court's docket now.[9/] How the

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9/Among the cases now pending are Dr. Vuitch's appeal from a Maryland conviction, supra, n. 1, and the following cases: Doe v. Scott, 321 F. Supp. 1385 (D.C.N.D.Ill. 1971), appeal pending sub nom. Hanrahan v. Doe, No. 1522; Roe v. Wade, 314 F. Supp. 1217 (D.C.N.D. Tex. 1970), appeal pending, No. 808; Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (D.C.E.D.La. 1970), appeal pending, No. 1010; Rodgers v. Danforth, appeal pending, No. 1402; Doe v. Bolton, 319 F. Supp. 1048 (D.C.N.D.Ga. 1970), cross appeals pending, Nos. 971, 973.

Court resolves these will effect very expansively both the movement to do away with anti-abortion laws and the counter movement to retain and strengthen them.

Generally, these attacks proceed from an expansion of the Court's decision in Griswold v. Connecticut, 381 U.S. 479 (1965), in which the Court struck down a state statute outlawing the use of contraceptive devices; the Court held the statute violated the right of marital privacy which was one of those "penumbral" rights which the Ninth Amendment retained in the people free from governmental abridgment.[10/] The argument is that this right of privacy, there applied to married couples, applies as well to the individual choices of each person about the uses to which one's body will be put and to the liberty to decide, among other things, whether to bear children or not. Other arguments, generally tangential to this privacy argument, turn on the alleged discrimination against the poor which inheres in laws that predominantly prevent abortions in public medical

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10/See, Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case," 64 Mich. L. Rev. 235 (1965); Dixon, "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy," 64 Mich. L. Rev. 197 (1965). Writers have already constructed from the Griswold base theories of privacy and personal liberty immunizing a wide range of personal activity and conduct between consensual adults -- from possession of marijuana and pornography to unorthodox sexual activity -- from legal regulation. E.g., Weiss & Wizner, "Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way," 54 Iowa L. Rev. 709 (1969). The Court has agreed to review next Term a case extending Griswold to void a Massachusetts statute which prohibited the furnishing of contraceptive information or devices to an unmarried person. Baird v. Eisenstadt, 429 F. 2d 1398 (C.A. 1, 1970), cert. granted, No. 804.

institutions while persons affluent enough to afford private medical care generally are not in fact restrained from having abortions. Several courts have adopted these arguments, while others have rejected them.[11/] It will be for the Court to resolve the issue with some measure of finality.

11/Compare Babbitz v. McCann, 310 F. Supp. 293 (D.C.E.D.Wis. 1970), with Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (D.C.E.D.La. 1970).

POSTSCRIPT

On May 3, the Court provisionally accepted for review next Term two of the cases cited in this report, supra, p. 9 n. 9. Roe v. Wade, No. 808; Doe v. Bolton, No. 971. In both cases, the three-judge district courts entered declaratory judgments that the state statutes were unconstitutional but refused to enjoin future enforcement of the laws. Thus, in addition to the issue of the constitutionality of the state laws, there is a federal jurisdictional issue about the propriety of injunctive relief. 1970-71 Report, pp. 353-409. The Court's order accepting the cases noted that the question of jurisdiction to review was postponed to the hearing of oral argument, which presumably means that at least some of the Justices doubt that the cases may be heard under jurisdictional statutes and doctrines. It is possible then that the cases may not be decided on the merits.

Other abortion cases on the Docket were dismissed on jurisdictional ground but still others were retained, awaiting disposition of the two on which argument will be heard.

S. C. 1970 - 26

The Supreme Court 1970-71 Term

A Brief Summary and Review of Decided Cases

XXVI

James v. Valtierra

Equal Protection and Discrimination Against the Poor

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April 30, 1971

Equal Protection and Discrimination Against the Poor

I

A divided Court has held that equal protection is not violated by a state constitutional provision requiring a referendum and approval of a majority of the electors before low rent public housing - but not other types of publicly assisted housing or other forms of public subsidies - may be constructed in a community. The Court restricted previous decisions preventing the imposition of burdens on certain groups or with regard to certain types of legislation to race-affected legislation and refused to extend the principle to the area of discrimination on the basis of wealth or the absence of wealth. James v. Valtierra, No. 154; Shaffer v. Valtierra, No. 226, April 26, 1971.

II

In 1950, following a state court ruling[1/] that the decisions of local governmental authorities to apply for federal assistance for public housing projects were "administrative" or "executive" and not therefore subject to constitutional provision permitting "legislative" decisions to be petitioned to referendum, California voters adopted an amendment to the state constitution, requiring a mandatory referendum and approval by a majority of the electors before low rent

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1/ Housing Authority v. Superior Court, 35 Cal. 2d 550 (1950).

public housing could be authorized for construction in a community.[2/] Suit was brought on behalf of low income persons who had been found qualified to occupy low rent public housing by public agencies but could not so occupy any because none was available. The suit sought a voiding of the referendum provision and an injunction forbidding public agencies to rely on the absence of approval through referendum of any housing projects as a reason for declining to seek federal assistance. The three-judge federal court voided the constitutional provision on the ground that it operated to disadvantage minority groups and the poor in violation of the equal protection clause. 313 F. Supp. 1 (D.C.N.D. Calif. 1970).

III

The Fourteenth Amendment imposes on the States and their agencies the obligation to protect the privileges or immunities of citizenship and the duty to afford each person due process of law and the responsibility to deny no person the equal protection of the

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2/ Article XXXIV of the California Constitution provides inter alia:

"Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until a majority of the qualified electors of the one city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

.....

"For the purposes of this article only 'persons of low' income shall mean persons or families who lack the amount of income which is necessary ...to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding...."

laws.[3] Although "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state courses of invidious racial discrimination...", Loving. v. Virginia, 388 U.S. 1, 10 (1967), the Amendment has never been restricted to state actions and policies solely concerned with race.[4] In particular, the equal protection clause has been used, very frequently in recent years, to void state classifications which impinge on the exercise of certain "fundamental" rights[5] or which are attached to the person or persons affected because of some "suspect" criterion.[6]

Many commentators have noticed in recent years a Court assumption that classifications based on the payment of some kind of fee are constitutionally suspect because they adversely affect lower income groups.[7] This suspicion first manifested iteslf in a

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[3] The pertinent portion of the first section of the Fourteenth Amendment provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] "Developments in the Law - Equal Protection," 82 Harv.L.Rev.1065 (1969); see 1970-71 Report, pp. 290-313.

[5] "Developments,..." op. cit., n.4, 1120-24; Killian, "The 18 Year Old Vote Case," American Law Division, LRS, December 29, 1970 (70-324A), pp. 9-13.

[6] "Developments,..." op. cit., n. 4, 1087-1119.

[7] "Developments,..." op.cit., no.4, 1124; Note, "Discrimination Against the Poor and the Fourteenth Amendment," 81 Harv. L. Rev.435(1967); 1970-71 Report, pp. 290-313. But compare, Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969).

long series of cases which struck down state practices making the availability of trial transcripts, appellate counsel, and appeal itself vary with respect to the financial ability of the defendant. Griffin v. Illinois, 351 U.S. 12(1956); Douglas v. California, 372 U.S. 353(1963); Anders v. California, 386 U.S. 738 (1967). Just this Term, in Tate v. Short, 401 U.S. ... (1971), 1970-71 Report, pp. 290-313, a majority of the Court held it to be an equal protection violation to jail automatically an indigent who is unable to pay a fine until other reasonable efforts have been made to collect the fine.

This Term also, in Boddie v. Connecticut, 401 U.S. ...(1971), 1970-71 Report, ibid., the Court held that a discrimination based on an inability of indigents to afford filing fees to get into divorce courts constituted a due process violation. This reliance on due process apparently represented a wish on the part of some Justices to restrict the trend in earlier Court decisions toward making wealth classifications invidious and almost void per se. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); McDonald v. Board of Election Comm., 394 U.S. 802, 807 (1969).[8/]

The fact that the legislative decision may be that of the people, made through a referendum, instead of a decision by the people's representatives assembled in a law-making body, has made no difference so far in the results reached by the Court. Thus, in Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964), the Court voided a legislative apportionment plan, which did not comply with the Court's population-based plan requirements even though the plan had been adopted by a

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8/ 1970-71 Report, pp.293-96. See also, 1969-70 Report, pp. 218-31.

majority of voters in a referendum. If the plan did indeed deny equal protection to the majority, it had been approved by the majority, but this was irrelevant to the constitutional considerations, the Court held.

In Reitman v. Mulkey, 387 U.S. 369 (1967), a five-to-four majority voided a constitutional provision initiated and approved by the voters which repealed California's "open housing" law and which guaranteed against enactment of any law restricting the right of any person to choose to whom he would sell his property. The rationale of the majority opinion was diffuse and indefinite and gave rise to much comment by the scholarly community.[9/] But subsequently, in Hunter v. Erickson, 393 U.S. 385 (1969), 1968-69 Report, pp. 45-50, 260, the Court seemed to have the doctrinal considerations in hand. The voters of Akron had amended the City charter to repeal an "open housing" ordinance and to provide that any future "open housing" ordinance must, unlike any other kind of ordinance, be submitted to a vote of the people before it could go into effect. The Court's holding was that this singling out of one type of legislation, a type designed to afford relief to discriminated-against minorities, imposed a special and particular burden on their efforts to seek legislative relief and could not withstand an equal protection clause challenge.[10/]

9/ E.g., Karst & Horowitz, "Reitman v. Mulkey: A Telophase of Substantive Equal Protection," 1967 Sup. Ct. Rev. 39 (Kurland ed.); Black, "Foreword: 'State Action,' Equal Protection, and California's Proposition 14," 81 Harv. L. Rev. 69 (1967). See 1969-70 Report, pp. 61-3 nn. 70,72.

10/ But see Alexander Bickel, The Supreme Court and the Idea of Progress (Cambridge: 1970), 69.

The question in Valtierra was whether this "special burden" rationale as applied to a class of low income persons would have similar equal protection results.

IV

Justice Black delivered the opinion of the Court, which was concurred in by the Chief Justice and Justices Harlan, Stewart, and White. Justice Marshall delivered a dissent which was joined by Justices Brennan and Blackmun. Justice Douglas did not participate.

Justice Black emphasized the credentials of the referendum authorization in California, noting that initiative and referendum were provided for in the first state constitution. The particular provision under attack, he noted, was written into the constitution after the state court had ruled that the particular decisions of public agencies in preparing for and authorizing public housing construction were not subject to referendum. The fact that a mandatory referendum was called for was not unique, he pointed out, since state constitutional amendments, issuance of general obligation bonds, annexations, and the disposal of public parks are all subject to mandatory referenda.

The lower court had relied on Hunter v. Erickson, supra, the Justice noted, but its reliance was misplaced. Hunter was explainable because it had specially burdened racial minorities. The provision attacked there created a classification based upon race and no justification for such a classification was advanced by the City. But the Justice could not agree that the referendum provision here rested on any classification of race; all low rent housing, that occupied by

whites as well as by Negroes and other minorities, was subject to voter approval. Any reliance on Hunter must extend the principle of that case and the Court would not do so.

Neither could any case be made out of a claim that a mandatory referendum on low-rent public housing was not inclusive as well of other housing and related programs some distinct group was disadvantaged. A lawmaking procedure that disadvantages some particular group does not for that reason alone violate the equal protection clause. If the Court were so to hold, it would have to scrutinize every governmental structure to strike down any provision that disadvantaged any group.

Justice Marshall's dissent argued that in singling out for mandatory referenda only housing for low income persons, and not similarly treating publicly assisted housing developments for the aged, veterans, state employees, moderate income persons, and others, the State had drawn a line which discriminated against the poor. Classification on the basis of poverty, the Justice continued, was highly suspect and entitled to the most careful scrutiny by the Court. But after decreeing that the state provision did not discriminate on the basis of race, the majority had not scrutinized it at all. He would hold that by the provision in singling out the poor to bear a burden not shared by other persons the State had violated the equal protection clause.

V

This decision continues a dispute within the Court with respect to the proper scope of the Fourteenth Amendment and the equal protection clause in particular. Justice Black in particular has

argued strongly in recent decisions that using the clause against much more than racial classifications violates the intent of the framers. E.g., Oregon v. Mitchell, 400 U.S. 112, 126-30 (1970)[11/] ; and see his opinion for the Court in Labine v. Vincent, 401 U.S. ...(1971), 1970-71 Report, pp. 410-21. However, the Justice has also concurred in Tate v. Short, supra, though without expressly basing his vote on the equal protection rationale of the Court. The cases and materials cited supra also indicate the divisions of the Court but none of the rest of the Justices, even those who disagree, like Justices Harlan and Stewart, with a line of cases like the apportionment decisions, appears to agree that the equal protection clause applies only to racial classifications.

Thus, it appears unlikely, unless cases still to come this Term on apportionment, elections, and the like show otherwise, that the seeming majority acquiescence in Justice Black's limitation of the Hunter principle to statutory schemes which burden racial minorities in this case extends much beyond the result in this case. And yet a number of decisions, especially Boddie v. Connecticut, supra, and Labine v. Vincent, supra, do bespeak a strong resistance on a part of a majority to hold back in applying equal protection standards in new areas, especially with regard to classifications that have a historical basis. But the continued existence of Lucas v. Forty-Fourth General Assembly, supra, denotes the fact that Hunter cannot reasonably be so limited as Justice Black would have it and that the cases are capable of being expanded into new areas, such as zoning and other governmental decisions which allegedly "fence out" or disadvantage economic and ethnic minorities.

11/Killian, The 18 Year Old Vote Case, American Law Division, LRS, December 29, 1970 (70-324 A), pp. 28-30; and see id., 23-26.

Some recent cases have struck down what the courts have found to be governmental actions and policies to discriminate against Negroes in allocating city facilities and services. Thus, in Kennedy Park Homes Assn. v. City of Lackawanna, 318 F.Supp. 669 (D.C.W.D.N.Y. 1970), aff'd, 436 F.2d 108 (C.A. 2, 1970), cert. denied, 39 L.W. 3437, the courts found that city officials in order to prevent a nonprofit association from constructing low-income housing in a "white" section of town had rezoned the area, adopted a moratorium on construction, and refused to license new sewer hook-ups. The courts enjoined such actions. In Hawkins v. Town of Shaw, 437 F. 2d 1286 (C.A. 5, 1971), the court found that the town had discriminated on the basis of race in the provision of municipal services, paved streets, curbs, sewers, street lights, traffic lights, inasmuch as all the "white" area was accorded such services but practically none of the"Negro" area. And at least two courts in reliance on Reitman v. Mulkey, supra, and Hunter v. Erickson, supra, have held that recission of voluntary plans to relieve racial imbalance in the public schools is a form of racial discrimination. Keyes v. School District Number One of Denver, 303 F.Supp. 279, 289 (D.C.D.Colo. 1969); Bradley v. Milliken, 433 F. 2d 897 (C.A. 6, 1970), S.C. 1970 - 24, passim.

But the cases involving zoning and other actions which are expressly or implicitly directed at low-income persons, and not directed

at racial groups, are not yet at the appellate stage.[12/] When they do reach the Court the question must be faced whether Valtierra governs or whether an expanded principle of Hunter v. Erickson applies.

12/ One such case, which also involved the referendum issue present in this case, was ordered to trial on plaintiffs' contentions of economic and ethnic discrimination, Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F. 2d 291 (C.A. 9, 1970), but after plaintiffs prevailed on trial the matter was settled by consent decree.

The Supreme Court 1970-71 Term

A Brief Summary and Review of Decided Cases

XVII

McGautha v. California

Capital Punishment

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May 7, 1971

CAPITAL PUNISHMENT

DUE PROCESS AND THE IMPOSITION OF THE DEATH PENALTY

I

In a six-to-three decision the Supreme Court has held that the imposition of capital punishment by the same jury which has decided the issue of guilt without a separate hearing on the issue of punishment and in the absence of standards designed to limit the jury's absolute discretion does not offend federal constitutional provisions. Unless the Court shortly agrees to hear other cases raising other issues about the death penalty, the States are now free to carry out sentences of execution imposed on over 600 persons over the last several years. Neither of these cases concerned the constitutionality of the death penalty per se. McGautha v. California, No. 203; Crampton v. Ohio, No. 204, May 3, 1971.

II

McGautha was convicted of first-degree murder, committed in the course of an armed robbery. Under California procedure, following the trial on the issue of guilt there is a second trial on the issue of the penalty before the same jury. McGautha's contention was that the State had established no standards which governed the deliberations of the jury on the penalty issue and that the unreviewable discretion vested in the jury to vote life or death on

any basis the members wished, denied him due process of law. The contention was rejected below. 70 Cal. 2d 770, 452 P. 2d 650 (1969).

Crampton was also convicted of first-degree murder of his wife. Under state procedure, the same jury sitting at the same time on both issues decided both the issue of guilt and the issue of punishment. He argued that due process and other federal constitutional guarantees required that the trial of the guilt issue and the trial of the penalty issue be separated, so that if he were convicted he could offer evidence to mitigate the penalty decision whereas on the issue of guilt he could not offer mitigating evidence without making incriminating admissions to the jury. Crampton also raised the issue of standards. The lower courts held against him on both contentions. 18 Ohio St. 2d 182, 248 N. E. 2d 614 (1969).

III

The history of English and early United States law and practice with regard to the punishment of serious, and some not so serious, crimes has been one in which a large number of crimes were capital, but procedural and other barriers were placed in the way of imposition of death in large numbers of cases.[1/] For the United States in the last Century and this one the law has seen a

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1/ I Sir James F. Stephen, A History of the Criminal Law of England (London: 1883), 457-78.

consistent narrowing of the number of crimes which are capital and the last decade has witnessed a dramatic falling off in the number of sentences of executions carried out.[2/]

Diminution of the numbers executed in this country has been primarily a result of legislative action and the exercise of executive clemency, both taken in response to what has been perceived as a gradual development of public opinion against capital punishment. The courts have not generally played any substantive role, although one should not fail to notice the commonly understood practice of courts to require less of a showing of error to reverse convictions in which the death sentence has been imposed.[3/]

In the last twenty years, however, many organized groups have turned to the courts, on this issue as on many others, as a source of and contributors to change in the death penalty controversy. Many traditional civil rights organizations have been drawn into the matter by the statistical showings that sentences of death are significantly more often imposed on minority group persons;[4/]

2/ E.g., Edwin Powers, Crime and Punishment in Early Massachusetts - 1620-1692 (Boston; 1966), esp. ch. 9; Thorsten Sellin (ed.), Capital Punishment (New York: 1967).

3/ See, e.g., Justice Jackson's comment in Stein v. New York, 346 U.S. 156, 196 (1953): "When the penalty is death, we, like State court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."

4/ The lengthy Maxwell v. Bishop litigation primarily concerned this issue until the Supreme Court specifically excluded it in favor of the other issues. Maxwell v. Stephens, 229 F.Supp. 205 (D.C.E.D.Ark. 1964), aff'd., 348 F. 2d 325 (C.A. 8, 1965), cert. den., 382 U.S. 944 (1965); Maxwell v. Bishop, 257 F. Supp. 710 (D.C.E.D.Ark. 1966). Maxwell's attempt to appeal to the Court of Appeals was rebuffed by both the District Court and the Court of Appeals but the Supreme Court directed that the appeal

traditional civil liberties groups have moved into the struggle for a number of observable reasons: the imposition and carrying out of death sentences being generally perceived as occurring more often when the defendant is poor and a member of a racial or ethnic minority group than if he is "unpoor" and white; a tendency to reform of criminal laws, substance and procedure, generally, with a perception that the presence of capital issues frequently skews the developing legal processes; concern with the essential informality of the sentencing stage of the trial process as opposed to the increasing procedural intricacy of the trial of the issue of guilt.[5/]

The substantive attack on the death penalty has been primarily one based on the "cruel and unusual punishment" clause of the Eighth Amendment.[6/] It has been vigorously argued that capital punishment is void under the Eighth Amendment, either because death is now, at this period in time, a punishment which the

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4/ (cont'd.) be heard. 385 U.S. 650 (1967). It was heard and rejected again. 398 F. 2d 138, 141-48 (C.A. 8, 1968). See also, Moorer v. South Carolina, 368 F. 2d 458 (C.A. 4, 1966).

5/ See the discussion of these points in National Commission on Reform of Federal Criminal Laws, Working Papers (Washington: 1970), vol. II, 1347, 1360-61; President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (Washington: 1967), 143; President's Comm. ..., Task Force Report, The Courts (Washington: 1967), 27-8.

6/ Cf. Note, "The Cruel and Unusual Punishment Clause and the Substantive Criminal Law," 79 Harv. L. Rev. 635 (1966); Note, "Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court," 16 Stan. L. Rev. 996 (1964). See 1967-68 Report, pp. 124-135.

prevailing moral sentiment of the community rejects or because its imposition and execution is so erratic, irrational, and capricious with regard to the persons actually put to death as against the far larger numbers who legally were liable for the punishment, that as to any particular defendant its imposition would be "cruel and unusual."[7/] An offshoot of the latter type of argument has been a limited attempt on the part of some to tighten the number of criminal acts for which death would not be a "cruel and unusual" punishment.[8/]

To date, the Supreme Court has accepted only one case for review as to which it considered the "cruel and unusual" punishment argument and that was a case in which this last

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7/ Goldberg & Dershowitz, "Declaring the Death Penalty Unconstitutional," 83 Harv. L. Rev. 1773 (1970); Comment, "The Death Penalty Cases," 56 Calif. L. Rev. 1268, 1324-1354 (1968).

8/ In Rudolph v. Alabama, 375 U. S. 889 (1963), Justices Goldberg, Douglas, and Brennan dissented from a denial of certiorari, wishing to consider whether the Eighth Amendment permitted the imposition of the death penalty on one convicted of rape who had neither taken nor endangered life. Cf. Packer, "Making the Punishment Fit the Crime," 77 Harv. L. Rev. 1071 (1964). In Ralph v. Warden, No. 13, 757 (C.A. 4, December 11, 1970), the court held that imposition of the death penalty in such a case constituted cruel and unusual punishment.

specialized argument was ideally suited.[9] But that case was decided on a procedural issue and other cases accepted have been taken with the Eighth Amendment issue excluded from consideration.[10]

IV

Greater success for a period was achieved by those litigants who came to the Court arguing a variety of essentially procedural considerations. Most significant of these cases was Witherspoon v. Illinois, 391 U. S. 510 (1968), 1967-68 Report, pp. 246-56, in which the Court held that the exclusion of jurors from a panel which is asked to impose, among other possible penalties, the death sentence solely because these jurors may have scruples or objections about capital punishment is invalid so long as the jurors do not admit that their scruples are so severe that they could never consider death as a possible verdict.[11] The Court also struck down

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9/ Boykin v. Alabama, 395 U. S. 238 (1969). Boykin had been sentenced to death by a jury after pleading guilty to five armed robberies in which no one was killed or injured. The Court reversed on a procedural grounds. Cf. 1969-70 Report, pp. 346-47.

10/ The grant of certiorari in Crampton and McGautha excluded the issue. 398 U. S. 936 (1970) Cf. Swain v. Alabama, 382 U. S. 944 (1965) (Justice Douglas dissenting).

11/ Note, "Trial by Jury in Criminal Cases," 69 Colum. L. Rev. 419, 432-449 (1969); Note, "Jury Selection and the Death Penalty: Witherspoon in the Lower Courts," 37 U. Chi. L. Rev. 759 (1970).

certain federal statutes establishing a penalty structure in such a way that a defendant choosing a jury trial faced the possibility of a death sentence whereas a defendant who elected to plead guilty or to stand trial before a judge without a jury was assured that the maximum penalty he could receive was life.[12/]

The Court twice heard argument in a case in which the issues of standards and the dual- versus single- jury were raised, but it was finally remanded for consideration of the Witherspoon holding. Maxwell v. Bishop, 398 U. S. 262 (1970). Review was then granted in these two cases with the issues limited to these two.

The standards issue is essentially a due process argument.[13/] It proceeds on the line that the legislature's failure to articulate any standards for the guidance of juries in capital cases sets the imposition of a death sentence free from any rational ground for decision and provides no basis upon which it may be reviewed by an appellate court. The jury may thus act arbitrarily in reaching its choice, doing so possibly by whim or caprice. The leading decision

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12/ United States v. Jackson, 390 U. S. 570 (1968), 1967-68 Report, pp. 256-61; Note, op. cit. n. 11, 69 Colum. L. Rev., 460-69.

13/ The Fifth Amendment's due process clause applies to the Federal Government and the Fourteenth Amendment's to the States. Cf. 1969-70 Report, pp. 196-210; Note, "The Death Penalty Cases," 56 Calif. L. Rev. 1268, 1415-1423 (1968).

upon which the defendants relied is Giaccio v. Pennsylvania, 382 U. S. 399 (1966), in which the Court struck down for vagueness and for lack of standards a statute permitting juries unlimited discretion to assess defendants, whom they have acquitted, the costs of the trial. On the standards issue, the Court, in an opinion by Justice Black, held that a law fails to meet the requirements of due process "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.... This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him." Id., 402-03. But the Justice also cautioned that "we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." Id., 405 n. 8.

The sentencing stage of a criminal trial has long been one governed by the most informal of standards. It remains so today although the Court has imposed some substantive and some procedural limitations on the sentencing power of judges. Whether

these limitations apply, or can in fact be made to apply, to jury sentencing is an undecided issue.[14/]

The single - versus dual - jury determination issue arises out of the argument that the single-verdict procedure is one that requires an accused to give up one right in order to exercise another right. The Fifth Amendment, for example, protects one against being compelled to incriminate himself. But on a trial in which the issue of guilt and the issue of penalty are to be determined at the same time a defendant wishing to place before a jury facts which he may feel will suggest extenuating circumstances and lead to a lesser degree of punishment must in effect give up his privilege against self-incrimination and place before the jury facts which inevitably will contribute to the jury's decision to convict. A defendant not willing to forego the privilege must give up any opportunity to address the jury on the question of punishment.

Several cases from recent years are relied on here. In Simmons v. United States, 390 U. S. 377 (1968), 1967-68 Report, pp. 338-40, 342-45, the Court, in an opinion by Justice Harlan, refused to allow the admission at trial of the defendant's testimony given at a pretrial hearing on a motion to suppress certain evidence.

14/ For the limitations briefly noted, cf. 1969-70 Report, pp. 370-74. On standards for jury capital sentencing, see American Law Institute, Model Penal Code (tent. Draft No. 9), 59-74; Working Papers, op. cit., n. 5, 1366-1375. The National Commission on Reform of Federal Criminal Laws, Final Report (Washington: 1970), 313-15, recommended abolition of capital punishment but included a set of standards should it be retained.

In order to have standing to move to suppress, the defendant at the hearing had to admit ownership of the incriminating evidence; admission of the testimony at trial after the suppression motion had failed would have formed a strong link to the commission of the trial. Justice Harlan wrote, however, that the Government could not put defendant to a choice between constitutional rights: the right to protest an alleged unlawful search and seizure or the right not to incriminate himself.

Other cases relied on were United States v. Jackson, supra, n. 12, and Jackson v. Denno, 378 U. S. 368 (1964), in which the Court held that the trial judge must hold a hearing away from the jury and himself determine the voluntariness of a confession before it could be admitted, as against the New York procedure permitting its admission so that the jury could determine voluntariness with instructions not to consider the confession if the jurors found it not to have been voluntary. But several decisions last Term substantially undermined the rationale of these cases[15/] and the defendants had to overcome as well the decision in Spencer v. Texas, 385 U. S. 554 (1967), in which a closely divided Court held that a dual trial was not required in a situation in which a

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15/ Brady v. United States, 397 U. S. 742 (1970); Parker v. North Carolina, 397 U. S. 790 (1970); McMann v. Richardson, 397 U. S. 759 (1970); 1969-70 Report, pp. 332-54; see esp. id. pp. 351-52, for comment on Crampton.

jury was asked to determine both the issue of guilt and the issue of recidivism. That is, at the trial on the issue of guilt the prosecution could introduce as well the record of defendant's past convictions so that if the jury found defendant guilty the jury could sentence him as a repeating offender as well. The majority rejected the argument that introduction of the past record could prejudice the defendant before the jury on the issue of guilt.

V

Justice Harlan delivered the opinion of the Court in a single opinion dealing with both McGautha and Crampton. The Chief Justice and Justices Black, Stewart, White, and Blackmun joined the opinion and Justice Black also filed a brief concurrence. There were two dissents: Justice Brennan wrote an opinion on the standards issue and Justice Douglas wrote a dissent on the single - versus dual - jury issue. Each joined the other's opinion and Justice Marshall joined both.

(A)

Justice Harlan's treatment of the standards issue consisted of an historical survey of the progressive limitation of the crimes and types of crimes for which death was the penalty, achieved first by efforts to assess legislative degrees of crimes and then by vesting discretion in juries to impose death or recommend mercy, and of a survey of efforts here and in Great Britain to formulate

standards, all of which had resulted in little or no real limitation on the jury's discretion. Thus, in his view, it was seen that the standardless authority of the jury represented a steady progression from a period in which many crimes were inflexibly capital to a time when the jury representing the mores of the community imposed fewer and fewer death sentences. Such a history of settled practice, the lodging of total discretion in the jury going back well into the last Century, required a strong showing of constitutional necessity in order to be upset.

But the record of attempts to formulate standards, Justice Harlan thought, showed that the best which had been achieved was simply a listing of some of the factors which a jury should take into account and which afforded only a minimal limitation on the discretion the jury exercised.

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untramelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Justice Brennan's 64-page dissent argued that due process did indeed require the formulation of standards to restrict the discretion of juries and to make their decisions reviewable. Substantially compressed, the argument runs thus: One element of due process is that policy choices are made and articulated by responsible organs of government; normally, this will be the legislative branch but in complicated areas the legislature may delegate responsibility provided it does so in ways which make the ultimate decision both responsible and reviewable. Another element of due process is that when federal rights are involved the States may not so restrict reviewability of the exercise of power that federal review would be ineffectual in protecting federal rights.

As applied, the Justice's due process argument would mean that a State which has decided that some criminals will be executed but that others will not must establish standards by which it can be determined that a convicted criminal belongs in one class or another. This action will involve making express judgments about the penal ends which the State wishes to serve -- rehabilitation, retribution, deterrence, prevention -- and about the application of these ends to particular crimes which it has made punishable. If it vests sentencing discretion in juries it must articulate the standards by which the jury is to decide and require the jury to articulate its reasons for the application of a sentence in the

particular case. In this way, the process of common law development of standards can be followed and reviewability of the jury's decision is made possible.

(B)

The issue of the single trial on the issues of guilt and punishment was similarly dealt with fairly briefly by Justice Harlan. The Simmons case with its emphasis on the tension between constitutional rights was not disapproved but its force was considerably lessened. Instead, the Justice pointed to the guilty plea cases from last Term, supra, n. 15, as showing that the criminal justice system was replete with situations requiring the making of difficult choices and the fact that a defendant might be required to make a choice between rights does not necessarily mean that any constitutional issue has been joined.

To the argument that in order to put before the jury mitigating matters on the question of punishment the defendant had to give up his privilege against self-incrimination, Justice Harlan agreed that the effect of making that choice might well have that result. But in this sense, the choice was no different than deciding to take the stand to testify in one's behalf knowing that to do so meant giving up the privilege to remain silent on cross-examination about matters reasonably related to the subject matter of his direct testimony or that taking the stand would permit one

to be cross-examined about any prior criminal record. Thus, neither the express language of the Fifth Amendment privilege nor the policies underlying it were inplicated by the fact that trial structure may create pressure upon a defendant to testify when he has a right to remain silent. Neither, continued the Justice, did the converse of the argument require a different result. Assuming without deciding that a defendant might have some federal constitutional right to present evidence or testimony bearing on the issue of punishment, the Court could see no federal constitutional violation arising from the fact that the single-trial structure might lead some defendants to forgo this right. Again, it was merely an example of a defendant faced with a difficult decision.

Justice Douglas' dissent argued that the burdening of the privilege against self-incrimination was impermissible. The single-trial procedure was not simply an example of a system which incidentally put a defendant to a hard choice; it was instead a procedure which could operate no other way. Additionally, the Justice thought due process required that a defendant be afforded a meaningful opportunity to address his sentencers on the issue of the sentence, a right which the single-trial procedure plainly denied.

(C)

Concluding, Justice Harlan emphasized that dual trials and promulgation of standards might well be the best procedures in terms

of policy and might accord with the enlightened ideas of students of criminology. But the Court was reviewing the procedures according to constitutional standards. "The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.... The procedures which petitioners challenge are those by which most capital trials in this country are conducted, and by which all were conducted until a few years ago. We have determined that these procedures are consistent with the rights to which petitioners were constitutionally entitled, and that their trials were entirely fair."

Justice Black noted that he agreed generally with Justice Harlan's views but he objected to any assertion by the Court of power to judge whether criminal trials were "unfair" or "unreasonable" or some other such standard. The Court could only decide whether any express or implied federal constitutional right had been violated. The Justice also rejected the "cruel and unusual punishment" contention raised by some amici briefs.

VI

As we have noted the issues in these two cases did not go to the constitutionality per se of capital punishment and do not shed any clear light on the prospect for success or failure of the "cruel and unusual punishment" argument should the Court review it, although it must be thought unlikely that such an argument would stand a substantial possibility of being sustained. But there are

about 120 cases on the Court's docket which do raise some variation of this issue and it may well be that the Court will review one or more of the cases before permitting the resumption of executions in this Country.

The result of the procedural attack in these cases and the probable result of the substantive attack will no doubt change the focus of the capital punishment controversy from the constitutional attack in the courts back to the legislative front where it was fought over for so long. The most lasting, if the Court adheres to the decision and requires its observance by the lower courts, effect of this momentary change in tactics by anti-capital punishment foes has been the ruling in Witherspoon which has opened up juries throughout the country to scrupled persons; this may well have the effect of reducing the number of death sentences handed down, unless the Court permits less than unanimous verdicts on the issue.[16/]

Whatever may be the long-term trends, the short-range prospect is the possibility that the absence of executions since mid-1967 is about to end.

16/ In Andres v. United States, 333 U.S. 740 (1948), it was held that a federal jury must be unanimous in reaching a sentencing decision just as it must be unanimous on guilt. Maxwell v. Dow, 176 U.S. 581 (1900). But the latter requirement as a due process matter is being re-examined this Term and the former might be as well. Johnson v. Louisiana, No. 5161; Apodaca v. Oregon, No. 5358, 1970-71 Report, p. 90; cf. 1967-68 Report, pp. 254-56.

The Supreme Court 1970-71 Term

A Brief Summary and Review of Decided Cases

XXVIII

United States v. Reidel

United States v. Thirty-Seven Photographs

Obscenity

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May 10, 1971

OBSCENITY
THE POWER OF GOVERNMENT TO SUPPRESS PORNOGRAPHY

I

Returning to consideration of a basic question once thought resolved, the Court has reaffirmed its first obscenity decision, handed down in 1957, holding that the First Amendment does not bar the suppression of obscene materials by the Federal Government from the channels of interstate commerce or passage into this Country from abroad. Overruling two lower court decisions which had interpreted recent precedent to the contrary, the Court, with only two dissents, held that commercial dealings in obscene materials could be suppressed but divided almost evenly on the question whether purely private, noncommercial handling of such materials could be suppressed. The decisions, however, do not broaden governmental powers, inasmuch as the limitations heretofore imposed have all been in the area of procedural protection or, more importantly, the progressive narrowing of the material which can be legally considered obscene. United States v. Reidel, No. 534; United States v. Thirty-Seven Photographs, No. 133, May 3, 1971.

II

Reidel was indicted on charges of having violated 18 U.S.C. sec. 1461 which prohibits the use of the mails for the delivery of obscene materials. He was alleged to have mailed copies of an illustrated pamphlet which sampled foreign pornography in order that

interested persons would know what to order. One of the recipients was a postal inspector who had answered a newspaper advertisement.

Thirty-seven Photographs arose when one Luros was found on customs inspection to have in his luggage the pictures which he intended to use to illustrate a new edition of the Kama Sutra. The photos were seized pursuant to 19 U.S.C. sec. 1305(a) which prohibits the importation of obscene materials and authorizes seizure. The United States Attorney then instituted formal judicial proceedings to bring about forfeiture of the materials.

The trial court in Reidel dismissed the indictment, holding that sec. 1461 could not constitutionally be applied to the distribution of obscene materials to willing adult recipients. The other trial court upheld Luros' contentions that the statute was procedurally invalid and that it could not be applied to the possession or importation of obscene materials for one's private use. 309 F. Supp. 36 (D.C.C.D. Calif. 1970).

III

The law of obscenity began in seventeenth century England and came to full development in the United States in the late nineteenth century when a considerable amount of legislation was enacted and in the first half of the twentieth century. Of the hundreds of cases decided by the courts none alluded to the bearing of the United States Constitution on the issue. Dicta in a few Supreme Court cases indicated that obscenity, like some other disfavored forms of

communication, was outside the protection of the First Amendment.[1/] Then, in Roth v. United States, 354 U.S. 476 (1957), involving the federal statute at issue in Reidel and a state prosecution in a separate case, entitled Alberts v. California, the Court held that obscene expression "is not within the area of constitutionally protected speech or press." Id., 485. Justices Black and Douglas dissented, arguing that the First Amendment prohibited all censorship, all suppression of expression no matter how worthless. Justice Harlan would have held that the States have a much greater leeway to deal with erotic publications than the Federal Government has; he would have restricted the latter to suppression of "hard-core" materials whereas he would sustain state suppression so long as it was rational. Chief Justice Warren thought that the Court had decided too much in setting out its obscenity test; he contended the defendants were engaged in commercial exploitation of obscenity and could claim no First Amendment protection.[2/]

1/ E.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (obscenity, libel, fighting words). A major constitional issue was raised with regard to state court judgments that Edmund Wilson's Memoirs of Hecate County was obscene but with Justice Frankfurter disqualifying himself the Court divided four-to-four, thus affirming without opinion the lower courts. Doubleday and Co. v. New York, 335 U.S. 848 (1948).

2/ For discussions of Roth, see Kalven, "The Metaphysics of the Law of Obscenity," 1960 Sup. Ct. Rev. 1, 7-28 (Kurland ed.); Lockhart & McClure, "Censorship of Obscenity: The Developing Constitutional Standards," 45 Minn. L. Rev. 5, 18-29 (1960).

In the next several years, the Court splintered several different ways in applying and reformulating standards for judging what is obscene and suppressible and what is not obscene and protected.[3/] No set of standards claimed a majority of the Court and the result was usually but not always a decision holding materials protected arrived at by coalitions of Justices for diverse reasons. In the late 1960's there did develop a unifying concern for the protection of children and of those adults not willingly exposing themselves to material they found objectionable and a disinclination to protect persons exploiting - "pandering" - the erotic nature of even borderline and arguably protected materials.[4/] With these three concepts in mind the Justices submerged their differences and began reversing lower court convictions

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3/ The subject is discussed from varying points of view in Kalven, op. cit., n. 2; Lockhart & McClure, op. cit., n. 2; Thomas I. Emerson, The System of Freedom of Expression (New York: 1970), ch. 8; Charles Rembar, The End of Obscenity (New York: 1968); Richard H. Kuh, Foolish Figleaves? Pornography in - and out of - Court (New York: 1967); Rogge, "[T]he High Court of Obscenity," (pts. 1 & 2) 41 Colo. L. Rev. 1, 201 (1969). The transcripts of the oral arguments before the Court in obscenity cases from Roth to Stanley v. Georgia, infra, have been published. Leon Friedman (ed.), Obscenity - The Complete Oral Arguments Before the Supreme Court in the Major Obscenity Cases (New York: 1970).

4/ On children, see Ginsberg v. New York, 390 U.S. 629 (1968), 1967-68 Report, pp. 191-200; Krislov, "From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Legislation," 1968 Sup. Ct. Rev. 153 (Kurland ed.). On pandering, see Ginzburg v. United States, 383 U.S. 463 (1966). The protection of unwilling adults found full expression in Rowan v. Post Office Department, 397 U.S. 728 (1970), 1969-70 Report, pp. 309-14.

and judgments without opinions.[5/] And in Stanley v. Georgia, 394 U.S. 557 (1969), 1968-69 Report, pp. 189-99, the court held that government could not make criminal the possession of obscene materials by a person in the privacy of his home; although the Court stressed its adherence to Roth, the rationale of Stanley appeared to undermine the vitality of the earlier case[6/] and it was so interpreted by several courts.[7/]

IV

Justice White wrote the opinion of the Court in both cases. In Reidel he was joined by the Chief Justice and Justices Brennan, Stewart, and Blackmun. Justices Harlan and Marshall each concurred separately. Justice Black filed a dissent which Justice Douglas joined.

5/ The first case was Redrup v. New York, 386 U.S. 767 (1967). The other cases were reversed on the authority of Redrup. Rogge, op. cit., n. 3, (pt. 1), 43-59. 1967-68 Report, pp. 201-02; 1968-69 Report, pp. 196-99; 1969-70 Report, pp. 315-18. Four cases this Term have been so decided. Keriakos v. Hunt, 400 U.S. 929 (1970); California v. Pinkus, 400 U.S. 922 (1970), 1970-71 Report, pp. 84-5; Childs v. Oregon, 39 L.W. 3436 (April 5, 1971); Bloss v. Michigan, 39 L.W. 3485 (May 3, 1971).

6/ Katz, "Privacy and Pornography: Stanley v. Georgia," 1969 Sup. Ct. Rev. 203 (Kurland ed.); Engdahl, "Requiem for Roth: Obscenity Doctrine Is Changing," 68 Mich. L. Rev. 185 (1969).

7/ In addition to the lower courts here reversed, see Karalexis v. Byrne, 306 F. Supp. 1363 (D.C.D. Mass. 1969), vacated and remanded, 401 U.S. ... (1971); United States v. Various Articles of "Obscene" Merchandise, 315 F. Supp. 191 (D.C.S.D. N.Y. 1970); United States v. Dellapia, 433 F. 2d 1252 (C.A. 2, 1970).

Justice White noted that Reidel had been charged with the same offense that Roth had been convicted of and reasserted the holding in Roth to the effect that the First Amendment did not protect dissemination of obscenity. Roth was good law now, he continued, and Stanley v. Georgia, supra, did not require a different conclusion. Stanley was concerned with freedom of mind and thought and the privacy of the home; Stanley's right to have whatever materials he wished to have in his home, however, did not create a right in a distributor or disseminator of such materials to sell it to someone to possess in his home.

> The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution.
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> Reidel is in a wholly different position. He has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process. But Roth has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today.

Concluding, Justice White noted that while the First Amendment did not bar governmental suppression of obscenity, neither did it compel such suppresssion. Thus, the arguments directed to the Court

asserting the propriety of conferring freedom on adults to read and view whatever they pleased and decrying the costs and side-effects of governmental censorship were more appropriately directed to the legislative branch. There lay the choice whether to continue past practice or to strike off on a new course.

Justice Harlan concurred on the basis of his understanding that Stanley stood for the proposition that governmental power to proscribe obscenity could not be exercised to the exclusion of other constitutionally protected interests of the individual. Stanley's constitutionally protected interest was freedom from governmental coercion of his thoughts and fantasies and freedom from punishment for "the mere possession of the memorabilia of a man's thoughts and dreams . . .." Justice Marshall's concurrence was based on his concurring opinion in Thirty-Seven Photographs in which he suggested an analysis of governmental interests in regulating the distribution of pornography, one of which was the interest in protecting children and unwilling adults from exposure to objectionable material. Because Reidel was mailing the material to any requester there was danger that children would be exposed and such uncontrolled commercial dealings as this the Justice would not protect.

Justice White's opinion in Thirty-Seven Photographs was joined by the Chief Justice and Justices Brennan and Blackmun. Justices

Harlan and Stewart concurred in separate opinions and Justices Black, Douglas, and Marshall dissented.

The Justice read the trial court's decision as holding that the statute was too broad in that it penalized purely private possession of obscene materials and that it could not therefore be enforced. But such a decision was error, the Justice wrote, whether possession was for private or commercial use. Stanley protected possession in the privacy of the home, but "obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use . . .. [A] port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search."[8/] Thus, whatever Luros intended to use the pictures for they were subject to seizure by customs.

Justice Harlan concurred solely on the basis that since the customs statute could constitutionally be applied to importation

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8/ The opinion appears to rely in substantial part, on the privacy issue, on the historic exception of customs searches from the coverage of the Fourth Amendment. A case argued this Term and yet to be decided raises the issue squarely of the constitutional limitations on border searches. United States v. Johnson, No. 577, 1970-71 Report, p. 136.

of obscene materials for commercial use Luros could not raise the constitutional issue whether purely private possession could be reached by the statute as well. Therefore, the Justice would not reach that question. Justice Stewart concurred because he thought commercial importation could be constitutionally suppressed, but he disagreed that the Government could take materials away from a traveler who intended to make no commercial use of it.

Justice Marshall's dissent set up categories of interests which government had in regulating obscenity. It could not police the thoughts of citizens but it could protect children and unwilling adults from exposure. The danger of such exposure was most serious in the context of commercial dissemination of such materials. He would require the most rigorous safeguards to bar distribution to children and to adults who did not want it but mere private possession he would not permit government to reach, whether possession was in the home, on one's person, or in his luggage. Although Luros admitted he intended to use the photos in a commercial sense there was adequate time for the government to protect its valid interests when the commercial use was made of the materials. Until then the Justice would hold Luros' possession protected.

The dissent by Justices Black and Douglas was to both cases. They would apply the view consistently urged by the two of them in Roth and subsequent cases, that the First Amendment forbids all govern-

mental censorship. Otherwise, Justice Black continued, the Court must itself continue to review the books, the magazines, and the motion pictures that someone wants to suppress to make sure that the materials are legally obscene within the concept of a majority of the Court.

V

Thirty-Seven Photographs also contained a procedural problem. The trial court had also declared the customs statute unconstitutional on the alternative ground that it did not comply with the Court-established standards requiring the briefest possible restraint and prompt judicial review of any administrative decision to censor.[9/] Justice White noted that the customs statute contained no time limitations and would therefore be invalid, except that the Court could glean from the legislative history a congressional intention that the process be prompt and timely and that the Court could glean from past practice and lower court decisions a record of fairly prompt action. Therefore, Justice White concluded, it was appropriate for the Court to impose on the Government the obligation to commence forfeiture proceedings within 14 days of any seizure and that the trial court

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9/ The cases and the limitations are reviewed in 1970-71 Report, pp. 140-50, noting Blount v. Rizzi, 400 U.S. 410 (1971).

render a decision within 60 days of such commencement.[10/] The Justice cautioned that the time limitations were not necessarily applicable in other circumstances.

Justice Black's dissent also questioned the propriety of the Court rewriting the statute to impose the time limitations. In his view, the Court should simply void the statute and let Congress enact a valid law if it wished to do so. Only Justice Douglas agreed with the dissent.

VI

These two decisions resolve the doubt raised by recent cases about the continuing viability of Roth. Commercial dealings in obscene materials are not protected and may be suppressed by governmental action. Four Members of the Court believe that possession of obscene materials outside the home may be banned as well but four other Members think to the contrary and the ninth Justice has taken no position. The matter must be taken as unsettled. Presumably, the commercial dealings rationale is broad enough to cause the rejection as well of the contention that persons, adults, willing to expose themselves to motion pictures in the "privacy" of a theatre should be permitted to do so.[11/] Certainly, most of the litigation arises in

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10/ The Court's treatment resolves one issue thought open, 1970-71 Report, p. 147, whether the prompt judicial resolution refers only to the trial court decision or to the appellate process as well. The decision makes clear that an applicant is entitled only to a prompt decision by the trial court and that the appellate process may take its own course. The result was foreshadowed by Justice Brennan's comment in Byrne v. Karalexis, 27 L. Ed. 2d 792, 796 (1971), to this effect.

11/ Cf. Karalexis v. Byrne, supra, n. 7.

the context of commerce and it is there that we may expect much continued litigation.

The critical question with regard to how much leeway governmental power to suppress materials there is to be turns on the Court's standards for determining what is obscene and what is not. The trend in recent years has been toward finding almost nothing printed legally obscene[12/] and to bringing in a great deal of still and motion picture material within the concept of legally nonobscene.[13/] Despite the recent Court inability to decide the issue of the obscenity of "I Am Curious (Yellow)", it does not appear that the Court, as presently constituted, is likely to reverse that trend.

To be argued next Term are two cases, United States v. Unicorn Enterprises, No. 1009, concerning the "redeeming social importance" phase of the obscenity test, and Miller v. California, No. 1288, concerning the concept of community standards. 1970-71 Report, p. 217. If the Court restricts these two concepts, governmental authority to suppress materials would be expanded; if the Court adheres to the present view, governmental power would be quite limited.

12/ See, e.g., Rembar, op. cit., n. 3; cf. A Book Names "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

13/ Cf. Jacobellis v. Ohio, 378 U.S. 184 (1964); California v. Pinkus and Keriakos v. Hunt, supra, n. 5. But see Grove Press v. Maryland State Board of Censors, 39 L.W. 3386 (March 8, 1971), 1970-71 Report, pp. 213-17.

The Court having this Term set out guidelines to inform federal district judges asked to intervene with pending state prosecutions of persons, on obscenity charges as well as on others, will next Term explore the standards to be applied when federal courts are asked to intervene with pending state civil cases involving allegedly obscene materials. Mitchum v. Foster, No. 876. Additionally, the Court will explore the specific application of the standards for pending criminal cases in the context of an obscenity case in which it is alleged that the actions of state authorities bring the case within the exception to the rule of no interference. Col-An Entertainment Corp. v. Harper, No. 1495. See 1970-71 Report, pp. 353-409.