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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1971

JUNE 12 THROUGH JUNE 22, 1972

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATA

151 U. S. 408, line 5 from bottom: "presents" should be "prevents."

405 U. S. LXIII: The following sentence should appear at the end of the NOTE: "Cases reported on page 1201 *et seq.* are those written in chambers by individual Justices."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

RICHARD G. KLEINDIENST, Attorney General.*
ERWIN N. GRISWOLD, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

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*The Honorable Richard G. Kleindienst, of Arizona, formerly Deputy Attorney General, was nominated to be Attorney General by President Nixon on February 15, 1972; the nomination was confirmed by the Senate on June 8, 1972; he was commissioned on June 12, 1972, and took the oath of office on the same date. He was presented to the Court on June 19, 1972 (see *post*, p. v).

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, William H. Rehnquist, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. iv.)

PRESENTATION OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 19, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

Mr. Solicitor General Griswold presented the Honorable Richard G. Kleindienst, Attorney General of the United States.

THE CHIEF JUSTICE said:

Mr. Attorney General, the Court welcomes you to the performance of the important duties which devolve upon you as the chief law officer of the Government, and as an officer of this Court. Your commission will be recorded with the Clerk.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1970 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

TABLE OF CASES CITED

TABLE OF STATUTES CITED

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1971

THE BREMEN ET AL. *v.* ZAPATA OFF-SHORE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–322. Argued March 21, 1972—Decided June 12, 1972

Petitioner Unterweser made an agreement to tow respondent's drilling rig from Louisiana to Italy. The contract contained a forum-selection clause providing for the litigation of any dispute in the High Court of Justice in London. When the rig under tow was damaged in a storm, respondent instructed Unterweser to tow the rig to Tampa, the nearest port of refuge. There, respondent brought suit in admiralty against petitioners. Unterweser invoked the forum clause in moving for dismissal for want of jurisdiction and brought suit in the English court, which ruled that it had jurisdiction under the contractual forum provision. The District Court, relying on *Carbon Black Export, Inc.* v. *The Monrosa,* 254 F. 2d 297, held the forum-selection clause unenforceable, and refused to decline jurisdiction on the basis of *forum non conveniens.* The Court of Appeals affirmed. *Held:* The forum-selection clause, which was a vital part of the towing contract, is binding on the parties unless respondent can meet the heavy burden of showing that its enforcement would be unreasonable, unfair, or unjust. Pp. 8–20.

428 F. 2d 888 and 446 F. 2d 907, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring statement, *post,* p. 20. DOUGLAS, J., filed a dissenting opinion, *post,* p. 20.

David C. G. Kerr argued the cause for petitioners. With him on the briefs was *Jack C. Rinard.*

James K. Nance argued the cause for respondent. With him on the brief was *Dewey R. Villareal, Jr.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit declining to enforce a forum-selection clause governing disputes arising under an international towage contract between petitioners and respondent. The circuits have differed in their approach to such clauses.[1] For the reasons stated hereafter, we vacate the judgment of the Court of Appeals.

In November 1967, respondent Zapata, a Houston-based American corporation, contracted with petitioner Unterweser, a German corporation, to tow Zapata's ocean-going, self-elevating drilling rig *Chaparral* from Louisiana to a point off Ravenna, Italy, in the Adriatic Sea, where Zapata had agreed to drill certain wells.

Zapata had solicited bids for the towage, and several companies including Unterweser had responded. Unterweser was the low bidder and Zapata requested it to submit a contract, which it did. The contract submitted by Unterweser contained the following provision, which is at issue in this case:

> "Any dispute arising must be treated before the London Court of Justice."

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[1] Compare, *e. g., Central Contracting Co.* v. *Maryland Casualty Co.*, 367 F. 2d 341 (CA3 1966), and *Wm. H. Muller & Co.* v. *Swedish American Line Ltd.*, 224 F. 2d 806 (CA2), cert. denied, 350 U. S. 903 (1955), with *Carbon Black Export, Inc.* v. *The Monrosa*, 254 F. 2d 297 (CA5 1958), cert. dismissed, 359 U. S. 180 (1959).

In addition the contract contained two clauses purporting to exculpate Unterweser from liability for damages to the towed barge.[2]

After reviewing the contract and making several changes, but without any alteration in the forum-selection or exculpatory clauses, a Zapata vice president executed the contract and forwarded it to Unterweser in Germany, where Unterweser accepted the changes, and the contract became effective.

On January 5, 1968, Unterweser's deep sea tug *Bremen* departed Venice, Louisiana, with the *Chaparral* in tow bound for Italy. On January 9, while the flotilla was in international waters in the middle of the Gulf of Mexico, a severe storm arose. The sharp roll of the *Chaparral* in Gulf waters caused its elevator legs, which had been raised for the voyage, to break off and fall into the sea, seriously damaging the *Chaparral*. In this emergency situation Zapata instructed the *Bremen* to tow its damaged rig to Tampa, Florida, the nearest port of refuge.

On January 12, Zapata, ignoring its contract promise to litigate "any dispute arising" in the English courts, commenced a suit in admiralty in the United States

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[2] The General Towage Conditions of the contract included the following:

"1. . . . [Unterweser and its] masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

"2. . . .

"b) Damages suffered by the towed object are in any case for account of its Owners."

In addition, the contract provided that any insurance of the *Chaparral* was to be "for account of" Zapata. Unterweser's initial telegraphic bid had also offered to "arrange insurance covering towage risk for rig if desired." As Zapata had chosen to be self-insured on all its rigs, the loss in this case was not compensated by insurance.

District Court at Tampa, seeking $3,500,000 damages against Unterweser *in personam* and the *Bremen in rem,* alleging negligent towage and breach of contract.[3] Unterweser responded by invoking the forum clause of the towage contract, and moved to dismiss for lack of jurisdiction or on *forum non conveniens* grounds, or in the alternative to stay the action pending submission of the dispute to the "London Court of Justice." Shortly thereafter, in February, before the District Court had ruled on its motion to stay or dismiss the United States action, Unterweser commenced an action against Zapata seeking damages for breach of the towage contract in the High Court of Justice in London, as the contract provided. Zapata appeared in that court to contest jurisdiction, but its challenge was rejected, the English courts holding that the contractual forum provision conferred jurisdiction.[4]

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[3] The *Bremen* was arrested by a United States marshal acting pursuant to Zapata's complaint immediately upon her arrival in Tampa. The tug was subsequently released when Unterweser furnished security in the amount of $3,500,000.

[4] Zapata appeared specially and moved to set aside service of process outside the country. Justice Karminski of the High Court of Justice denied the motion on the ground the contractual choice-of-forum provision conferred jurisdiction and would be enforced, absent a factual showing it would not be "fair and right" to do so. He did not believe Zapata had made such a showing, and held that it should be required to "stick to [its] bargain." App. 206, 211, 213. The Court of Appeal dismissed an appeal on the ground that Justice Karminski had properly applied the English rule. Lord Justice Willmer stated that rule as follows:

"The law on the subject, I think, is not open to doubt . . . . It is always open to parties to stipulate . . . that a particular Court shall have jurisdiction over any dispute arising out of their contract. Here the parties chose to stipulate that disputes were to be referred to the 'London Court,' which I take as meaning the High Court in this country. *Prima facie* it is the policy of the Court to hold parties to the bargain into which they have en-

In the meantime, Unterweser was faced with a dilemma in the pending action in the United States court at Tampa. The six-month period for filing action to limit its liability to Zapata and other potential claimants was about to expire,[5] but the United States District Court in Tampa had not yet ruled on Unterweser's motion to dismiss or stay Zapata's action. On July 2, 1968, confronted with difficult alternatives, Unterweser filed an action to limit its liability in the District Court in Tampa. That court entered the customary injunction against proceedings outside the limitation court, and Zapata refiled its initial claim in the limitation action.[6]

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tered. . . . But that is not an inflexible rule, as was shown, for instance, by the case of *The Fehmarn,* [1957] 1 Lloyd's Rep. 511; (C. A.) [1957] 2 Lloyd's Rep. 551 . . . .

"I approach the matter, therefore, in this way, that the Court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain. The question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in this country . . . ." [1968] 2 Lloyd's Rep. 158, 162–163.

[5] 46 U. S. C. §§ 183, 185. See generally G. Gilmore & C. Black, Admiralty § 10–15 (1957).

[6] In its limitation complaint, Unterweser stated it "reserve[d] all rights" under its previous motion to dismiss or stay Zapata's action, and reasserted that the High Court of Justice was the proper forum for determining the entire controversy, including its own right to limited liability, in accord with the contractual forum clause. Unterweser later counterclaimed, setting forth the same contractual cause of action as in its English action and a further cause of action for salvage arising out of the *Bremen*'s services following the casualty. In its counterclaim, Unterweser again asserted that the High Court of Justice in London was the proper forum for determining all aspects of the controversy, including its counterclaim.

It was only at this juncture, on July 29, after the six-month period for filing the limitation action had run, that the District Court denied Unterweser's January motion to dismiss or stay Zapata's initial action. In denying the motion, that court relied on the prior decision of the Court of Appeals in *Carbon Black Export, Inc.* v. *The Monrosa,* 254 F. 2d 297 (CA5 1958), cert. dismissed, 359 U. S. 180 (1959). In that case the Court of Appeals had held a forum-selection clause unenforceable, reiterating the traditional view of many American courts that "agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced." 254 F. 2d, at 300–301.[7] Apparently concluding that it was bound by the *Carbon Black* case, the District Court gave the forum-selection clause little, if any, weight. Instead, the court treated the motion to dismiss under normal *forum non conveniens* doctrine applicable in the absence of such a clause, citing *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501 (1947). Under that doctrine "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.,* at 508. The District Court concluded: "The balance of conveniences here is not strongly in favor of [Unterweser] and [Zapata's] choice of forum should not be disturbed."

Thereafter, on January 21, 1969, the District Court denied another motion by Unterweser to stay the limitation action pending determination of the controversy in the High Court of Justice in London and granted Zapata's motion to restrain Unterweser from litigating

[7] The *Carbon Black* court went on to say that it was, in any event, unnecessary for it to reject the more liberal position taken in *Wm. H. Muller & Co.* v. *Swedish American Line Ltd.,* 224 F. 2d 806 (CA2), cert. denied, 350 U. S. 903 (1955), because the case before it had a greater nexus with the United States than that in *Muller.*

further in the London court. The District Judge ruled that, having taken jurisdiction in the limitation proceeding, he had jurisdiction to determine all matters relating to the controversy. He ruled that Unterweser should be required to "do equity" by refraining from also litigating the controversy in the London court, not only for the reasons he had previously stated for denying Unterweser's first motion to stay Zapata's action, but also because Unterweser had invoked the United States court's jurisdiction to obtain the benefit of the Limitation Act.

On appeal, a divided panel of the Court of Appeals affirmed, and on rehearing *en banc* the panel opinion was adopted, with six of the 14 *en banc* judges dissenting. As had the District Court, the majority rested on the *Carbon Black* decision, concluding that " 'at the very least' " that case stood for the proposition that a forum-selection clause " 'will not be enforced unless the selected state would provide a more convenient forum than the state in which suit is brought.' " From that premise the Court of Appeals proceeded to conclude that, apart from the forum-selection clause, the District Court did not abuse its discretion in refusing to decline jurisdiction on the basis of *forum non conveniens*. It noted that (1) the flotilla never "escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the district court"; (2) a considerable number of potential witnesses, including Zapata crewmen, resided in the Gulf Coast area; (3) preparation for the voyage and inspection and repair work had been performed in the Gulf area; (4) the testimony of the *Bremen* crew was available by way of deposition; (5) England had no interest in or contact with the controversy other than the forum-selection clause. The Court of Appeals majority further noted that Zapata was a United States citizen and "[t]he dis-

cretion of the district court to remand the case to a foreign forum was consequently limited"—especially since it appeared likely that the English courts would enforce the exculpatory clauses.[8] In the Court of Appeals' view, enforcement of such clauses would be contrary to public policy in American courts under *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (1955), and *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697 (1963). Therefore, "[t]he district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance." [9]

We hold, with the six dissenting members of the Court of Appeals, that far too little weight and effect were given to the forum clause in resolving this controversy. For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American

[8] The record contains an undisputed affidavit of a British solicitor stating an opinion that the exculpatory clauses of the contract would be held "prima facie valid and enforceable" against Zapata in any action maintained in England in which Zapata alleged that defaults or errors in Unterweser's tow caused the casualty and damage to the *Chaparral*.

In addition, it is not disputed that while the limitation fund in the District Court in Tampa amounts to $1,390,000, the limitation fund in England would be only slightly in excess of $80,000 under English law.

[9] The Court of Appeals also indicated in passing that even if it took the view that choice-of-forum clauses were enforceable unless "unreasonable" it was "doubtful" that enforcement would be proper here because the exculpatory clauses would deny Zapata relief to which it was "entitled" and because England was "seriously inconvenient" for trial of the action.

company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were "contrary to public policy," or that their effect was to "oust the jurisdiction" of the court.[10] Al-

[10] Many decisions reflecting this view are collected in Annot., 56 A. L. R. 2d 300, 306–320 (1957), and Later Case Service (1967).

For leading early cases, see, *e. g., Nute* v. *Hamilton Mutual Ins. Co.,* 72 Mass. (6 Gray) 174 (1856); *Nashua River Paper Co.* v. *Hammermill Paper Co.,* 223 Mass. 8, 111 N. E. 678 (1916); *Benson* v. *Eastern Bldg. & Loan Assn.,* 174 N. Y. 83, 66 N. E. 627 (1903).

The early admiralty cases were in accord. See, *e. g., Wood & Selick, Inc.* v. *Compagnie Generale Transatlantique,* 43 F. 2d 941 (CA2 1930); *The Ciano,* 58 F. Supp. 65 (ED Pa. 1944); *Kuhnhold* v. *Compagnie Generale Transatlantique,* 251 F. 387 (SDNY 1918); *Prince Steam-Shipping Co.* v. *Lehman,* 39 F. 704 (SDNY 1889).

In *Insurance Co.* v. *Morse,* 20 Wall. 445 (1874), this Court broadly stated that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." *Id.,* at 451. But the holding of that case was only that the State of Wisconsin could not by statute force a foreign corporation to "agree" to surrender its federal

though this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view, advanced in the well-reasoned dissenting opinion in the instant case, is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances.[11] We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty. It is merely the other side of the proposition recognized by this Court in *National Equipment Rental, Ltd.* v. *Szukhent,* 375 U. S. 311 (1964), holding that in federal courts a party may validly consent to be sued in a juris-

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statutory right to remove a state court action to the federal courts as a condition of doing business in Wisconsin. Thus, the case is properly understood as one in which a state statutory requirement was viewed as imposing an unconstitutional condition on the exercise of the federal right of removal. See, *e. g., Wisconsin* v. *Philadelphia & Reading Coal Co.,* 241 U. S. 329 (1916).

As Judge Hand noted in *Krenger* v. *Pennsylvania R. Co.,* 174 F. 2d 556 (CA2 1949), even at that date there was in fact no "absolute taboo" against such clauses. See, *e. g., Mittenthal* v. *Mascagni,* 183 Mass. 19, 66 N. E. 425 (1903); *Daley* v. *People's Bldg., Loan & Sav. Assn.,* 178 Mass. 13, 59 N. E. 452 (1901) (Holmes, J.). See also *Cerro de Pasco Copper Corp.* v. *Knut Knutsen, O. A. S.,* 187 F. 2d 990 (CA2 1951).

[11] *E. g., Central Contracting Co.* v. *Maryland Casualty Co.,* 367 F. 2d 341 (CA3 1966); *Anastasiadis* v. *S. S. Little John,* 346 F. 2d 281 (CA5 1965) (by implication); *Wm. H. Muller & Co.* v. *Swedish American Line Ltd.,* 224 F. 2d 806 (CA2), cert. denied, 350 U. S. 903 (1955); *Cerro de Pasco Copper Corp.* v. *Knut Knutsen, O. A. S.,* 187 F. 2d 990 (CA2 1951); *Central Contracting Co.* v. *C. E. Youngdahl & Co.,* 418 Pa. 122, 209 A. 2d 810 (1965).

The *Muller* case was overruled in *Indussa Corp.* v. *S. S. Ranborg,* 377 F. 2d 200 (CA2 1967), insofar as it held that the forum clause was not inconsistent with the "lessening of liability" provision of the Carriage of Goods by Sea Act, 46 U. S. C. § 1303 (8), which was applicable to the transactions in *Muller, Indussa,* and *Carbon Black.* That Act is not applicable in this case.

diction where he cannot be found for service of process through contractual designation of an "agent" for receipt of process in that jurisdiction. In so holding, the Court stated:

> "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." *Id.*, at 315–316.

This approach is substantially that followed in other common-law countries including England.[12] It is the view advanced by noted scholars and that adopted by the Restatement of the Conflict of Laws.[13] It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world. Not surprisingly, foreign businessmen prefer, as do we, to

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[12] In addition to the decision of the Court of Appeal in the instant case, *Unterweser Reederei G. m. b. H.* v. *Zapata Off-Shore Co.* [*The Chaparral*], [1968] 2 Lloyd's Rep. 158 (C. A.), see *e. g., Mackender* v. *Feldia A. G.*, [1967] 2 Q. B. 590 (C. A.); *The Fehmarn*, [1958] 1 W. L. R. 159 (C. A.); *Law* v. *Garrett*, [1878] 8 Ch. D. 26 (C. A.); *The Eleftheria*, [1970] P. 94. As indicated by the clear statements in *The Eleftheria* and of Lord Justice Willmer in this case, *supra*, n. 4, the decision of the trial court calls for an exercise of discretion. See generally A. Dicey & J. Morris, The Conflict of Laws 979–980, 1087–1088 (8th ed. 1967); Cowen & Mendes da Costa, The Contractual Forum: Situation in England and the British Commonwealth, 13 Am. J. Comp. Law 179 (1964); Reese, The Contractual Forum: Situation in the United States, *id.*, at 187, 190 n. 13; Graupner, Contractual Stipulations Conferring Exclusive Jurisdiction Upon Foreign Courts in the Law of England and Scotland, 59 L. Q. Rev. 227 (1943).

[13] Restatement (Second) of the Conflict of Laws § 80 (1971); Reese, The Contractual Forum: Situation in the United States, 13 Am. J. Comp. Law 187 (1964); A. Ehrenzweig, Conflict of Laws § 41 (1962). See also Model Choice of Forum Act (National Conference of Commissioners on Uniform State Laws 1968).

have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum-selection clause "ousted" the District Court of jurisdiction over Zapata's action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power,[14] such

[14] The record here refutes any notion of overweening bargaining power. Judge Wisdom, dissenting, in the Court of Appeals noted:

"Zapata has neither presented evidence of nor alleged fraud or undue bargaining power in the agreement. Unterweser was only one of several companies bidding on the project. No evidence contradicts its Managing Director's affidavit that it specified English courts 'in an effort to meet Zapata Off-Shore Company half way.' Zapata's Vice President has declared by affidavit that no specific negotiations concerning the forum clause took place. But this was not simply a form contract with boilerplate language that Zapata

as that involved here, should be given full effect. In this case, for example, we are concerned with a far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea. In the course of its voyage, it was to traverse the waters of many jurisdictions. The *Chaparral* could have been damaged at any point along the route, and there were countless possible ports of refuge. That the accident occurred in the Gulf of Mexico and the barge was towed to Tampa in an emergency were mere fortuities. It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the *Bremen* or Unterweser might happen to be found.[15] The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade,

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had no power to alter. The towing of an oil rig across the Atlantic was a new business. Zapata did make alterations to the contract submitted by Unterweser. The forum clause could hardly be ignored. It is the final sentence of the agreement, immediately preceding the date and the parties' signatures. . . ." 428 F. 2d 888, 907.

[15] At the very least, the clause was an effort to eliminate all uncertainty as to the nature, location, and outlook of the forum in which these companies of differing nationalities might find themselves. Moreover, while the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law. See, *e. g., Tzortzis* v. *Monark Line A/B,* [1968] 1 W. L. R. 406 (C. A.); see generally 1 T. Carver, Carriage by Sea 496–497 (12th ed. 1971); G. Cheshire, Private International Law 193 (7th ed. 1965); A. Dicey & J. Morris, The Conflict

commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement,[16] and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations. Under these circumstances, as Justice Karminski reasoned in sustaining jurisdiction over Zapata in the High Court of Justice, "[t]he force of an agreement for litigation in this country, freely entered into between two competent parties, seems to me to be very powerful."

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of Laws 705, 1046 (8th ed. 1967); Collins, Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England, 2 J. Mar. L. & Comm. 363, 365–370 and n. 7 (1971). It is therefore reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law.

The record contains an affidavit of a Managing Director of Unterweser stating that Unterweser considered the choice-of-forum provision to be of "overriding importance" to the transaction. He stated that Unterweser towage contracts ordinarily provide for exclusive German jurisdiction and application of German law, but that "[i]n this instance, in an effort to meet [Zapata] half way, [Unterweser] proposed the London Court of Justice. Had this provision not been accepted by [Zapata], [Unterweser] would not have entered into the towage contract . . . ." He also stated that the parties intended, by designating the London forum, that English law would be applied. A responsive affidavit by Hoyt Taylor, a vice president of Zapata, denied that there were any discussions between Zapata and Unterweser concerning the forum clause or the question of the applicable law.

[16] See nn. 14–15, *supra*. Zapata has denied specifically discussing the forum clause with Unterweser, but, as Judge Wisdom pointed out, Zapata made numerous changes in the contract without altering the forum clause, which could hardly have escaped its attention. Zapata is clearly not unsophisticated in such matters. The contract of its wholly owned subsidiary with an Italian corporation covering the contemplated drilling operations in the Adriatic Sea provided that all disputes were to be settled by arbitration in London under English law, and contained broad exculpatory clauses. App. 306–311.

Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside. Although their opinions are not altogether explicit, it seems reasonably clear that the District Court and the Court of Appeals placed the burden on Unterweser to show that London would be a more convenient forum than Tampa, although the contract expressly resolved that issue. The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. Accordingly, the case must be remanded for reconsideration.

We note, however, that there is nothing in the record presently before us that would support a refusal to enforce the forum clause. The Court of Appeals suggested that enforcement would be contrary to the public policy of the forum under *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (1955), because of the prospect that the English courts would enforce the clauses of the towage contract purporting to exculpate Unterweser from liability for damages to the *Chaparral*. A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. See, *e. g., Boyd* v. *Grand Trunk W. R. Co.*, 338 U. S. 263 (1949). It is clear, however, that whatever the proper scope of the policy expressed in *Bisso*,[17] it does not reach this case. *Bisso* rested on considerations with respect to the towage business strictly in

[17] *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697 (1963) (*per curiam*), merely followed *Bisso* and declined to subject its rule governing towage contracts in American waters to "indeterminate exceptions" based on delicate analysis of the facts of each case. See 372 U. S., at 698 (Harlan, J., concurring).

American waters, and those considerations are not controlling in an international commercial agreement. Speaking for the dissenting judges in the Court of Appeals, Judge Wisdom pointed out:

> "[W]e should be careful not to over-emphasize the strength of the [*Bisso*] policy. . . . [T]wo concerns underlie the rejection of exculpatory agreements: that they may be produced by overweening bargaining power; and that they do not sufficiently discourage negligence. . . . Here the conduct in question is that of a foreign party occurring in international waters outside our jurisdiction. The evidence disputes any notion of overreaching in the contractual agreement. And for all we know, the uncertainties and dangers in the new field of transoceanic towage of oil rigs were so great that the tower was unwilling to take financial responsibility for the risks, and the parties thus allocated responsibility for the voyage to the tow. It is equally possible that the contract price took this factor into account. I conclude that we should not invalidate the forum selection clause here unless we are firmly convinced that we would thereby significantly encourage negligent conduct within the boundaries of the United States." 428 F. 2d, at 907–908. (Footnotes omitted.)

Courts have also suggested that a forum clause, even though it is freely bargained for and contravenes no important public policy of the forum, may nevertheless be "unreasonable" and unenforceable if the chosen forum is *seriously* inconvenient for the trial of the action. Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.

We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. The remoteness of the forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement; yet even there the party claiming should bear a heavy burden of proof.[18] Similarly, selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum. For example, so long as *Bisso* governs American courts with respect to the towage business in American waters, it would quite arguably be improper to permit an American tower to avoid that policy by providing a foreign forum for resolution of his disputes with an American towee.

This case, however, involves a freely negotiated international commercial transaction between a German and an American corporation for towage of a vessel from the Gulf of Mexico to the Adriatic Sea. As noted, selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation. Whatever "inconvenience" Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly

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[18] See, *e. g.*, Model Choice of Forum Act § 3 (3), *supra*, n. 13, comment: "On rare occasions, the state of the forum may be a substantially more convenient place for the trial of a particular controversy than the chosen state. If so, the present clause would permit the action to proceed. This result will presumably be in accord with the desires of the parties. It can be assumed that they did not have the particular controversy in mind when they made the choice-of-forum agreement since they would not consciously have agreed to have the action brought in an inconvenient place."

foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

In the course of its ruling on Unterweser's second motion to stay the proceedings in Tampa, the District Court did make a conclusory finding that the balance of convenience was "strongly" in favor of litigation in Tampa. However, as previously noted, in making that finding the court erroneously placed the burden of proof on Unterweser to show that the balance of convenience was strongly in its favor.[19] Moreover, the finding falls far short of a conclusion that Zapata would be effectively deprived of its day in court should it be

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[19] Applying the proper burden of proof, Justice Karminski in the High Court of Justice at London made the following findings, which appear to have substantial support in the record:

"[Zapata] pointed out that in this case the balance of convenience so far as witnesses were concerned pointed in the direction of having the case heard and tried in the United States District Court at Tampa in Florida because the probability is that most, but not necessarily all, of the witnesses will be American. The answer, as it seems to me, is that a substantial minority at least of witnesses are likely to be German. The tug was a German vessel and was, as far as I know, manned by a German crew . . . . Where they all are now or are likely to be when this matter is litigated I do not know, because the experience of the Admiralty Court here strongly points out that maritime witnesses in the course of their duties move about freely. The homes of the German crew presumably are in Germany. There is probably a balance of numbers in favour of the Americans, but not, as I am inclined to think, a very heavy balance." App. 212.

It should also be noted that if the exculpatory clause is enforced in the English courts, many of Zapata's witnesses on the questions of negligence and damage may be completely unnecessary.

forced to litigate in London. Indeed, it cannot even be assumed that it would be placed to the expense of transporting its witnesses to London. It is not unusual for important issues in international admiralty cases to be dealt with by deposition. Both the District Court and the Court of Appeals majority appeared satisfied that Unterweser could receive a fair hearing in Tampa by using deposition testimony of its witnesses from distant places, and there is no reason to conclude that Zapata could not use deposition testimony to equal advantage if forced to litigate in London as it bound itself to do. Nevertheless, to allow Zapata opportunity to carry its heavy burden of showing not only that the balance of convenience is strongly in favor of trial in Tampa (that is, that it will be far more inconvenient for Zapata to litigate in London than it will be for Unterweser to litigate in Tampa), but also that a London trial will be so manifestly and gravely inconvenient to Zapata that it will be effectively deprived of a meaningful day in court, we remand for further proceedings.

Zapata's remaining contentions do not require extended treatment. It is clear that Unterweser's action in filing its limitation complaint in the District Court in Tampa was, so far as Zapata was concerned, solely a defensive measure made necessary as a response to Zapata's breach of the forum clause of the contract. When the six-month statutory period for filing an action to limit its liability had almost run without the District Court's having ruled on Unterweser's initial motion to dismiss or stay Zapata's action pursuant to the forum clause, Unterweser had no other prudent alternative but to protect itself by filing for limitation of its liability.[20] Its action in so doing was a direct consequence

[20] Zapata has suggested that Unterweser was not in any way required to file its "affirmative" limitation complaint because it

of Zapata's failure to abide by the forum clause of the towage contract. There is no basis on which to conclude that this purely necessary defensive action by Unterweser should preclude it from relying on the forum clause it bargained for.

For the first time in this litigation, Zapata has suggested to this Court that the forum clause should not be construed to provide for an exclusive forum or to include *in rem* actions. However, the language of the clause is clearly mandatory and all-encompassing; the language of the clause in the *Carbon Black* case was far different.[21]

The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

MR. JUSTICE WHITE, concurring.

I concur in the opinion and judgment of the Court except insofar as the opinion comments on the issues which are remanded to the District Court. In my view these issues are best left for consideration by the District Court in the first instance.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner Unterweser contracted with respondent to tow respondent's drilling barge from Louisiana to Italy. The towage contract contained a "forum selection clause"

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could just as easily have pleaded limitation of liability by way of defense in Zapata's initial action, either before or after the six-month period. That course of action was not without risk, however, that Unterweser's attempt to limit its liability by answer would be held invalid. See G. Gilmore & C. Black, Admiralty § 10–15 (1957). We do not believe this hazardous option in any way deprived Unterweser's limitation complaint of its essentially defensive character so far as Zapata was concerned.

[21] See 359 U. S., at 182.

providing that any dispute must be litigated before the High Court of Justice in London, England. While the barge was being towed in the Gulf of Mexico a casualty was suffered. The tow made for Tampa Bay, the nearest port, where respondent brought suit for damages in the District Court.

Petitioners sued respondent in the High Court of Justice in London, which denied respondent's motion to dismiss.

Petitioners, having previously moved the District Court to dismiss, filed a complaint in that court seeking exoneration or limitation of liability as provided in 46 U. S. C. § 185. Respondent filed its claim in the limitation proceedings, asserting the same cause of action as in its original action. Petitioners then filed objections to respondent's claim and counterclaimed against respondent, alleging the same claims embodied in its English action, plus an additional salvage claim.

Respondent moved for an injunction against petitioners' litigating further in the English case and the District Court granted the injunction pending determination of the limitation action. Petitioners moved to stay their own limitation proceeding pending a resolution of the suit in the English court. That motion was denied. 296 F. Supp. 733.

That was the posture of the case as it reached the Court of Appeals, petitioners appealing from the last two orders. The Court of Appeals affirmed. 428 F. 2d 888, 446 F. 2d 907.

Chief Justice Taft in *Hartford Accident Co.* v. *Southern Pacific,* 273 U. S. 207, 214, in discussing the Limitation of Liability Act said that "the great object of the statute was to encourage shipbuilding and to induce the investment of money in this branch of industry, by limiting the venture of those who build the ship to the loss of the ship itself or her freight then pending, in cases of damage or wrong, happening without the privity or

knowledge of the ship owner, and by the fault or neglect of the master or other persons on board; that the origin of this proceeding for limitation of liability is to be found in the general maritime law, differing from the English maritime law; and that such a proceeding is entirely within the constitutional grant of power to Congress to establish courts of admiralty and maritime jurisdiction."

Chief Justice Taft went on to describe how the owner of a vessel who, in case the vessel is found at fault, may limit his liability to the value of the vessel and may bring all claimants "into concourse in the proceeding, by monition" and they may be enjoined from suing the owner and the vessel on such claims in any other court. *Id.*, at 215.

Chief Justice Taft concluded: "[T]his Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. . . . The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy, and is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person." *Id.*, at 215–216.

The Limitation Court is a court of equity and traditionally an equity court may enjoin litigation in another court where equitable considerations indicate that the other litigation might prejudice the proceedings in the Limitation Court. Petitioners' petition for limitation

subjects them to the full equitable powers of the Limitation Court.

Respondent is a citizen of this country. Moreover, if it were remitted to the English court, its substantive rights would be adversely affected. Exculpatory provisions in the towage control provide (1) that petitioners, the masters and the crews "are not responsible for defaults and/or errors in the navigation of the tow" and (2) that "[d]amages suffered by the towed object are in any case for account of its Owners."

Under our decision in *Dixilyn Drilling Corp* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697, 698, "a contract which exempts the tower from liability for its own negligence" is not enforceable, though there is evidence in the present record that it is enforceable in England. That policy was first announced in *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85; and followed in *Boston Metals Co.* v. *The Winding Gulf*, 349 U. S. 122; *Dixilyn, supra; Gray* v. *Johansson*, 287 F. 2d 852 (CA5); *California Co.* v. *Jumonville*, 327 F. 2d 988 (CA5); *American S. S. Co.* v. *Great Lakes Towing Co.*, 333 F. 2d 426 (CA7); *D. R. Kincaid, Ltd.* v. *Trans-Pacific Towing, Inc.*, 367 F. 2d 857 (CA9); *A. L. Mechling Barge Lines, Inc.* v. *Derby Co.*, 399 F. 2d 304 (CA5). Cf. *United States* v. *Seckinger*, 397 U. S. 203. Although the casualty occurred on the high seas, the *Bisso* doctrine is nonetheless applicable. *The Scotland*, 105 U. S. 24; *The Belgenland*, 114 U. S. 355; *The Gylfe* v. *The Trujillo*, 209 F. 2d 386 (CA2).

Moreover, the casualty occurred close to the District Court, a number of potential witnesses, including respondent's crewmen, reside in that area, and the inspection and repair work were done there. The testimony of the tower's crewmen, residing in Germany, is already available by way of depositions taken in the proceedings.

All in all, the District Court judge exercised his discretion wisely in enjoining petitioners from pursuing the litigation in England.*

I would affirm the judgment below.

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*It is said that because these parties specifically agreed to litigate their disputes before the London Court of Justice, the District Court, absent "unreasonable" circumstances, should have honored that choice by declining to exercise its jurisdiction. The forum-selection clause, however, is part and parcel of the exculpatory provision in the towing agreement which, as mentioned in the text, is not enforceable in American courts. For only by avoiding litigation in the United States could petitioners hope to evade the *Bisso* doctrine.

Judges in this country have traditionally been hostile to attempts to circumvent the public policy against exculpatory agreements. For example, clauses specifying that the law of a foreign place (which favors such releases) should control have regularly been ignored. Thus, in *The Kensington,* 183 U. S. 263, 276, the Court held void an exemption from liability despite the fact that the contract provided that it should be construed under Belgian law which was more tolerant. And see *E. Gerli & Co.* v. *Cunard S. S. Co.,* 48 F. 2d 115, 117 (CA2); *Oceanic Steam Nav. Co.* v. *Corcoran,* 9 F. 2d 724, 731 (CA2); *In re Lea Fabrics, Inc.,* 226 F. Supp. 232, 237 (NJ); *F. A. Straus & Co.* v. *Canadian P. R. Co.,* 254 N. Y. 407, 173 N. E. 564; *Siegelman* v. *Cunard White Star,* 221 F. 2d 189, 199 (CA2) (Frank, J., dissenting). 6A A. Corbin on Contracts § 1446 (1962).

The instant stratagem of specifying a foreign forum is essentially the same as invoking a foreign law of construction except that the present circumvention also requires the American party to travel across an ocean to seek relief. Unless we are prepared to overrule *Bisso* we should not countenance devices designed solely for the purpose of evading its prohibition.

It is argued, however, that one of the rationales of the *Bisso* doctrine, "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains" (349 U. S., at 91), does not apply here because these parties may have been of equal bargaining stature. Yet we have often adopted prophylactic rules rather than attempt to sort the core cases from the marginal ones. In any event, the other objective of the *Bisso* doctrine, to "discourage negligence by making wrongdoers pay damages" (*ibid.*) applies here and in every case regardless of the relative bargaining strengths of the parties.

Syllabus

ARGERSINGER *v.* HAMLIN, SHERIFF

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 70–5015. Argued December 6, 1971—Reargued February 28, 1972—Decided June 12, 1972

The right of an indigent defendant in a criminal trial to the assistance of counsel, which is guaranteed by the Sixth Amendment as made applicable to the States by the Fourteenth, *Gideon* v. *Wainwright,* 372 U. S. 335, is not governed by the classification of the offense or by whether or not a jury trial is required. No accused may be deprived of his liberty as the result of any criminal prosecution, whether felony or misdemeanor, in which he was denied the assistance of counsel. In this case, the Supreme Court of Florida erred in holding that petitioner, an indigent who was tried for an offense punishable by imprisonment up to six months, a $1,000 fine, or both, and given a 90-day jail sentence, had no right to court-appointed counsel, on the ground that the right extends only to trials "for non-petty offenses punishable by more than six months imprisonment." Pp. 27–40.

236 So. 2d 442, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a concurring opinion, in which DOUGLAS and STEWART, JJ., joined, *post,* p. 40. BURGER, C. J., filed an opinion concurring in the result, *post,* p. 41. POWELL, J., filed an opinion concurring in the result, in which REHNQUIST, J., joined, *post,* p. 44.

Bruce S. Rogow argued the cause for petitioner on the reargument and *J. Michael Shea* argued the cause *pro hac vice* on the original argument. With them on the brief was *P. A. Hubbart.*

George R. Georgieff, Assistant Attorney General of Florida, reargued the cause for respondent. With him on the brief were *Robert L. Shevin,* Attorney General, and *Raymond L. Marky,* Assistant Attorney General, joined by the Attorneys General for their respective States as follows: *Gary K. Nelson* of Arizona, *Arthur K.*

Bolton of Georgia, *W. Anthony Park* of Idaho, *Jack P. F. Gremillion* of Louisiana, *James S. Erwin* of Maine, *Robert L. Woodahl* of Montana, *Robert List* of Nevada, *Robert Morgan* of North Carolina, *Helgi Johanneson* of North Dakota, and *Daniel R. McLeod* of South Carolina.

Solicitor General Griswold argued the cause for the United States as *amicus curiae* on the reargument urging reversal. With him on the brief were *Assistant Attorney General Petersen, Deputy Solicitor General Greenawalt, Harry R. Sachse, Beatrice Rosenberg,* and *Sidney M. Glazer.*

Briefs of *amici curiae* urging reversal were filed by *William E. Hellerstein* for the Legal Aid Society of New York, and by *Marshall J. Hartman* for the National Legal Aid and Defender Association.

Lauren Beasley, Chief Assistant Attorney General of Utah, filed a brief for the Attorney General of Utah as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *John E. Havelock,* Attorney General, for the State of Alaska, and by *Andrew P. Miller,* Attorney General, and *Vann H. Lefcoe,* Assistant Attorney General, for the Commonwealth of Virginia.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, an indigent, was charged in Florida with carrying a concealed weapon, an offense punishable by imprisonment up to six months, a $1,000 fine, or both. The trial was to a judge, and petitioner was unrepresented by counsel. He was sentenced to serve 90 days in jail, and brought this habeas corpus action in the Florida Supreme Court, alleging that, being deprived of his right to counsel, he was unable as an indigent layman properly to raise and present to the trial court good and sufficient defenses to the charge for which he stands convicted. The Florida

Supreme Court by a four-to-three decision, in ruling on the right to counsel, followed the line we marked out in *Duncan* v. *Louisiana,* 391 U. S. 145, 159, as respects the right to trial by jury and held that the right to court-appointed counsel extends only to trials "for non-petty offenses punishable by more than six months imprisonment." 236 So. 2d 442, 443.[1]

The case is here on a petition for certiorari, which we granted. 401 U. S. 908. We reverse.

The Sixth Amendment, which in enumerated situations has been made applicable to the States by reason of the Fourteenth Amendment (see *Duncan* v. *Louisiana, supra; Washington* v. *Texas,* 388 U. S. 14; *Klopfer* v. *North Carolina,* 386 U. S. 213; *Pointer* v. *Texas,* 380 U. S. 400; *Gideon* v. *Wainwright,* 372 U. S. 335; and *In re Oliver,* 333 U. S. 257), provides specified standards for "all criminal prosecutions."

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[1] For a survey of the opinions of judges, prosecutors, and defenders concerning the right to counsel of persons charged with misdemeanors, see 1 L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 127–135 (1965).

A review of federal and state decisions following *Gideon* is contained in Comment, Right to Counsel: The Impact of *Gideon* v. *Wainwright* in the Fifty States, 3 Creighton L. Rev. 103 (1970).

Twelve States provide counsel for indigents accused of "serious crime" in the misdemeanor category. *Id.,* at 119–124.

Nineteen States provide for the appointment of counsel in most misdemeanor cases. *Id.,* at 124–133. One of these is Oregon, whose Supreme Court said in *Stevenson* v. *Holzman,* 254 Ore. 94, 100–101, 458 P. 2d 414, 418, "If our objective is to insure a fair trial in every criminal prosecution the need for counsel is not determined by the seriousness of the crime. The assistance of counsel will best avoid conviction of the innocent—an objective as important in the municipal court as in a court of general jurisdiction."

California's requirement extends to traffic violations. *Blake* v. *Municipal Court,* 242 Cal. App. 2d 731, 51 Cal. Rptr. 771.

Overall, 31 States have now extended the right to defendants charged with crimes less serious than felonies. Comment, Right to Counsel, *supra,* at 134.

One is the requirement of a "public trial." *In re Oliver, supra,* held that the right to a "public trial" was applicable to a state proceeding even though only a 60-day sentence was involved. 333 U. S., at 272.

Another guarantee is the right to be informed of the nature and cause of the accusation. Still another, the right of confrontation. *Pointer* v. *Texas, supra.* And another, compulsory process for obtaining witnesses in one's favor. *Washington* v. *Texas, supra.* We have never limited these rights to felonies or to lesser but serious offenses.

In *Washington* v. *Texas, supra,* we said, "We have held that due process requires that the accused have the assistance of counsel for his defense, that he be confronted with the witnesses against him, and that he have the right to a speedy and public trial." 388 U. S., at 18. Respecting the right to a speedy and public trial, the right to be informed of the nature and cause of the accusation, the right to confront and cross-examine witnesses, the right to compulsory process for obtaining witnesses, it was recently stated, "It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf." Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 705 (1968).

District of Columbia v. *Clawans,* 300 U. S. 617, illustrates the point. There, the offense was engaging without a license in the business of dealing in second-hand property, an offense punishable by a fine of $300 or imprisonment for not more than 90 days. The Court held that the offense was a "petty" one and could be tried without a jury. But the conviction was reversed

and a new trial ordered, because the trial court had prejudicially restricted the right of cross-examination, a right guaranteed by the Sixth Amendment.

The right to trial by jury, also guaranteed by the Sixth Amendment by reason of the Fourteenth, was limited by *Duncan* v. *Louisiana, supra,* to trials where the potential punishment was imprisonment for six months or more. But, as the various opinions in *Baldwin* v. *New York,* 399 U. S. 66, make plain, the right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone. As stated in *Duncan:*

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States." 391 U. S., at 156.

While there is historical support for limiting the "deep commitment" to trial by jury to "serious criminal cases," [2] there is no such support for a similar limitation on the right to assistance of counsel:

> "Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel. . . .
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> . . . . . .
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> "[It] appears that in at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes . . . ." *Powell* v. *Alabama,* 287 U. S. 45, 60, 64–65.

The Sixth Amendment thus extended the right to counsel beyond its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided. See *James* v. *Headley,* 410 F. 2d 325, 331–332, n. 9.

We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than

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[2] See Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 980–982 (1926); *James* v. *Headley,* 410 F. 2d 325, 331. Cf. Kaye, Petty Offenders Have No Peers!, 26 U. Chi. L. Rev. 245 (1959).

six months may be tried without a jury, they may also be tried without a lawyer.

The assistance of counsel is often a requisite to the very existence of a fair trial. The Court in *Powell* v. *Alabama, supra,* at 68–69—a capital case—said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

In *Gideon* v. *Wainwright, supra* (overruling *Betts* v. *Brady,* 316 U. S. 455), we dealt with a felony trial. But we did not so limit the need of the accused for a lawyer. We said:

> "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and fed-

> eral, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." 372 U. S., at 344.[3]

Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty. *Powell* and *Gideon* suggest that there are certain fundamental rights applicable to all such criminal prosecutions, even those, such

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[3] See also *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463:

"[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is [re]presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious."

as *In re Oliver, supra,* where the penalty is 60 days' imprisonment:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, *and to be represented by counsel.*" 333 U. S., at 273 (emphasis supplied).

The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more. See, *e. g., Powell* v. *Texas,* 392 U. S. 514; *Thompson* v. *Louisville,* 362 U. S. 199; *Shuttlesworth* v. *Birmingham,* 382 U. S. 87.

The trial of vagrancy cases is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions. See *Papachristou* v. *Jacksonville,* 405 U. S. 156.

In re Gault, 387 U. S. 1, dealt with juvenile delinquency and an offense which, if committed by an adult, would have carried a fine of $5 to $50 or imprisonment in jail for not more than two months (*id.,* at 29), but which when committed by a juvenile might lead to his detention in a state institution until he reached the age of 21. *Id.,* at 36–37. We said (*id.,* at 36) that "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of coun-

sel at every step in the proceedings against him,' " citing *Powell* v. *Alabama,* 287 U. S., at 69. The premise of *Gault* is that even in prosecutions for offenses less serious than felonies, a fair trial may require the presence of a lawyer.

Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

In addition, the volume of misdemeanor cases,[4] far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result. The Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 128 (1967), states:

> "For example, until legislation last year increased the number of judges, the District of Columbia Court of General Sessions had four judges to process the preliminary stages of more than 1,500 felony cases, 7,500 serious misdemeanor cases, and 38,000 petty offenses and an equal number of traffic offenses per year. An inevitable consequence of volume that large is the almost total preoccupa-

[4] In 1965, 314,000 defendants were charged with felonies in state courts, and 24,000 were charged with felonies in federal courts. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 55 (1967). Exclusive of traffic offenses, however, it is estimated that there are annually between four and five million court cases involving misdemeanors. *Ibid.* And, while there are no authoritative figures, extrapolations indicate that there are probably between 40.8 and 50 million traffic offenses each year. Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L. Rev. 1249, 1261 (1970).

tion in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure. As Dean Edward Barrett recently observed:

" 'Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases as they take their initial looks at the files. Defense lawyers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything, longer, and so there is no choice but to dispose of the cases.

" 'Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.

" 'Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills.' "

That picture is seen in almost every report. "The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush." Hellerstein, The Importance of the Mis-

demeanor Case on Trial and Appeal, 28 The Legal Aid Brief Case 151, 152 (1970).

There is evidence of the prejudice which results to misdemeanor defendants from this "assembly-line justice." One study concluded that "[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970).

We must conclude, therefore, that the problems associated with misdemeanor and petty [5] offenses often

[5] Title 18 U. S. C. § 1 defines a petty offense as one in which the penalty does not exceed imprisonment for six months, or a fine of not more than $500, or both. Title 18 U. S. C. § 3006A (b) provides for the appointment of counsel for indigents in all cases "other than a petty offense." But, as the Court of Appeals for the Fifth Circuit noted in *James* v. *Headley*, 410 F. 2d, at 330–331, 18 U. S. C. § 3006A, which was enacted as the Criminal Justice Act of 1964, contains a congressional plan for furnishing legal representation at federal expense for certain indigents and does not purport to cover the full range of constitutional rights to counsel.

Indeed, the Conference Report on the Criminal Justice Act of 1964 made clear the conferees' belief that the right to counsel extends to all offenses, petty and serious alike. H. R. Conf. Rep. No. 1709, 88th Cong., 2d Sess. (1964).

In that connection, the Federal Rules of Criminal Procedure, as amended in 1966, provide in Rule 44 (a): "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment."

The Advisory Committee note on Rule 44 says: "Like the original rule the amended rule provides a right to counsel which is broader in two respects than that for which compensation is provided in the Criminal Justice Act of 1964:

"(1) The right extends to petty offenses to be tried in the district courts, and

"(2) The right extends to defendants unable to obtain counsel for reasons other than financial."

require the presence of counsel to insure the accused a fair trial. MR. JUSTICE POWELL suggests that these problems are raised even in situations where there is no prospect of imprisonment. *Post,* at 48. We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail. And, as we said in *Baldwin* v. *New York,* 399 U. S., at 73, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation." [6]

We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.[7]

That is the view of the Supreme Court of Oregon, with which we agree. It said in *Stevenson* v. *Holzman,* 254 Ore. 94, 102, 458 P. 2d 414, 418:

"We hold that no person may be deprived of his

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[6] See *Marston* v. *Oliver,* 324 F. Supp. 691, 696 (ED Va. 1971): "Any incarceration of over thirty days, more or less, will usually result in loss of employment, with a consequent substantial detriment to the defendant and his family."

[7] We do not share MR. JUSTICE POWELL'S doubt that the Nation's legal resources are sufficient to implement the rule we announce today. It has been estimated that between 1,575 and 2,300 full-time counsel would be required to represent *all* indigent misdemeanants, excluding traffic offenders. Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L. Rev. 1249, 1260–1261 (1970). These figures are relatively insignificant when compared to the estimated 355,200 attorneys in the United States (Statistical Abstract of the United States 153 (1971)), a number which is projected to double by the year 1985. See Ruud, That Burgeoning Law School Enrollment, 58 A. B. A. J. 146, 147. Indeed, there are 18,000 new admissions to the bar each year—3,500 more lawyers than are required to fill the "estimated 14,500 average annual openings." *Id.,* at 148.

> liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of the assistance of counsel will preclude the imposition of a jail sentence." [8]

We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement. How crimes should be classified is largely a state matter.[9] The fact that traffic charges technically fall within the category of "criminal prosecutions" does not necessarily mean that many of them will be brought into the class [10] where imprisonment actually occurs.

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[8] Article I, § 9, of the proposed Revised Constitution of Oregon provides:

"Every person has the right to assistance of counsel in all official proceedings and dealings with public officers that may materially affect him. If he cannot afford counsel, he has the right to have counsel appointed for him in any case in which he may lose his liberty."

[9] One partial solution to the problem of minor offenses may well be to remove them from the court system. The American Bar Association Special Committee on Crime Prevention and Control recently recommended, *inter alia,* that:

"Regulation of various types of conduct which harm no one other than those involved (e. g., public drunkenness, narcotics addiction, vagrancy, and deviant sexual behavior) should be taken out of the courts. The handling of these matters should be transferred to nonjudicial entities, such as detoxification centers, narcotics treatment centers and social service agencies. The handling of other nonserious offenses, such as housing code and traffic violations, should be transferred to specialized administrative bodies." ABA Report, New Perspectives on Urban Crime iv (1972). Such a solution, of course, is peculiarly within the province of state and local legislatures.

[10] "Forty thousand traffic charges (arising out of 150,000 nonparking traffic citations) were disposed of by court action in Seattle during 1964. The study showed, however, that in only about 4,500 cases was there any possibility of imprisonment as the result of a

The American Bar Association Project on Standards for Criminal Justice states:

> "As a matter of sound judicial administration it is preferable to disregard the characterization of the offense as felony, misdemeanor or traffic offense. Nor is it adequate to require the provision of defense services for all offenses which carry a sentence to jail or prison. Often, as a practical matter, such sentences are rarely if ever imposed for certain types of offenses, so that for all intents and purposes the punishment they carry is at most a fine. Thus, the standard seeks to distinguish those classes of cases in which there is real likelihood that incarceration may follow conviction from those types in which there is no such likelihood. It should be noted that the standard does not recommend a determination of the need for counsel in terms of the facts of each particular case; it draws a categorical line at those *types* of offenses for which incarceration as a punishment is a practical possibility." Providing Defense Services 40 (Approved Draft 1968).

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traffic conviction. In only three kinds of cases was the accused exposed to any danger of imprisonment: (1) where the offense charged was hit-and-run, reckless or drunken driving; or (2) where any additional traffic violation was charged against an individual subject to a suspended sentence for a previous violation; or (3) where, whatever the offense charged, the convicted individual was unable to pay the fine imposed." Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 711 (1968).

Of the 1,288,975 people convicted by the City of New York in 1970 for traffic infractions such as jaywalking and speeding, only 24 were fined and imprisoned, given suspended sentences, or jailed. Criminal Court of the City of New York Annual Report 11 (1970). Of the 19,187 convicted of more serious traffic offenses, such as driving under the influence, reckless driving, and leaving the scene of an accident, 404 (2.1%) were subject to some form of imprisonment. *Ibid.*

Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join, concurring.

I join the opinion of the Court and add only an observation upon its discussion of legal resources, *ante,* at 37 n. 7. Law students as well as practicing attorneys may provide an important source of legal representation for the indigent. The Council on Legal Education for Professional Responsibility (CLEPR) informs us that more than 125 of the country's 147 accredited law schools have established clinical programs in which faculty-supervised students aid clients in a variety of civil and criminal matters.* CLEPR Newsletter, May 1972, p. 2. These programs supplement practice rules enacted in 38 States authorizing students to practice law under prescribed conditions. *Ibid.* Like the American Bar Association's Model Student Practice Rule (1969), most of these regulations permit students to make supervised

*A total of 57 law schools have also established clinical programs in corrections, where law students, under faculty supervision, aid prisoners in the preparation of petitions for post-conviction relief. CLEPR Newsletter, May 1972, p. 3. See *United States* v. *Simpson,* 141 U. S. App. D. C. 8, 15–16, 436 F. 2d 162, 169–170 (1970).

court appearances as defense counsel in criminal cases. CLEPR, State Rules Permitting the Student Practice of Law: Comparisons and Comments 13 (1971). Given the huge increase in law school enrollments over the past few years, see Ruud, That Burgeoning Law School Enrollment, 58 A. B. A. J. 146 (1972), I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision.

MR. CHIEF JUSTICE BURGER, concurring in the result.

I agree with much of the analysis in the opinion of the Court and with MR. JUSTICE POWELL's appraisal of the problems. Were I able to confine my focus solely to the burden that the States will have to bear in providing counsel, I would be inclined, at this stage of the development of the constitutional right to counsel, to conclude that there is much to commend drawing the line at penalties in excess of six months' confinement. Yet several cogent factors suggest the infirmities in any approach that allows confinement for any period without the aid of counsel at trial; any deprivation of liberty is a serious matter. The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be simpler than those involved in a felony trial and yet be beyond the capability of a layman, especially when he is opposed by a law-trained prosecutor. There is little ground, therefore, to assume that a defendant, unaided by counsel, will be any more able adequately to defend himself against the lesser charges that may involve confinement than more serious charges. Appeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record.

Trial judges sitting in petty and misdemeanor cases—and prosecutors—should recognize exactly what will be required by today's decision. Because no individual can be imprisoned unless he is represented by counsel, the trial judge and the prosecutor will have to engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term. The judge can preserve the option of a jail sentence only by offering counsel to any defendant unable to retain counsel on his own. This need to predict will place a new load on courts already overburdened and already compelled to deal with far more cases in one day than is reasonable and proper. Yet the prediction is not one beyond the capacity of an experienced judge, aided as he should be by the prosecuting officer. As to jury cases, the latter should be prepared to inform the judge as to any prior record of the accused, the general nature of the case against the accused, including any use of violence, the severity of harm to the victim, the impact on the community, and the other factors relevant to the sentencing process. Since the judge ought to have some degree of such information after judgment of guilt is determined, ways can be found in the more serious misdemeanor cases when jury trial is not waived to make it available to the judge before trial.* This will not mean a full "presentence" report on every defendant in every case before the jury passes on guilt, but a prosecutor should know before trial whether he intends to urge a jail sentence, and if he does he should be prepared to aid the court with the factual and legal basis for his view on that score.

*In a nonjury case the prior record of the accused should not be made known to the trier of fact except by way of traditional impeachment.

This will mean not only that more defense counsel must be provided, but also additional prosecutors and better facilities for securing information about the accused as it bears on the probability of a decision to confine.

The step we take today should cause no surprise to the legal profession. More than five years ago the profession, speaking through the American Bar Association in a Report on Standards Relating to Providing Defense Services, determined that society's goal should be "that the *system* for providing counsel and facilities for the defense be as good as the system which society provides for the prosecution." American Bar Association Project on Standards for Criminal Justice, Providing Defense Services 1 (Approved Draft 1968). The ABA was not addressing itelf, as we must in this case, to the constitutional requirement but only to the broad policy issue. Elsewhere in the Report the ABA stated that:

> "The fundamental premise of these standards is that representation by counsel is desirable in criminal cases both from the viewpoint of the defendant and of society." *Id.*, at 3.

After considering the same general factors involved in the issue we decide today, the ABA Report specifically concluded that:

> "Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise." *Id.*, § 4.1, pp. 37–38.

In a companion ABA Report on Standards Relating to the Prosecution Function and the Defense Function

the same basic theme appears in the positive standard cast in these terms:

> "Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused." *Id.*, at 153 (Approved Draft 1968).

The right to counsel has historically been an evolving concept. The constitutional requirements with respect to the issue have dated in recent times from *Powell* v. *Alabama,* 287 U. S. 45 (1932), to *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). Part of this evolution has been expressed in the policy prescriptions of the legal profession itself, and the contributions of the organized bar and individual lawyers—such as those appointed to represent the indigent defendants in the *Powell* and *Gideon* cases—have been notable. The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in the result.

Gideon v. *Wainwright,* 372 U. S. 335 (1963), held that the States were required by the Due Process Clause of the Fourteenth Amendment to furnish counsel to all indigent defendants charged with felonies.[1] The ques-

[1] While it is true that Mr. Justice Black's opinion for the Court in *Gideon* is not narrowly written, Mr. Justice Harlan was quick to suggest, in his concurring opinion, that the facts in *Gideon* did not require the Court to decide whether the indigent's right to appointed counsel should extend to all criminal cases. 372 U. S., at 351. In opinions announced more recently, the Court has assumed

tion before us today is whether an indigent defendant convicted of an offense carrying a maximum punishment of six months' imprisonment, a fine of $1,000, or both, and sentenced to 90 days in jail, is entitled as a matter of constitutional right to the assistance of appointed counsel. The broader question is whether the Due Process Clause requires that an indigent charged with a state petty offense [2] be afforded the right to appointed counsel.

In the case under review, the Supreme Court of Florida agreed that indigents charged with serious misdemeanors were entitled to appointed counsel, but, by a vote of four to three, it limited that right to offenses punishable by more than six months' imprisonment.[3] The state court, in drawing a six-month line, followed the lead of this Court in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), and in the subsequent case of *Baldwin* v. *New York,* 399 U. S. 66 (1970), which was decided shortly after the opinion below, in which the Court held that the due process right to a trial by jury in state criminal cases was limited to cases in which the offense charged was punishable by more than six months' imprisonment. It is clear that wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent

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that the holding of *Gideon* has not yet been extended to misdemeanor cases. See *In re Gault,* 387 U. S. 1, 29 (1967); *Mempa* v. *Rhay,* 389 U. S. 128, 134 (1967); *Burgett* v. *Texas,* 389 U. S. 109, 114 (1967); *Loper* v. *Beto,* 405 U. S. 473 (1972).

[2] As used herein, the term "petty offense" means any offense where the authorized imprisonment does not exceed six months, *Baldwin* v. *New York,* 399 U. S. 66, 69 (1970). It also includes all offenses not punishable by imprisonment, regardless of the amount of any fine that might be authorized. To this extent, the definition used herein differs from the federal statutory definition of "petty offense," which includes offenses punishable by not more than six months' imprisonment or by a fine not exceeding $500. 18 U. S. C. § 1.

[3] 236 So. 2d 442 (1970).

has a right to appointed counsel in all cases in which there is a due process right to a jury trial. An unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together unassembled facts, but before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant. If there is no accompanying right to counsel, the right to trial by jury becomes meaningless.

Limiting the right to jury trial to cases in which the offense charged is punishable by more than six months' imprisonment does not compel the conclusion that the indigent's right to appointed counsel must be similarly restricted. The Court's opinions in *Duncan, Baldwin,* and *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937), reveal that the jury-trial limitation has historic origins at common law. No such history exists to support a similar limitation of the right to counsel; to the contrary, at common law, the right to counsel was available in misdemeanor but not in felony cases.[4] Only as recently as *Gideon* has an indigent in a state trial had a right to appointed counsel in felony cases. Moreover, the interest protected by the right to have guilt or innocence determined by a jury—tempering the possibly arbitrary and harsh exercise of prosecutorial and judicial power[5]—while important, is not as fundamental to the guarantee of a fair trial as is the right to counsel.[6]

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[4] See *Powell* v. *Alabama,* 287 U. S. 45, 60–61 (1932).

[5] *Duncan* v. *Louisiana,* 391 U. S. 145, 156 (1968).

[6] Although we have given retroactive effect to our ruling in *Gideon, Pickelsimer* v. *Wainwright,* 375 U. S. 2 (1963), we have said that, "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *DeStefano* v. *Woods,* 392 U. S. 631, 634 (1968).

I am unable to agree with the Supreme Court of Florida that an indigent defendant, charged with a petty offense, may in every case be afforded a fair trial without the assistance of counsel. Nor can I agree with the new rule of due process, today enunciated by the Court, that "absent a knowing and intelligent waiver, no person may be imprisoned . . . unless he was represented by counsel at his trial." *Ante,* at 37. It seems to me that the line should not be drawn with such rigidity.

There is a middle course, between the extremes of Florida's six-month rule and the Court's rule, which comports with the requirements of the Fourteenth Amendment. I would adhere to the principle of due process that requires fundamental fairness in criminal trials, a principle which I believe encompasses the right to counsel in petty cases whenever the assistance of counsel is necessary to assure a fair trial.

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I am in accord with the Court that an indigent accused's need for the assistance of counsel does not mysteriously evaporate when he is charged with an offense punishable by six months or less. In *Powell* v. *Alabama*[7] and *Gideon,*[8] both of which involved felony prosecutions, this Court noted that few laymen can present adequately their own cases, much less identify and argue relevant legal questions. Many petty offenses will also present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel. Even in relatively simple cases, some defendants, because of ignorance or some other handicap, will be incapable of defending themselves. The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable con-

[7] *Supra,* n. 4, at 68–69.

[8] 372 U. S., at 343–345.

ditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label "petty." [9]

Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken-driving conviction or a hit-and-run escapade.[10] Losing one's driver's license is more serious for some individuals than a brief stay in jail. In *Bell* v. *Burson*, 402 U. S. 535 (1971), we said:

> "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.*, at 539.

When the deprivation of property rights and interests is of sufficient consequence,[11] denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process.

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[9] See 1 L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 132 (1965).

[10] See *James* v. *Headley*, 410 F. 2d 325, 334–335 (CA5 1969).

[11] A wide range of civil disabilities may result from misdemeanor convictions, such as forfeiture of public office (*State ex rel. Stinger* v. *Kruger*, 280 Mo. 293, 217 S. W. 310 (1919)), disqualification for a licensed profession (Cal. Bus. & Prof. Code § 3094 (1962) (optometrists); N. C. Gen. Stat. § 93A–4 (b) (1965) (real estate brokers)), and loss of pension rights (Fla. Stat. Ann. § 185.18 (3) (1966) (police disability pension denied when injury is result of participation in fights, riots, civil insurrections, or while committing crime); Ind. Ann. Stat. § 28–4616 (1948) (teacher convicted of misdemeanor resulting in imprisonment); Pa. Stat. Ann., Tit. 53, § 39323 (Supp. 1972–1973) and § 65599 (1957) (conviction of crime or misdemeanor)). See generally Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929 (1970).

This is not to say that due process requires the appointment of counsel in all petty cases, or that assessment of the possible consequences of conviction is the sole test for the need for assistance of counsel. The flat six-month rule of the Florida court and the equally inflexible rule of the majority opinion apply to *all* cases within their defined areas regardless of circumstances. It is precisely because of this mechanistic application that I find these alternatives unsatisfactory. Due process, perhaps the most fundamental concept in our law, embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial. While counsel is often essential to a fair trial, this is by no means a universal fact. Some petty offense cases are complex; others are exceedingly simple. As a justification for furnishing counsel to indigents accused of felonies, this Court noted, "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." [12] Yet government often does not hire lawyers to prosecute petty offenses; instead the arresting police officer presents the case. Nor does every defendant who can afford to do so hire lawyers to defend petty charges. Where the possibility of a jail sentence is remote and the probable fine seems small, or where the evidence of guilt is overwhelming, the costs of assistance of counsel may exceed the benefits.[13] It is anomalous that the Court's opinion today will extend

[12] *Gideon* v. *Wainwright,* 372 U. S., at 344.

[13] In petty offenses, there is much less plea negotiation than in serious offenses. See Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (hereinafter Challenge) 134 (1967). Thus, in cases where the evidence of guilt is overwhelming, the assistance of counsel is less essential to obtain a lighter sentence.

the right of appointed counsel to indigent defendants in cases where the right to counsel would rarely be exercised by nonindigent defendants.

Indeed, one of the effects of this ruling will be to favor defendants classified as indigents over those not so classified, yet who are in low-income groups where engaging counsel in a minor petty-offense case would be a luxury the family could not afford. The line between indigency and assumed capacity to pay for counsel is necessarily somewhat arbitrary, drawn differently from State to State and often resulting in serious inequities to accused persons. The Court's new rule will accent the disadvantage of being barely self-sufficient economically.

A survey of state courts in which misdemeanors are tried showed that procedures were often informal, presided over by lay judges. Jury trials were rare, and the prosecution was not vigorous.[14] It is as inaccurate to say that no defendant can obtain a fair trial without the assistance of counsel in such courts as it is to say that no defendant needs the assistance of counsel if the offense charged is only a petty one.[15]

Despite its overbreadth, the easiest solution would be a prophylactic rule that would require the appointment of counsel to indigents in all criminal cases. The simplicity of such a rule is appealing because it could be

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[14] Silverstein, *supra,* n. 9, at 125–126.

[15] Neither the Report by the President's Commission on Law Enforcement and Administration of Justice nor the American Bar Association went the route the Court takes today. The President's Commission recommended that counsel be provided for criminal defendants who face "a significant penalty" and at least to those who are in danger of "substantial loss of liberty." Challenge, *supra,* n. 13, at 150. The American Bar Association standard would not extend the right to counsel to cases where "loss of liberty" is not "likely to be imposed." American Bar Association Project on Standards for Criminal Justice, Providing Defense Services 37–40 (Approved Draft 1968). Neither supports a new, inflexible constitutional rule.

applied automatically in every case, but the price of pursuing this easy course could be high indeed in terms of its adverse impact on the administration of the criminal justice systems of 50 States. This is apparent when one reflects on the wide variety of petty or misdemeanor offenses, the varying definitions thereof, and the diversity of penalties prescribed. The potential impact on state court systems is also apparent in view of the variations in types of courts and their jurisdictions, ranging from justices of the peace and part-time judges in the small communities to the elaborately staffed police courts which operate 24 hours a day in the great metropolitan centers.

The rule adopted today does not go all the way. It is limited to petty-offense cases in which the sentence is some imprisonment. The thrust of the Court's position indicates, however, that when the decision must be made, the rule will be extended to all petty-offense cases except perhaps the most minor traffic violations. If the Court rejects on constitutional grounds, as it has today, the exercise of any judicial discretion as to need for counsel if a jail sentence is imposed, one must assume a similar rejection of discretion in other petty-offense cases. It would be illogical—and without discernible support in the Constitution—to hold that no discretion may ever be exercised where a nominal jail sentence is contemplated and at the same time endorse the legitimacy of discretion in "non-jail" petty-offense cases which may result in far more serious consequences than a few hours or days of incarceration.

The Fifth and Fourteenth Amendments guarantee that property, as well as life and liberty, may not be taken from a person without affording him due process of law. The majority opinion suggests no constitutional basis for distinguishing between deprivations of liberty and property. In fact, the majority suggests no reason at

all for drawing this distinction. The logic it advances for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed. Nor does the majority deny that some "non-jail" penalties are more serious than brief jail sentences.

Thus, although the new rule is extended today only to the imprisonment category of cases, the Court's opinion foreshadows the adoption of a broad prophylactic rule applicable to all petty offenses. No one can foresee the consequences of such a drastic enlargement of the constitutional right to free counsel. But even today's decision could have a seriously adverse impact upon the day-to-day functioning of the criminal justice system. We should be slow to fashion a new constitutional rule with consequences of such unknown dimensions, especially since it is supported neither by history nor precedent.

II

The majority opinion concludes that, absent a valid waiver, a person may not be imprisoned even for lesser offenses unless he was represented by counsel at the trial. In simplest terms this means that under no circumstances, in any court in the land, may anyone be imprisoned—however briefly—unless he was represented by, or waived his right to, counsel. The opinion is disquietingly barren of details as to how this rule will be implemented.

There are thousands of statutes and ordinances which authorize imprisonment for six months or less, usually as an alternative to a fine. These offenses include some of the most trivial of misdemeanors, ranging from spitting on the sidewalk to certain traffic offenses. They also include a variety of more serious misdemeanors. This broad spectrum of petty-offense cases daily floods the lower criminal courts. The rule laid down today

will confront the judges of each of these courts with an awkward dilemma. If counsel is not appointed or knowingly waived, no sentence of imprisonment for any duration may be imposed. The judge will therefore be forced to decide in advance of trial—and without hearing the evidence—whether he will forgo entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature. His alternatives, assuming the availability of counsel, will be to appoint counsel and retain the discretion vested in him by law, or to abandon this discretion in advance and proceed without counsel.

If the latter course is followed, the first victim of the new rule is likely to be the concept that justice requires a personalized decision both as to guilt and the sentence. The notion that sentencing should be tailored to fit the crime and the individual would have to be abandoned in many categories of offenses. In resolving the dilemma as to how to administer the new rule, judges will be tempted arbitrarily to divide petty offenses into two categories—those for which sentences of imprisonment may be imposed and those in which no such sentence will be given regardless of the statutory authorization. In creating categories of offenses which by law are imprisonable but for which he would not impose jail sentences, a judge will be overruling *de facto* the legislative determination as to the appropriate range of punishment for the particular offense. It is true, as the majority notes, that there are some classes of imprisonable offenses for which imprisonment is rarely imposed. But even in these, the occasional imposition of such a sentence may serve a valuable deterrent purpose. At least the legislatures, and until today the courts, have viewed the threat of

imprisonment—even when rarely carried out—as serving a legitimate social function.

In the brief for the United States as *amicus curiae*, the Solicitor General suggested that some flexibility could be preserved through the technique of trial *de novo* if the evidence—contrary to pretrial assumptions—justified a jail sentence. Presumably a mistrial would be declared, counsel appointed, and a new trial ordered. But the Solicitor General also recognized that a second trial, even with counsel, might be unfair if the prosecutor could make use of evidence which came out at the first trial when the accused was uncounseled. If the second trial were held before the same judge, he might no longer be open-minded. Finally, a second trial held for no other reason than to afford the judge an opportunity to impose a harsher sentence might run afoul of the guarantee against being twice placed in jeopardy for the same offense.[16] In all likelihood, there will be no second trial and certain offenses classified by legislatures as imprisonable, will be treated by judges as unimprisonable.

The new rule announced today also could result in equal protection problems. There may well be an unfair and unequal treatment of individual defendants, depending on whether the individual judge has determined in advance to leave open the option of imprisonment. Thus, an accused indigent would be entitled in some courts to counsel while in other courts in the same jurisdiction an indigent accused of the same offense would have no counsel. Since the services of counsel may be essential to a fair trial even in cases in which no jail sentence is imposed, the results of this type of pretrial judgment could be arbitrary and discriminatory.

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[16] See *Callan* v. *Wilson*, 127 U. S. 540 (1888); *North Carolina* v. *Pearce*, 395 U. S. 711 (1969).

A different type of discrimination could result in the typical petty-offense case where judgment in the alternative is prescribed: for example, "five days in jail or $100 fine." If a judge has predetermined that no imprisonment will be imposed with respect to a particular category of cases, the indigent who is convicted will often receive no meaningful sentence. The defendant who can pay a $100 fine, and does so, will have responded to the sentence in accordance with law, whereas the indigent who commits the identical offense may pay no penalty. Nor would there be any deterrent against the repetition of similar offenses by indigents.[17]

To avoid these equal protection problems and to preserve a range of sentencing options as prescribed by law, most judges are likely to appoint counsel for indigents in all but the most minor offenses where jail sentences are extremely rare. It is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel. The Solicitor General, who suggested on behalf of the United States the rule the Court today adopts, recognized that the consequences could be far reaching. In addition to the expense of compensating counsel, he noted that the mandatory requirement of defense counsel will "require more pre-trial time of prosecutors, more courtroom time, and this will lead to bigger backlogs with present personnel. Court reporters will be needed as well as counsel, and they are one of our worst bottlenecks." [18]

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[17] The type of penalty discussed above (involving the discretionary alternative of "jail or fine") presents serious problems of fairness—both to indigents and nonindigents and to the administration of justice. Cf. *Tate* v. *Short,* 401 U. S. 395 (1971). No adequate resolution of these inherently difficult problems has yet been found. The rule adopted by the Court today, depriving the lower courts of all discretion in such cases unless counsel is available and is appointed, could aggravate the problem.

[18] Tr. of Oral Arg. 34–35.

After emphasizing that the new constitutional rule should not be made retroactive, the Solicitor General commented on the "chaos" which could result from any mandatory requirement of counsel in misdemeanor cases:

> "[I]f . . . this Court's decision should become fully applicable on the day it is announced, there could be a massive pileup in the state courts which do not now meet this standard. This would involve delays and frustrations which would not be a real contribution to the administration of justice." [19]

The degree of the Solicitor General's concern is reflected by his admittedly unique suggestion regarding the extraordinary demand for counsel which would result from the new rule. Recognizing implicitly that, in many sections of the country, there simply will not be enough lawyers available to meet this demand either in the short or long term, the Solicitor General speculated whether "clergymen, social workers, probation officers, and other persons of that type" could be used "as counsel in certain types of cases involving relatively small sentences." [20] Quite apart from the practical and political problem of amending the laws of each of the 50 States which require a license to practice law, it is difficult to square this suggestion with the meaning of the term "assistance of counsel" long recognized in our law.

The majority's treatment of the consequences of the new rule which so concerned the Solicitor General is not reassuring. In a footnote, it is said that there are presently 355,200 attorneys and that the number will increase rapidly, doubling by 1985. This is asserted to be sufficient to provide the number of full-time counsel, estimated by one source at between 1,575 and 2,300, to represent all indigent misdemeanants, excluding traffic

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[19] *Id.*, at 36–37.

[20] *Id.*, at 39.

offenders. It is totally unrealistic to imply that 355,200 lawyers are potentially available. Thousands of these are not in practice, and many of those who do practice work for governments, corporate legal departments, or the Armed Services and are unavailable for criminal representation. Of those in general practice, we have no indication how many are qualified to defend criminal cases or willing to accept assignments which may prove less than lucrative for most.[21]

It is similarly unrealistic to suggest that implementation of the Court's new rule will require no more than 1,575 to 2,300 "full-time" lawyers. In few communities are there full-time public defenders available for, or private lawyers specializing in, petty cases. Thus, if it were possible at all, it would be necessary to coordinate the schedules of those lawyers who are willing to take an

[21] The custom in many, if not most, localities is to appoint counsel on a case-by-case basis. Compensation is generally inadequate. Even in the federal courts under the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, which provides one of the most generous compensation plans, the rates for appointed counsel—$20 per hour spent out of court, $30 per hour of court time, subject to a maximum total fee of $400 for a misdemeanor case and $1,000 for a felony—are low by American standards. Consequently, the majority of persons willing to accept appointments are the young and inexperienced. See Cappelletti, Part One: The Emergence of a Modern Theme, in Cappelletti & Gordley, Legal Aid: Modern Themes and Variations, 24 Stan. L. Rev. 347, 377–378 (1972). MR. JUSTICE BRENNAN suggests, in his concurring opinion, that law students might provide an important source of legal representation. He presents no figures, however, as to how many students would be qualified and willing to undertake the responsibilities of defending indigent misdemeanants. Although welcome progress is being made with programs, supported by the American Bar Association, to enlist the involvement of law students in indigent representation, the problems of meeting state requirements and of assuring the requisite control and supervision, are far from insubstantial. Moreover, the impact of student participation would be limited primarily to the 140 or less communities where these law schools are located.

occasional misdemeanor appointment with the crowded calendars of lower courts in which cases are not scheduled weeks in advance but instead are frequently tried the day after arrest. Finally, the majority's focus on aggregate figures ignores the heart of the problem, which is the distribution and availability of lawyers, especially in the hundreds of small localities across the country.

Perhaps the most serious potential impact of today's holding will be on our already overburdened local courts.[22] The primary cause of "assembly line" justice is a volume of cases far in excess of the capacity of the system to handle efficiently and fairly. The Court's rule may well exacerbate delay and congestion in these courts. We are familiar with the common tactic of counsel of exhausting every possible legal avenue, often without due regard to its probable payoff. In some cases this may be the lawyer's duty; in other cases it will be done for purposes of delay.[23] The absence of direct economic impact on the client, plus the omnipresent ineffective-assistance-of-counsel claim, frequently produces a decision to litigate every issue. It is likely that young lawyers, fresh out of law school, will receive most of the appointments in petty-offense cases. The admirable zeal of these lawyers; their eagerness to make a reputation; the time their not yet crowded schedules permit them to devote to relatively minor legal problems; their desire for courtroom exposure; the availability in some cases of hourly fees, lucrative to the novice; and the recent constitutional explosion in procedural rights for the accused—all these factors are likely to result in the stretch-

[22] See generally H. James, Crisis in the Courts, c. 2 (1968); Challenge, *supra,* n. 13, at 145–156.

[23] See, *e. g.,* James, *supra,* n. 22, at 27–30; Schrag, On Her Majesty's Secret Service: Protecting the Consumer in New York City, 80 Yale L. J. 1529 (1971).

ing out of the process with consequent increased costs to the public and added delay and congestion in the courts.[24]

There is an additional problem. The ability of various States and localities to furnish counsel varies widely. Even if there were adequate resources on a national basis, the uneven distribution of these resources—of lawyers, of facilities, and available funding—presents the most acute problem. A number of state courts have considered the question before the Court in this case, and have been compelled to confront these realities. Many have concluded that the indigent's right to appointed counsel does not extend to all misdemeanor cases. In reaching this conclusion, the state courts have drawn the right-to-counsel line in different places, and most have acknowledged that they were moved to do so, at least in part, by the impracticality of going further.[25]

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[24] In Cook County, Illinois, a recent study revealed that the members of the Chicago Bar Association's Committee on the Defense of Prisoners who are appointed to represent indigent defendants elect a jury trial in 63% of their trial cases, while other appointed counsel and retained counsel do so in 33% and the public defender in only 15%. "One possible explanation for this contrast is that committee counsel, who are sometimes serving in part to gain experience, are more willing to undertake a jury trial than is an assistant public defender, who is very busy and very conscious of the probable extra penalty accruing to a defendant who loses his case before a jury." D. Oaks & W. Lehman, A Criminal Justice System and the Indigent 159 (1968) (footnote omitted).

[25] See *Irvin* v. *State,* 44 Ala. App. 101, 203 So. 2d 283 (1967); *Burrage* v. *Superior Court,* 105 Ariz. 53, 459 P. 2d 313 (1969); *Cableton* v. *State,* 243 Ark. 351, 420 S. W. 2d 534 (1967); *State ex rel. Argersinger* v. *Hamlin,* 236 So. 2d 442 (Fla. 1970); *People* v. *Dupree,* 42 Ill. 2d 249, 246 N. E. 2d 281 (1969); *People* v. *Mallory,* 378 Mich. 538, 147 N. W. 2d 66 (1967); *Hendrix* v. *City of Seattle,* 76 Wash. 2d 142, 456 P. 2d 696 (1969), cert. denied, 397 U. S. 948 (1970); *State ex rel. Plutschack* v. *Department of Health and Social Services,* 37 Wis. 2d 713, 155 N. W. 2d 549 (1968).

In other States, legislatures and courts through the enactment of laws or rules have drawn the line short of that adopted by the majority.[26] These cases and statutes reflect the judgment of the courts and legislatures of many States, which understand the problems of local judicial systems better than this Court, that the rule announced by the Court today may seriously overtax capabilities.[27]

The papers filed in a recent petition to this Court for a writ of certiorari serve as an example of what today's ruling will mean in some localities. In November 1971 the petition in *Wright* v. *Town of Wood*, No. 71–5722, was filed with this Court. The case, arising out of a South Dakota police magistrate court conviction for the municipal offense of public intoxication, raises the same issues before us in this case. The Court requested that the town of Wood file a response. On March 8, 1972, a lawyer occasionally employed by the town filed with the clerk an affidavit explaining why the town had not responded. He explained that Wood, South Dakota,

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[26] See Hawaii Const., Art. I, § 11 (1968); Idaho Code §§ 19–851, 19–852 (Supp. 1971); Kan. Stat. Ann. § 22–4503 (Supp. 1971); Ky. Rule Crim. Proc. 8.04; La. Rev. Stat. § 15:141 (F) (1967); Me. Rule Crim. Proc. 44; Md. Rule 719b2 (a); Neb. Rev. Stat. § 29–1803 (1964); Nev. Rev. Stat. §§ 171.188, 193.140 (1969); N. Mex. Stat. Ann. § 41–22–3 (Supp. 1971); Utah Code Ann. § 77–64–2 (Supp. 1971); Vt. Stat. Ann., Tit. 13, § 6503 (Supp. 1971); Va. Code Ann. § 19.1–241.1 (Supp. 1971).

[27] See Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 68 (1963). Local judges interviewed by the authors concluded that the right to counsel should not be extended to petty cases. "If no such dividing line can be drawn, if the question of assigned counsel in misdemeanor cases resolves itself into an 'all or nothing' proposition, then, the thrust of their views was that limited funds and lawyer-manpower and the need for judicial economy dictate that it be 'nothing.'" (Footnote omitted.) But see *State* v. *Borst*, 278 Minn. 388, 154 N. W. 2d 888 (1967).

has a population of 132, that it has no sewer or water system and is quite poor, that the office of the nearest lawyer is in a town 40 miles away, and that the town had decided that contesting this case would be an unwise allocation of its limited resources.

Though undoubtedly smaller than most, Wood is not dissimilar to hundreds of communities in the United States with no or very few lawyers, with meager financial resources, but with the need to have some sort of local court system to deal with minor offenses.[28] It is quite common for the more numerous petty offenses in such towns to be tried by local courts or magistrates while the more serious offenses are tried in a county-wide court located in the county seat.[29] It is undoubtedly true that some injustices result from the informal procedures of these local courts when counsel is not furnished; certainly counsel should be furnished to some indigents in some cases. But to require that counsel be furnished virtually every indigent charged with an imprisonable offense would be a practical impossibility for many small town courts. The community could simply not enforce its own laws.[30]

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[28] See *Cableton* v. *State*, 243 Ark., at 358, 420 S. W. 2d, at 538–539: "[T]here are more justices of the peace in Arkansas than there are resident practicing lawyers and . . . there are counties in which there are no practicing lawyers. The impact of [right to counsel in misdemeanor cases] would seriously impair the administration of justice in Arkansas and impose an intolerable burden upon the legal profession." (Footnote omitted.)

[29] See Silverstein, *supra*, n. 9, at 125–126.

[30] The successful implementation of the majority's rule would require state and local governments to appropriate considerable funds, something they have not been willing to do. Three States with 21% of the Nation's population provide more than 50% of all state appropriations for indigent defense. Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L. Rev. 1249, 1265 (1970). For example, in 1971 the State of Kansas spent $570,000

Perhaps it will be said that I give undue weight both to the likelihood of short-term "chaos" and to the possibility of long-term adverse effects on the system. The answer may be given that if the Constitution requires the rule announced by the majority, the consequences are immaterial. If I were satisfied that the guarantee of due process required the assistance of counsel in every case in which a jail sentence is imposed or that the only workable method of insuring justice is to adopt the majority's rule, I would not hesitate to join the Court's opinion despite my misgivings as to its effect upon the administration of justice. But in addition to the resulting problems of availability of counsel, of costs, and especially of intolerable delay in an already overburdened system, the majority's drawing of a new inflexible rule may raise more Fourteenth Amendment problems than it resolves. Although the Court's opinion does not deal explicitly with any sentence other than deprivation of liberty however brief, the according of special constitutional status to cases where such a sentence is imposed may derogate from the need for counsel in other types of cases, unless the Court embraces an even broader prophylactic rule. Due process requires a fair trial in all cases. Neither the six-month rule approved below nor the rule today enunciated by the Court is likely to achieve this result.

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defending indigents in felony cases—up from $376,000 in 1969. Although the budgetary request for 1972 was $612,000, the legislature has appropriated only $400,000. Brief for Appellant in *James* v. *Strange*, No. 71–11, decided today, *post*, p. 128. "In view of American resources the funds spent on the legal services program can only be regarded as trivial." Cappelletti, *supra*, n. 21, at 379. "Although the American economy is over 8 times the size of the British and the American population is almost 4 times as great, American legal aid expenditures are less than 2 times as high." *Id.*, at 379 n. 210.

III

I would hold that the right to counsel in petty-offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case-by-case basis.[31] The determination should be made before the accused formally pleads; many petty cases are resolved by guilty pleas in which the assistance of counsel may be required.[32] If the trial court should conclude that the assistance of counsel is not required in any case, it should state its reasons so that the issue could be preserved for review. The trial court would then become obligated to scrutinize carefully the subsequent proceedings for the protection of the defendant. If an unrepresented defendant sought to enter a plea of guilty, the Court should examine the case against him to insure that there is admissible evidence tending to support the elements of the offense. If a case went to trial without defense counsel, the court should intervene, when necessary, to insure that the defendant adequately brings out the facts in his favor and to prevent legal issues from being overlooked. Formal trial rules should not be applied strictly against unrepresented defendants. Finally, appellate

[31] It seems to me that such an individualized rule, unlike a six-month rule and the majority's rule, does not present equal protection problems under this Court's decisions in *Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Douglas* v. *California,* 372 U. S. 353 (1963); and *Mayer* v. *City of Chicago,* 404 U. S. 189 (1971).

[32] See, *e. g.,* Katz, Municipal Courts—Another Urban Ill, 20 Case Western Reserve L. Rev. 87, 92–96 (1968). Cf. *Hamilton* v. *Alabama,* 368 U. S. 52 (1961); *White* v. *Maryland,* 373 U. S. 59 (1963); *Harvey* v. *Mississippi,* 340 F. 2d 263 (CA5 1965).

Although there is less plea negotiating in petty cases, see n. 13, *supra,* the assistance of counsel may still be needed so that the defendant who is not faced with overwhelming evidence of guilt can make an intelligent decision whether to go to trial.

courts should carefully scrutinize all decisions not to appoint counsel and the proceedings which follow.

It is impossible, as well as unwise, to create a precise and detailed set of guidelines for judges to follow in determining whether the appointment of counsel is necessary to assure a fair trial. Certainly three general factors should be weighed. First, the court should consider the complexity of the offense charged. For example, charges of traffic law infractions would rarely present complex legal or factual questions, but charges that contain difficult intent elements or which raise collateral legal questions, such as search-and-seizure problems, would usually be too complex for an unassisted layman. If the offense were one where the State is represented by counsel and where most defendants who can afford to do so obtain counsel, there would be a strong indication that the indigent also needs the assistance of counsel.

Second, the court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed. As noted in Part I above, imprisonment is not the only serious consequence the court should consider.

Third, the court should consider the individual factors peculiar to each case. These, of course, would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case. The attitude of the community toward a particular defendant or particular incident would be another consideration. But there might be other reasons why a defendant would have a peculiar need for a lawyer which would compel the appointment of counsel in a case where the court would normally think this unnecessary. Obviously, the sensitivity and diligence of individual judges would be crucial to the operation of a rule of fundamental fairness requiring the consideration of the varying factors in each case.

Such a rule is similar in certain respects to the special-circumstances rule applied to felony cases in *Betts* v. *Brady,* 316 U. S. 455 (1942), and *Bute* v. *Illinois,* 333 U. S. 640 (1948), which this Court overruled in *Gideon.*[33] One of the reasons for seeking a more definitive standard in felony cases was the failure of many state courts to live up to their responsibilities in determining on a case-by-case basis whether counsel should be appointed. See the concurring opinion of Mr. Justice Harlan in *Gideon,* 372 U. S., at 350–351. But this Court should not assume that the past insensitivity of some state courts to the rights of defendants will continue. Certainly if the Court follows the course of reading rigid rules into the Constitution, so that the state courts will be unable to exercise judicial discretion within the limits of fundamental fairness, there is little reason to think that insensitivity will abate.

In concluding, I emphasize my long-held conviction that the adversary system functions best and most fairly only when all parties are represented by competent counsel. Before becoming a member of this Court, I participated in efforts to enlarge and extend the availability of counsel. The correct disposition of this case, therefore, has been a matter of considerable concern to me—as it has to the other members of the Court. We are all strongly drawn to the ideal of extending the right to counsel, but I differ as to two fundamentals: (i) what the Constitution *requires,* and (ii) the effect upon the criminal justice system, especially in the smaller cities and the thousands of police, municipal, and justice of the peace courts across the country.

The view I have expressed in this opinion would accord considerable discretion to the courts, and would allow the

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[33] I do not disagree with the overruling of *Betts;* I am in complete accord with *Gideon. Betts,* like *Gideon,* concerned the right to counsel in a felony case. See n. 1, *supra.* Neither case controls today's result.

flexibility and opportunity for adjustment which seems so necessary when we are imposing new doctrine on the lowest level of courts of 50 States. Although this view would not precipitate the "chaos" predicted by the Solicitor General as the probable result of the Court's absolutist rule, there would still remain serious practical problems resulting from the expansion of indigents' rights to counsel in petty-offense cases.[34] But the according of reviewable discretion to the courts in determining when counsel is necessary for a fair trial, rather than mandating a completely inflexible rule, would facilitate an orderly transition to a far wider availability and use of defense counsel.

In this process, the courts of first instance which decide these cases would have to recognize a duty to consider the need for counsel in every case where the defendant faces a significant penalty. The factors mentioned above, and such standards or guidelines to assure fairness as might be prescribed in each jurisdiction by legislation or rule of court, should be considered where relevant. The goal should be, in accord with the essence of the adversary system, to expand as rapidly as practicable the availability of counsel so that no person accused of crime must stand alone if counsel is needed.

As the proceedings in the courts below were not in accord with the views expressed above, I concur in the result of the decision in this case.

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[34] Indeed, it is recognized that many of the problems identified in this opinion will result from any raising of the standards as to the requirement of counsel. It is my view that relying upon judicial discretion to assure fair trial of petty offenses not only comports with the Constitution but will minimize problems which otherwise could affect adversely the administration of criminal justice in the very courts which already are under the most severe strain.

FUENTES *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 70–5039. Argued November 9, 1971—Decided June 12, 1972*

Appellants, most of whom were purchasers of household goods under conditional sales contracts, challenge the constitutionality of prejudgment replevin provisions of Florida law (in No. 70–5039) and Pennsylvania law (in No. 70–5138). These provisions permit a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of *ex parte* application to a court clerk, upon the posting of a bond for double the value of the property to be seized. The sheriff is then required to execute the writ by seizing the property. Under the Florida statute the officer seizing the property must keep it for three days. During that period the defendant may reclaim possession by posting his own security bond for double the property's value, in default of which the property is transferred to the applicant for the writ, pending a final judgment in the underlying repossession action. In Pennsylvania the applicant need not initiate a repossession action or allege (as Florida requires) legal entitlement to the property, it being sufficient that he file an "affidavit of the value of the property"; and to secure a post-seizure hearing the party losing the property through replevin must himself initiate a suit to recover the property. He may also post his own counterbond within three days of the seizure to regain possession. Included in the printed-form sales contracts that appellants signed were provisions for the sellers' repossession of the merchandise on the buyers' default. Three-judge District Courts in both cases upheld the constitutionality of the challenged replevin provisions. *Held:*

1. The Florida and Pennsylvania replevin provisions are invalid under the Fourteenth Amendment since they work a deprivation of property without due process of law by denying the right to a

*Together with No. 70–5138, *Parham et al.* v. *Cortese et al.*, on appeal from the United States District Court for the Eastern District of Pennsylvania.

prior opportunity to be heard before chattels are taken from the possessor. Pp. 80–93.

(a) Procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another, and the minimal deterrent effect of the bond requirement against unfounded applications for a writ constitutes no substitute for a pre-seizure hearing. Pp. 80–84.

(b) From the standpoint of the application of the Due Process Clause it is immaterial that the deprivation may be temporary and nonfinal during the three-day post-seizure period. Pp. 84–86.

(c) The possessory interest of appellants, who had made substantial installment payments, was sufficient for them to invoke procedural due process safeguards notwithstanding their lack of full title to the replevied goods. Pp. 86–87.

(d) The District Courts erred in rejecting appellants' constitutional claim on the ground that the household goods seized were not items of "necessity" and therefore did not require due process protection, as the Fourteenth Amendment imposes no such limitation. Pp. 88–90.

(e) The broadly drawn provisions here involved serve no such important a state interest as might justify summary seizure. Pp. 90–93.

2. The contract provisions for repossession by the seller on the buyer's default did not amount to a waiver of the appellants' procedural due process rights, those provisions neither dispensing with a prior hearing nor indicating the procedure by which repossession was to be achieved. *D. H. Overmyer Co.* v. *Frick Co.*, 405 U. S. 174, distinguished. Pp. 94–96.

No. 70–5039, 317 F. Supp. 954, and No. 70–5138, 326 F. Supp. 127, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 97. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the cases.

C. Michael Abbott argued the cause *pro hac vice* for appellant in No. 70–5039. With him on the brief was *Bruce S. Rogow*. *David A. School* argued the cause

pro hac vice for appellants in No. 70–5138. With him on the brief was *Harvey N. Schmidt.*

Herbert T. Schwartz, Deputy Attorney General of Florida, argued the cause for appellee Shevin in No. 70–5039. On the brief was *Robert L. Shevin,* Attorney General of Florida, *pro se. George W. Wright, Jr.,* argued the cause for appellee Firestone Tire & Rubber Co. in No. 70–5039. With him on the brief was *Karl B. Block, Jr. Robert F. Maxwell* argued the cause for appellees in No. 70–5138 and was on the brief for appellee Sears, Roebuck & Co. *J. Shane Creamer,* Attorney General, and *Peter W. Brown,* Deputy Attorney General, filed a brief for appellee the Commonwealth of Pennsylvania in No. 70–5138.

Briefs of *amici curiae* urging reversal in No. 70–5039 were filed by *Allan Ashman* for the National Legal Aid and Defender Association and by *Blair C. Shick, Jean Camper Cahn,* and *Barbara B. Gregg* for the National Consumer Law Center of Boston College Law School et al.

Harry N. Boureau, Ross L. Malone, Robert L. Clare, Jr., and *George J. Wade* filed a brief for General Motors Acceptance Corp. et al. as *amici curiae* urging affirmance in No. 70–5039.

MR. JUSTICE STEWART delivered the opinion of the Court.

We here review the decisions of two three-judge federal District Courts that upheld the constitutionality of Florida and Pennsylvania laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin. Both statutes provide for the issuance of writs ordering state agents to seize a person's possessions, simply upon the *ex parte* application of any other person who claims a right to them and posts a

security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure at any kind of prior hearing. The question is whether these statutory procedures violate the Fourteenth Amendment's guarantee that no State shall deprive any person of property without due process of law.

I

The appellant in No. 5039, Margarita Fuentes, is a resident of Florida. She purchased a gas stove and service policy from the Firestone Tire and Rubber Co. (Firestone) under a conditional sales contract calling for monthly payments over a period of time. A few months later, she purchased a stereophonic phonograph from the same company under the same sort of contract. The total cost of the stove and stereo was about $500, plus an additional financing charge of over $100. Under the contracts, Firestone retained title to the merchandise, but Mrs. Fuentes was entitled to possession unless and until she should default on her installment payments.

For more than a year, Mrs. Fuentes made her installment payments. But then, with only about $200 remaining to be paid, a dispute developed between her and Firestone over the servicing of the stove. Firestone instituted an action in a small-claims court for repossession of both the stove and the stereo, claiming that Mrs. Fuentes had refused to make her remaining payments. Simultaneously with the filing of that action and before Mrs. Fuentes had even received a summons to answer its complaint, Firestone obtained a writ of replevin ordering a sheriff to seize the disputed goods at once.

In conformance with Florida procedure,[1] Firestone

[1] See *infra*, at 73–75.

had only to fill in the blanks on the appropriate form documents and submit them to the clerk of the small-claims court. The clerk signed and stamped the documents and issued a writ of replevin. Later the same day, a local deputy sheriff and an agent of Firestone went to Mrs. Fuentes' home and seized the stove and stereo.

Shortly thereafter, Mrs. Fuentes instituted the present action in a federal district court, challenging the constitutionality of the Florida prejudgment replevin procedures under the Due Process Clause of the Fourteenth Amendment.[2] She sought declaratory and injunctive relief against continued enforcement of the procedural provisions of the state statutes that authorize prejudgment replevin.[3]

The appellants in No. 5138 filed a very similar action in a federal district court in Pennsylvania, challenging the constitutionality of that State's prejudgment replevin process. Like Mrs. Fuentes, they had had possessions seized under writs of replevin. Three of the appellants had purchased personal property—a bed, a table, and other household goods—under installment sales contracts like the one signed by Mrs. Fuentes; and the sellers of the property had obtained and executed summary writs of replevin, claiming that the appellants had fallen behind in their installment payments.

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[2] Both Mrs. Fuentes and the appellants in No. 5138 also challenged the prejudgment replevin procedures under the Fourth Amendment, made applicable to the States by the Fourteenth. We do not, however, reach that issue. See n. 32, *infra.*

[3] Neither Mrs. Fuentes nor the appellants in No. 5138 sought an injunction against any pending or future court proceedings as such. Compare *Younger* v. *Harris,* 401 U. S. 37. Rather, they challenged only the summary extra-judicial process of prejudgment seizure of property to which they had already been subjected. They invoked the jurisdiction of the federal district courts under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3).

The experience of the fourth appellant, Rosa Washington, had been more bizarre. She had been divorced from a local deputy sheriff and was engaged in a dispute with him over the custody of their son. Her former husband, being familiar with the routine forms used in the replevin process, had obtained a writ that ordered the seizure of the boy's clothes, furniture, and toys.[4]

In both No. 5039 and No. 5138, three-judge District Courts were convened to consider the appellants' challenges to the constitutional validity of the Florida and Pennsylvania statutes. The courts in both cases upheld the constitutionality of the statutes. *Fuentes* v. *Faircloth*, 317 F. Supp. 954 (SD Fla); *Epps* v. *Cortese*, 326 F. Supp. 127 (ED Pa.).[5] We noted probable jurisdiction of both appeals. 401 U. S. 906; 402 U. S. 994.

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[4] Unlike Mrs. Fuentes in No. 5039, none of the appellants in No. 5138 was ever sued in any court by the party who initiated seizure of the property. See *infra*, at 77–78.

[5] Since the announcement of this Court's decision in *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, summary prejudgment remedies have come under constitutional challenge throughout the country. The summary deprivation of property under statutes very similar to the Florida and Pennsylvania statutes at issue here has been held unconstitutional by at least two courts. *Laprease* v. *Raymours Furniture Co.*, 315 F. Supp. 716 (NDNY); *Blair* v. *Pitchess*, 5 Cal. 3d 258, 486 P. 2d 1242. But see *Brunswick Corp.* v. *J. & P., Inc.*, 424 F. 2d 100 (CA10); *Wheeler* v. *Adams Co.*, 322 F. Supp. 645 (Md.); *Almor Furniture & Appliances, Inc.* v. *MacMillan*, 116 N. J. Super. 65, 280 A. 2d 862. Applying *Sniadach* to other closely related forms of summary prejudgment remedies, some courts have construed that decision as setting forth general principles of procedural due process and have struck down such remedies. *E. g.*, *Adams* v. *Egley*, 338 F. Supp. 614 (SD Cal.); *Collins* v. *The Viceroy Hotel Corp.*, 338 F. Supp. 390 (ND Ill.); *Santiago* v. *McElroy*, 319 F. Supp. 284 (ED Pa.); *Klim* v. *Jones*, 315 F. Supp. 109 (ND Cal.); *Randone* v. *Appellate Dept.*, 5 Cal. 3d 536, 488 P. 2d 13; *Larson* v. *Fetherston*, 44 Wis. 2d 712, 172 N. W. 2d 20; *Jones Press Inc.* v. *Motor Travel Services Inc.*, 286 Minn. 205, 176 N. W. 2d 87. See *Lebowitz* v. *Forbes Leasing & Finance Corp.*, 326 F. Supp. 1335, 1341–1348 (ED Pa.). Other courts, however, have con-

II

Under the Florida statute challenged here,[6] "[a]ny person whose goods or chattels are wrongfully detained by any other person . . . may have a writ of replevin to recover them . . . ." Fla. Stat. Ann. § 78.01 (Supp. 1972–1973). There is no requirement that the applicant make a convincing showing before the seiz-

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strued *Sniadach* as closely confined to its own facts and have upheld such summary prejudgment remedies. *E. g., Reeves* v. *Motor Contract Co.,* 324 F. Supp. 1011 (ND Ga.); *Black Watch Farms* v. *Dick,* 323 F. Supp. 100 (Conn.); *American Olean Tile Co.* v. *Zimmerman,* 317 F. Supp. 150 (Hawaii); *Young* v. *Ridley,* 309 F. Supp. 1308 (DC); *Termplan, Inc.* v. *Superior Court of Maricopa County,* 105 Ariz. 270, 463 P. 2d 68; *300 West 154th Street Realty Co.* v. *Department of Buildings,* 26 N. Y. 2d 538, 260 N. E. 2d 534.

[6] The relevant Florida statutory provisions are the following:

Fla. Stat. Ann. § 78.01 (Supp. 1972–1973):

"Right to replevin.—Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on a forthcoming bond."

Fla. Stat. Ann. § 78.07 (Supp. 1972–1973):

"Bond; Requisites.—Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action."

Fla. Stat. Ann. § 78.08 (Supp. 1972–1973):

"Writ; form; return.—The writ shall command the officer to whom it may be directed to replevy the goods and chattels in pos-

ure that the goods are, in fact, "wrongfully detained." Rather, Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession and reciting in conclusory fashion that he is "lawfully entitled to the possession" of the property, and that he file a security bond

> "in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action." Fla. Stat. Ann. § 78.07 (Supp. 1972–1973).

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session of defendant, describing them, and to summon the defendant to answer the complaint."

Fla. Stat. Ann. § 78.10 (Supp. 1972–1973):

"Writ; execution on property in buildings, etc.—In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof and if it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county."

Fla. Stat. Ann. § 78.13 (Supp. 1972–1973):

"Writ; disposition of property levied on.—The officer executing the writ shall deliver the property to plaintiff after the lapse of three (3) days from the time the property was taken unless within the three (3) days defendant gives bond with surety to be approved by the officer in double the value of the property as appraised by the officer, conditioned to have the property forthcoming to abide the result of the action, in which event the property shall be redelivered to defendant."

On the sole basis of the complaint and bond, a writ is issued "command[ing] the officer to whom it may be directed to replevy the goods and chattels in possession of defendant . . . and to summon the defendant to answer the complaint." Fla. Stat. Ann. § 78.08 (Supp. 1972–1973). If the goods are "in any dwelling house or other building or enclosure," the officer is required to demand their delivery; but, if they are not delivered, "he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ . . . ." Fla. Stat. Ann. § 78.10 (Supp. 1972–1973).

Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. *After* the property has been seized, he will eventually have an opportunity for a hearing, as the defendant in the trial of the court action for repossession, which the plaintiff is required to pursue. And he is also not wholly without recourse in the meantime. For under the Florida statute, the officer who seizes the property must keep it for three days, and during that period the defendant may reclaim possession of the property by posting his own security bond in double its value. But if he does not post such a bond, the property is transferred to the party who sought the writ, pending a final judgment in the underlying action for repossession. Fla. Stat. Ann. § 78.13 (Supp. 1972–1973).

The Pennsylvania law[7] differs, though not in its essential nature, from that of Florida. As in Florida,

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[7] The basic Pennsylvania statutory provision regarding the issuance of writs of replevin is the following:

Pa. Stat. Ann., Tit. 12, § 1821. Writs of replevin authorized

"It shall and may be lawful for the justices of each county in this province to grant writs of replevin, in all cases whatsoever, where

a private party may obtain a prejudgment writ of replevin through a summary process of *ex parte* application to a prothonotary. As in Florida, the party seeking

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replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law."

The procedural prerequisites to issuance of a prejudgment writ are, however, set forth in the Pennsylvania Rules of Civil Procedure. The relevant rules are the following:

"Rule 1073. Commencement of Action

"(a) An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with

"(1) the plaintiff's affidavit of the value of the property to be replevied, and

"(2) the plaintiff's bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the plaintiff fails to maintain his right of possession of the property, he shall pay to the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.

"(b) An action of replevin without bond shall be commenced by filing with the prothonotary

"(1) a praecipe for a writ of replevin without bond or

"(2) a complaint.

"If the action is commenced without bond, the sheriff shall not replevy the property but at any time before the entry of judgment the plaintiff, upon filing the affidavit and bond prescribed by subdivision (a) of this rule, may obtain a writ of replevin with bond, issued in the original action, and have the sheriff replevy the property.

"Rule 1076. Counterbond

"(a) A counterbond may be filed with the prothonotary by a defendant or intervenor claiming the right to the possession of the property, except a party claiming only a lien thereon, within seventy-two (72) hours after the property has been replevied, or within seventy-two (72) hours after service upon the defendant when the taking of possession of the property by the sheriff has been waived by the plaintiff as provided by Rule 1077 (a), or within such extension of time as may be granted by the court upon cause shown.

"(b) The counterbond shall be in the same amount as the original

the writ may simply post with his application a bond in double the value of the property to be seized. Pa. Rule Civ. Proc. 1073 (a). There is no opportunity for a prior hearing and no prior notice to the other party. On this basis, a sheriff is required to execute the writ by seizing the specified property. Unlike the Florida statute, however, the Pennsylvania law does not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property. The party seeking the writ is not obliged to initiate a court action for repossession.[8] In-

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bond, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the party filing it fails to maintain his right to possession of the property he shall pay to the party entitled thereto the value of the property, and all legal costs, fees and damages sustained by reason of the delivery of the replevied property to the party filing the counterbond.

"Rule 1077. Disposition of Replevied Property. Sheriff's Return

"(a) When a writ of replevin with bond is issued, the sheriff shall leave the property during the time allowed for the filing of a counterbond in the possession of the defendant or of any other person if the plaintiff so authorizes him in writing.

"(b) Property taken into possession by the sheriff shall be held by him until the expiration of the time for filing a counterbond. If the property is not ordered to be impounded and if no counterbond is filed, the sheriff shall deliver the property to the plaintiff.

"(c) If the property is not ordered to be impounded and the person in possession files a counterbond, the property shall be delivered to him, but if he does not file a counterbond, the property shall be delivered to the party first filing a counterbond.

"(d) When perishable property is replevied the court may make such order relating to its sale or disposition as shall be proper.

"(e) The return of the sheriff to the writ of replevin with bond shall state the disposition made by him of the property and the name and address of any person found in possession of the property."

[8] Pa. Rule Civ. Proc. 1073 (b) does establish a procedure whereby an applicant may obtain a writ by filing a complaint, initiating a

deed, he need not even formally allege that he is lawfully entitled to the property. The most that is required is that he file an "affidavit of the value of the property to be replevied." Pa. Rule Civ. Proc. 1073 (a). If the party who loses property through replevin seizure is to get even a post-seizure hearing, he must initiate a lawsuit himself.[9] He may also, as under Florida law, post his own counterbond within three days after the seizure to regain possession. Pa. Rule Civ. Proc. 1076.

III

Although these prejudgment replevin statutes are descended from the common-law replevin action of six centuries ago, they bear very little resemblance to it. Replevin at common law was an action for the return of specific goods wrongfully taken or "distrained." Typically, it was used after a landlord (the "distrainor") had seized possessions from a tenant (the "distrainee") to satisfy a debt allegedly owed. If the tenant then instituted a replevin action and posted security, the landlord could be ordered to return the property at

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later court action. See n. 7, *supra*. In the case of every appellant in No. 70–5138, the applicant proceeded under Rule 1073 (a) rather than 1073 (b), seizing property under no more than a security bond and initiating no court action.

[9] Pa. Rule Civ. Proc. 1037 (a) establishes the procedure for initiating such a suit:

"If an action is not commenced by a complaint [under Rule 1073 (b)], the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros."

None of the appellants in No. 70–5138 attempted to initiate the process to require the filing of a post-seizure complaint under Rule 1037 (a).

once, pending a final judgment in the underlying action.[10] However, this prejudgment replevin of goods at common law did *not* follow from an entirely *ex parte* process of pleading by the distrainee. For "[t]he distrainor could always stop the action of replevin by claiming to be the owner of the goods; and as this claim was often made merely to delay the proceedings, the writ *de proprietate probanda* was devised early in the fourteenth century, which enabled the sheriff to determine summarily the question of ownership. If the question of ownership was determined against the distrainor the goods were delivered back to the distrainee [pending final judgment]." 3 W. Holdsworth, History of English Law 284 (1927).

Prejudgment replevin statutes like those of Florida and Pennsylvania are derived from this ancient possessory action in that they authorize the seizure of property before a final judgment. But the similarity ends there. As in the present cases, such statutes are most commonly used by creditors to seize goods allegedly wrongfully detained—not wrongfully taken—by debtors. At common law, if a creditor wished to invoke state power to recover goods wrongfully detained, he had to proceed through the action of debt or detinue.[11] These actions, however, did not provide for a return of property before final judgment.[12] And, more importantly, on the occasions when the common law did allow prejudgment seizure by state power, it provided some kind

[10] See T. Plucknett, A Concise History of the Common Law 367–369 (1956); 3 W. Holdsworth, History of English Law 284–285 (1927); 2 F. Pollock & F. Maitland, History of English Law 577 (1909); J. Cobbey, Replevin 19–29 (1890).

[11] See Plucknett, *supra*, n. 10, at 362–365; Pollock & Maitland, *supra*, n. 10, at 173–175, 203–211.

[12] The creditor could, of course, proceed without the use of state power, through self-help, by "distraining" the property before a judgment. See n. 10, *supra*.

of notice and opportunity to be heard to the party then in possession of the property, and a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them.

IV

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale,* 1 Wall. 223, 233. See *Windsor* v. *McVeigh,* 93 U. S. 274; *Hovey* v. *Elliott,* 167 U. S. 409; *Grannis* v. *Ordean,* 234 U. S. 385. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U. S. 545, 552.

The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings "at a meaningful time." The Florida replevin process guarantees an opportunity for a hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor the Pennsylvania statute provides for notice or an opportunity to be heard *before* the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not

only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 552.

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 170–172 (Frankfurter, J., concurring).

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be

awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley* v. *Illinois,* 405 U. S. 645, 647.

This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," *Mullane* v. *Central Hanover Tr. Co.,* 339 U. S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie* v. *Connecticut,* 401 U. S. 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. *E. g., Bell* v. *Burson,* 402 U. S. 535, 542; *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437; *Goldberg* v. *Kelly,* 397 U. S. 254; *Armstrong* v. *Manzo,* 380 U. S., at 551; *Mullane* v. *Central Hanover Tr. Co., supra,* at 313; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152–153; *United States* v. *Illinois Central R. Co.,* 291 U. S. 457, 463; *Londoner* v. *City & County of Denver,* 210 U. S. 373, 385–386. See *In re Ruffalo,* 390 U. S. 544, 550–551. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut, supra,* at 378–379 (emphasis in original).

The Florida and Pennsylvania prejudgment replevin statutes fly in the face of this principle. To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights.[13] Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation. Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides—and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. The Florida and Pennsylvania statutes do not even require the official issuing a writ of replevin to do that much.

The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less

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[13] They may not even test that much. For if an applicant for the writ knows that he is dealing with an uneducated, uninformed consumer with little access to legal help and little familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property—however unwarranted—may go unchallenged, and the applicant may feel that he can act with impunity.

effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.

V

The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection. In the present cases, the Florida and Pennsylvania statutes were applied to replevy chattels in the appellants' possession. The replevin was not cast as a final judgment; most, if not all, of the appellants lacked full title to the chattels; and their claim even to continued possession was a matter in dispute. Moreover, the chattels at stake were nothing more than an assortment of household goods. Nonetheless, it is clear that the appellants were deprived of possessory interests in those chattels that were within the protection of the Fourteenth Amendment.

A

A deprivation of a person's possessions under a prejudgment writ of replevin, at least in theory, may be only temporary. The Florida and Pennsylvania statutes do not require a person to wait until a post-seizure hearing and final judgment to recover what has been replevied. Within three days after the seizure, the statutes allow him to recover the goods if he, in return, surrenders other property—a payment necessary to secure a bond in double the value of the goods seized from him.[14] But it is now

[14] The appellants argue that this opportunity for quick recovery exists only in theory. They allege that very few people in their position are able to obtain a recovery bond, even if they know of the possibility. Appellant Fuentes says that in her case she was never told that she could recover the stove and stereo and that the deputy sheriff seizing them gave them at once to the Firestone agent, rather

well settled that a temporary, nonfinal deprivation of property is nonetheless a "deprivation" in the terms of the Fourteenth Amendment. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337; *Bell* v. *Burson*, 402 U. S. 535. Both *Sniadach* and *Bell* involved takings of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes included recovery provisions, allowing the defendants to post security to quickly regain the property taken from them.[15] Yet the Court firmly held that these were deprivations of property that had to be preceded by a fair hearing.

The present cases are no different. When officials of Florida or Pennsylvania seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of property whether or not he has the funds, the knowledge, and the time needed to take advantage of the recovery provision.

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than holding them for three days. She further asserts that of 442 cases of prejudgment replevin in small-claims courts in Dade County, Florida, in 1969, there was not one case in which the defendant took advantage of the recovery provision.

[15] *Bell* v. *Burson*, 402 U. S. 535, 536. Although not mentioned in the *Sniadach* opinion, there clearly was a quick-recovery provision in the Wisconsin prejudgment garnishment statute at issue. Wis. Stat. Ann. § 267.21 (1) (Supp. 1970–1971). *Family Finance Corp.* v. *Sniadach*, 37 Wis. 2d 163, 173–174, 154 N. W. 2d 259, 265. Mr. Justice Harlan adverted to the recovery provision in his concurring opinion. 395 U. S., at 343.

These sorts of provisions for recovery of property by posting security are, of course, entirely different from the security requirement upheld in *Lindsey* v. *Normet*, 405 U. S. 56, 65. There, the Court upheld a requirement that a tenant wanting a continuance of an eviction hearing must post security for accruing rent during the continuance. The tenant did not have to post security in order to remain in possession before a hearing; rather, he had to post security only in order to obtain a *continuance* of the hearing. Moreover, the security requirement in *Lindsey* was not a *recovery* provision. For the tenant was not deprived of his possessory interest even for one day without opportunity for a hearing.

The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

B

The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's protection of "property," however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest," *Boddie* v. *Connecticut,* 401 U. S., at 379, including statutory entitlements. See *Bell* v. *Burson,* 402 U. S., at 539; *Goldberg* v. *Kelly,* 397 U. S., at 262.

The appellants were deprived of such an interest in the replevied goods—the interest in continued possession and use of the goods. See *Sniadach* v. *Family Finance Corp.,* 395 U. S., at 342 (Harlan, J., concurring). They had acquired this interest under the conditional sales contracts that entitled them to possession and use of the chattels before transfer of title. In exchange for immediate possession, the appellants had agreed to pay a major financing charge beyond the basic price of the merchandise. Moreover, by the time the goods were summarily repossessed, they had made substantial installment payments. Clearly, their possessory interest in the goods, dearly bought and protected by contract,[16]

[16] The possessory interest of Rosa Washington, an appellant in No. 5138, in her son's clothes, furniture, and toys was no less sufficient to invoke due process safeguards. Her interest was not protected by contract. Rather, it was protected by ordinary property law,

was sufficient to invoke the protection of the Due Process Clause.

Their ultimate right to continued possession was, of course, in dispute. If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of the goods would be entitled to repossession. But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses,[17] that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.[18]

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there being a dispute between her and her estranged husband over which of them had a legal right not only to custody of the child but also to possession of the chattels.

[17] Mrs. Fuentes argues that Florida law allows her to defend on the ground that Firestone breached its obligations under the sales contract by failing to repair serious defects in the stove it sold her. We need not consider this issue here. It is enough that the right to continued possession of the goods was open to *some* dispute at a hearing since the sellers of the goods had to show, at the least, that the appellants had defaulted in their payments.

[18] The issues decisive of the ultimate right to continued possession, of course, may be quite simple. The simplicity of the issues might be relevant to the formality or scheduling of a prior hearing. See *Lindsey* v. *Normet,* 405 U. S., at 65. But it certainly cannot undercut the right to a prior hearing of some kind.

C

Nevertheless, the District Courts rejected the appellants' constitutional claim on the ground that the goods seized from them—a stove, a stereo, a table, a bed, and so forth—were not deserving of due process protection, since they were not absolute necessities of life. The courts based this holding on a very narrow reading of *Sniadach* v. *Family Finance Corp., supra,* and *Goldberg* v. *Kelly, supra,* in which this Court held that the Constitution requires a hearing before prejudgment wage garnishment and before the termination of certain welfare benefits. They reasoned that *Sniadach* and *Goldberg,* as a matter of constitutional principle, established no more than that a prior hearing is required with respect to the deprivation of such basically "necessary" items as wages and welfare benefits.

This reading of *Sniadach* and *Goldberg* reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.[19] *E. g., Opp Cotton Mills* v. *Administrator,* 312 U. S., at 152–153; *United States* v. *Illinois Central R. Co.,* 291 U. S., at 463; *Southern R. Co.* v. *Virginia,* 290 U. S. 190; *Londoner* v. *City & County of Denver,* 210 U. S. 373; *Central of Georgia* v. *Wright,* 207 U. S. 127; *Security Trust*

[19] The Supreme Court of California recently put the matter accurately: "*Sniadach* does not mark a radical departure in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court." *Randone* v. *Appellate Dept.,* 5 Cal. 3d 536, 550, 488 P. 2d 13, 22.

Co. v. *Lexington,* 203 U. S. 323; *Hibben* v. *Smith,* 191 U. S. 310; *Glidden* v. *Harrington,* 189 U. S. 255. In none of those cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine.[20]

Nor did they carve out a rule of "necessity" for the sort of nonfinal deprivations of property that they involved. That was made clear in *Bell* v. *Burson,* 402 U. S. 535, holding that there must be an opportunity for a fair hearing before mere suspension of a driver's license. A driver's license clearly does not rise to the level of "necessity" exemplified by wages and welfare benefits. Rather, as the Court accurately stated, it is an "important interest," *id.,* at 539, entitled to the protection of procedural due process of law.

The household goods, for which the appellants contracted and paid substantial sums, are deserving of similar protection. While a driver's license, for example, "may become [indirectly] essential in the pursuit of a livelihood," *ibid.,* a stove or a bed may be equally essential to provide a minimally decent environment for human beings in their day-to-day lives. It is, after all, such consumer goods that people work and earn a livelihood in order to acquire.

No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds

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[20] *Sniadach* v. *Family Finance Corp., supra,* at 340; *Goldberg* v. *Kelly,* 397 U. S. 254, 264. Of course, the primary issue in *Goldberg* was the form of hearing demanded by due process before termination of welfare benefits; the importance of welfare was directly relevant to that question.

could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary." [21]

VI

There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. *Boddie* v. *Connecticut,* 401 U. S., at 379. These situations, however, must be truly unusual.[22] Only in a few limited sit-

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[21] The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. See, *e. g., Boddie* v. *Connecticut,* 401 U. S. 371, 378, and cases cited therein. But *some* form of notice and hearing—formal or informal—is required before deprivation of a property interest that "cannot be characterized as *de minimis.*" *Sniadach* v. *Family Finance Corp., supra,* at 342 (Harlan, J., concurring).

[22] A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See *Bell* v. *Burson, supra,* at 540–541; *Goldberg* v. *Kelly, supra,* at 261. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of

uations has this Court allowed outright seizure [23] without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property

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a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley* v. *Illinois,* 405 U. S. 645, 656.

[23] Of course, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing. See, *e. g., Sniadach* v. *Family Finance Corp., supra.* In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Bros. & Co.* v. *Bennett,* 277 U. S. 29. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey* v. *Morgan,* 256 U. S. 94. It is much less clear what interests were involved in the third case, decided with an unexplicated *per curiam* opinion simply citing *Coffin Bros.* and *Ownbey. McKay* v. *McInnes,* 279 U. S. 820. As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Bros.* and *Ownbey* cases on which it relied completely. See *Sniadach* v. *Family Finance Corp., supra,* at 340; *id.,* at 344 (Harlan, J., concurring).

In cases involving deprivation of other interests, such as government employment, the Court similarly has required an unusually important governmental need to outweigh the right to a prior hearing. See, *e. g., Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895–896.

Seizure under a search warrant is quite a different matter, see n. 30, *infra.*

to collect the internal revenue of the United States,[24] to meet the needs of a national war effort,[25] to protect against the economic disaster of a bank failure,[26] and to protect the public from misbranded drugs[27] and contaminated food.[28]

The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake.[29] The replevin of chattels, as in the

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[24] *Phillips* v. *Commissioner,* 283 U. S. 589. The Court stated that "[d]elay in the judicial determination of property rights is not uncommon where it is *essential* that governmental needs be *immediately* satisfied." *Id.,* at 597 (emphasis supplied). The Court, then relied on "the need of the government promptly to secure its revenues." *Id.,* at 596.

[25] *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 566; *Stoehr* v. *Wallace,* 255 U. S. 239, 245; *United States* v. *Pfitsch,* 256 U. S. 547, 553.

[26] *Fahey* v. *Mallonee,* 332 U. S. 245.

[27] *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594.

[28] *North American Storage Co.* v. *Chicago,* 211 U. S. 306.

[29] By allowing repossession without an opportunity for a prior hearing, the Florida and Pennsylvania statutes may be intended specifically to reduce the costs for the private party seeking to seize goods in another party's possession. Even if the private gain at stake in repossession actions were equal to the great public interests recognized in this Court's past decisions, see nn. 24–28, *supra,* the Court has made clear that the avoidance of the ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right. See n. 22, *supra.* The appellees argue that the cost of holding hearings may be especially onerous in the context of the creditor-debtor relationship. But the Court's holding in *Sniadach* v. *Family Finance Corp., supra,* indisputably demonstrates that ordinary hearing costs are no more able to override due process rights in the creditor-debtor context than in other contexts.

In any event, the aggregate cost of an opportunity to be heard before repossession should not be exaggerated. For we deal here only with the right to an *opportunity* to be heard. Since the issues

present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health.

Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not "narrowly drawn to meet any such unusual condition." *Sniadach* v. *Family Finance Corp., supra,* at 339. And no such unusual situation is presented by the facts of these cases.

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.[30]

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and facts decisive of rights in repossession suits may very often be quite simple, there is a likelihood that many defendants would forgo their opportunity, sensing the futility of the exercise in the particular case. And, of course, no hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it.

[30] The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need—*e. g.,* the apprehension and conviction of criminals—rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or

VII

Finally, we must consider the contention that the appellants who signed conditional sales contracts thereby waived their basic procedural due process rights. The contract signed by Mrs. Fuentes provided that "in the event of default of any payment or payments, Seller at its option may take back the merchandise . . . ." The contracts signed by the Pennsylvania appellants similarly provided that the seller "may retake" or "repossess" the merchandise in the event of a "default in any payment." These terms were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning.

In *D. H. Overmyer Co.* v. *Frick Co.*, 405 U. S. 174, the Court recently outlined the considerations relevant to determination of a contractual waiver of due process rights. Applying the standards governing waiver of constitutional rights in a criminal proceeding [31]—although not holding that such standards must necessarily apply—the Court held that, on the particular facts of that case, the contractual waiver of due process

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fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus, our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued. But cf. *A Quantity of Books* v. *Kansas*, 378 U. S. 205.

[31] See *Brady* v. *United States*, 397 U. S. 742, 748; *Johnson* v. *Zerbst*, 304 U. S. 458, 464. In the civil area, the Court has said that "[w]e do not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307. Indeed, in the civil no less than the criminal area, "courts indulge every reasonable presumption against waiver." *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 393.

rights was "voluntarily, intelligently, and knowingly" made. *Id.,* at 187. The contract in *Overmyer* was negotiated between two corporations; the waiver provision was specifically bargained for and drafted by their lawyers in the process of these negotiations. As the Court noted, it was "not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion." *Id.,* at 186. Both parties were "aware of the significance" of the waiver provision. *Ibid.*

The facts of the present cases are a far cry from those of *Overmyer.* There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

The Court in *Overmyer* observed that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue." *Id.,* at 188. Yet, as in *Overmyer,* there is no need in the present cases to canvass those consequences fully. For a waiver of constitutional rights in any context must, at the very *least,* be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.

The conditional sales contracts here simply provided that upon a default the seller "may take back," "may retake" or "may repossess" merchandise. The contracts

included nothing about the waiver of a prior hearing. They did not indicate *how* or *through what process*—a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing—the seller could take back the goods. Rather, the purported waiver provisions here are no more than a statement of the seller's right to repossession upon occurrence of certain events. The appellees do not suggest that these provisions waived the appellants' right to a full post-seizure hearing to determine whether those events had, in fact, occurred and to consider any other available defenses. By the same token, the language of the purported waiver provisions did not waive the appellants' constitutional right to a preseizure hearing of some kind.

VIII

We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor.[32] Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a

[32] We do not reach the appellants' argument that the Florida and Pennsylvania statutory procedures violate the Fourth Amendment, made applicable to the States by the Fourteenth. See n. 2, *supra*. For once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated. There is no need for us to decide that question at this point.

subject, at this point, for legislation—not adjudication.[33] Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test. "[D]ue process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property . . . ." *Sniadach* v. *Family Finance Corp., supra,* at 343 (Harlan, J., concurring). See *Bell* v. *Burson, supra,* at 540; *Goldberg* v. *Kelly, supra,* at 267.

For the foregoing reasons, the judgments of the District Courts are vacated and these cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST did not participate in the consideration or decision of these cases.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

Because the Court's opinion and judgment improvidently, in my view, call into question important aspects of the statutes of almost all the States governing secured transactions and the procedure for repossessing personal property, I must dissent for the reasons that follow.

First: It is my view that when the federal actions were filed in these cases and the respective District

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[33] Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute.

Courts proceeded to judgment there were state court proceedings in progress. It seems apparent to me that the judgments should be vacated and the District Courts instructed to reconsider these cases in the light of the principles announced in *Younger* v. *Harris,* 401 U. S. 37 (1971); *Samuels* v. *Mackell,* 401 U. S. 66; *Boyle* v. *Landry,* 401 U. S. 77; and *Perez* v. *Ledesma,* 401 U. S. 82.

In No. 70–5039, the Florida statutes provide for the commencement of an action of replevin, with bond, by serving a writ summoning the defendant to answer the complaint. Thereupon the sheriff may seize the property, subject to repossession by defendant within three days upon filing of a counterbond, failing which the property is delivered to plaintiff to await final judgment in the replevin action. Fla. Stat. Ann. § 78.01 *et seq.* (Supp. 1972–1973). This procedure was attacked in a complaint filed by appellant Fuentes in the federal court, alleging that an affidavit in replevin had been filed by Firestone Tire & Rubber Co. in the Small Claims Court of Dade County; that a writ of replevin had been issued pursuant thereto and duly served, together with the affidavit and complaint; and that a trial date had been set in the Small Claims Court. Firestone's answer admitted that the replevin action was pending in the Small Claims Court and asserted that Mrs. Fuentes, plaintiff in the federal court and appellant here, had not denied her default or alleged that she had the right to possession of the property. Clearly, state court proceedings were pending, no bad faith or harassment was alleged, and no irreparable injury appeared that could not have been averted by raising constitutional objections in the pending state court proceeding. In this posture, it would appear that the case should be reconsidered under *Younger* v. *Harris* and companion cases, which were announced after the District Court's judgment.

In No. 70–5138, Pennsylvania Rule of Civil Procedure 1073 expressly provides that an "[a]ction of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond . . . ." When the writ issues and is served, the defendant has three days to file a counterbond and should he care to have a hearing he may file his own praecipe, in which event the plaintiff must proceed further in the action by filing and serving his complaint.

In the cases before us, actions in replevin were commenced in accordance with the rules, and appellee Sears, Roebuck & Co. urged in the District Court that plaintiffs had "adequate remedies at law which they could pursue in the state court proceedings which are still pending in accordance with the statutes and rules of Pennsylvania." App. 60. Under *Younger* v. *Harris* and companion cases, the District Court's judgment should be vacated and the case reconsidered.

Second: It goes without saying that in the typical installment sale of personal property both seller and buyer have interests in the property until the purchase price is fully paid, the seller early in the transaction often having more at stake than the buyer. Nor is it disputed that the buyer's right to possession is conditioned upon his making the stipulated payments and that upon default the seller is entitled to possession. Finally, there is no question in these cases that if default is disputed by the buyer he has the opportunity for a full hearing, and that if he prevails he may have the property or its full value as damages.

The narrow issue, as the Court notes, is whether it comports with due process to permit the seller, pending final judgment, to take possession of the property through a writ of replevin served by the sheriff without affording the buyer opportunity to insist that the seller establish at a hearing that there is reasonable

basis for his claim of default. The interests of the buyer and seller are obviously antagonistic during this interim period: the buyer wants the use of the property pending final judgment; the seller's interest is to prevent further use and deterioration of his security. By the Florida and Pennsylvania laws the property is to all intents and purposes placed in custody and immobilized during this time. The buyer loses use of the property temporarily but is protected against loss; the seller is protected against deterioration of the property but must undertake by bond to make the buyer whole in the event the latter prevails.

In considering whether this resolution of conflicting interests is unconstitutional, much depends on one's perceptions of the practical considerations involved. The Court holds it constitutionally essential to afford opportunity for a probable-cause hearing prior to repossession. Its stated purpose is "to prevent unfair and mistaken deprivations of property." But in these typical situations, the buyer-debtor has either defaulted or he has not. If there is a default, it would seem not only "fair," but essential, that the creditor be allowed to repossess; and I cannot say that the likelihood of a mistaken claim of default is sufficiently real or recurring to justify a broad constitutional requirement that a creditor do more than the typical state law requires and permits him to do. Sellers are normally in the business of selling and collecting the price for their merchandise. I could be quite wrong, but it would not seem in the creditor's interest for a default occasioning repossession to occur; as a practical matter it would much better serve his interests if the transaction goes forward and is completed as planned. Dollar-and-cents considerations weigh heavily against false claims of default as well as against precipitate action that would allow no opportunity for mistakes to surface and be

corrected.* Nor does it seem to me that creditors would lightly undertake the expense of instituting replevin actions and putting up bonds.

The Court relies on prior cases, particularly *Goldberg* v. *Kelly,* 397 U. S. 254 (1970); *Bell* v. *Burson,* 402 U. S. 535 (1971); and *Stanley* v. *Illinois,* 405 U. S. 645 (1972). But these cases provide no automatic test for determining whether and when due process of law requires adversary proceedings. Indeed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . ." "[W]hat procedures due process may require under any given set of circumstances must begin

*Appellants Paul and Ellen Parham admitted in their complaints that they were delinquent in their payments. They stipulated to this effect as well as to receipt of notices of delinquency prior to institution of the replevin action, and the District Court so found.

Appellant Epps alleged in his complaint that he was not in default. The defendant, Government Employees Exchange Corp., answered that Epps was in default in the amount of $311.25 as of August 9, 1970, that the entire sum due had been demanded in accordance with the relevant documents, and that Epps had failed and refused to pay that sum. The District Court did not resolve this factual dispute. It did find that Epps earned in excess of $10,000 per year and that the agreements Epps and Parham entered into complied with the provisions of Pennsylvania's Uniform Commercial Code and its Services and Installment Sales Act.

As for appellant Rosa Washington, the District Court, based on the allegations of her complaint, entered a temporary restraining order requiring that the property seized from her be returned forthwith. At a subsequent hearing the order was dissolved, the court finding "that the representations upon which the temporary restraining order of September 18, 1970, issued were incorrect, both as to allegations contained in the complaint and representations made by counsel." (App. 29.)

It was stipulated between appellant Fuentes and defendants in the District Court that Mrs. Fuentes was in default at the time the replevin action was filed and that notices to this effect were sent to her over several months prior to institution of the suit. (App. 25–26.)

with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961). See also *Stanley* v. *Illinois, supra,* at 650; *Goldberg* v. *Kelly, supra,* at 263. Viewing the issue before us in this light, I would not construe the Due Process Clause to require the creditors to do more than they have done in these cases to secure possession pending final hearing. Certainly, I would not ignore, as the Court does, the creditor's interest in preventing further use and deterioration of the property in which he has substantial interest. Surely under the Court's own definition, the creditor has a "property" interest as deserving of protection as that of the debtor. At least the debtor, who is very likely uninterested in a speedy resolution that could terminate his use of the property, should be required to make those payments, into court or otherwise, upon which his right to possession is conditioned. Cf. *Lindsey* v. *Normet,* 405 U. S. 56 (1972).

Third: The Court's rhetoric is seductive, but in end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law. It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all. Alternatively, they need only give a few days' notice of a hearing, take possession if hearing is waived or if there is default; and if hearing is necessary merely establish probable cause for asserting that default has occurred. It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present laws pro-

vide. On the contrary, the availability of credit may well be diminished or, in any event, the expense of securing it increased.

None of this seems worth the candle to me. The procedure that the Court strikes down is not some barbaric hangover from bygone days. The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years. The Uniform Commercial Code, which now so pervasively governs the subject matter with which it deals, provides in Art. 9, § 9–503, that:

> "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

Recent studies have suggested no changes in Art. 9 in this respect. See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report, § 9–503 (April 25, 1971). I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.

COLTEN *v.* KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

No. 71–404. Argued April 17, 1972—Decided June 12, 1972

Appellant, arrested for disorderly conduct when he failed, notwithstanding several requests by an officer, to leave a congested roadside where a friend in another car was being ticketed for a traffic offense, was tried and convicted in an inferior court and fined $10. Kentucky has a two-tier system for adjudicating certain criminal cases, under which a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general criminal jurisdiction but must risk a greater punishment if convicted. Exercising his right to a trial *de novo*, appellant was tried for disorderly conduct in the circuit court, convicted, and fined $50. The state appellate court affirmed, rejecting appellant's contention that the disorderly conduct statute is unconstitutional under the First and Fourteenth Amendments and that the greater punishment contravened the due process requirements of *North Carolina* v. *Pearce*, 395 U. S. 711, and violated the Fifth Amendment's Double Jeopardy Clause. The disorderly conduct statute makes it an offense for a person with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, to congregate with others in a public place and refuse to comply with a lawful police dispersal order. As construed by the Kentucky Court of Appeals, a violation occurs only where there is no bona fide intention to exercise a constitutional right or where the interest to be advanced by the individual's exercise of the right is insignificant in comparison to the inconvenience, annoyance, or alarm caused by his action. *Held:*

1. The disorderly conduct statute was not unconstitutionally applied, there having been ample evidence that the action of appellant, who had no constitutional right to observe the ticketing process or engage the issuing officer in conversation, was interfering with enforcement of traffic laws. Pp. 108–110.

2. The statute is not impermissibly vague or broad as "citizens who desire to obey [it] will have no difficulty in understanding it," and, as construed by the Kentucky court, individuals may not be convicted thereunder merely for expressing unpopular ideas. Pp. 110–111.

3. Kentucky's two-tier system does not violate the Due Process Clause, as it imposes no penalty on those who seek a trial *de novo* after having been convicted in the inferior court. The Kentucky procedure involves a completely fresh determination of guilt or innocence by the superior court which is not the court that acted on the case before and has no motive to deal more strictly with a *de novo* defendant than it would with any other. *North Carolina* v. *Pearce, supra,* distinguished. Pp. 112–119.

4. The Double Jeopardy Clause does not prohibit an enhanced sentence on reconviction. *North Carolina* v. *Pearce, supra,* at 719–720. Pp. 119–120.

467 S. W. 2d 374, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., *post,* p. 120, and MARSHALL, J., *post,* p. 122, filed dissenting opinions.

Alvin L. Goldman argued the cause for appellant. With him on the brief were *Melvin L. Wulf* and *Sanford Jay Rosen.*

Robert W. Willmott, Jr., Assistant Attorney General of Kentucky, argued the cause for appellee *pro hac vice.* With him on the brief was *Ed W. Hancock,* Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents two unrelated questions. Appellant challenges his Kentucky conviction for disorderly conduct on the ground that the conviction and the State's statute are repugnant to the First and Fourteenth Amendments. He also challenges the constitutionality of the enhanced penalty he received under Kentucky's two-tier system for adjudicating certain criminal cases, whereby a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general

criminal jurisdiction but must run the risk, if convicted, of receiving a greater punishment.

Appellant Colten and 15 to 20 other college students gathered at the Blue Grass Airport outside Lexington, Kentucky, to show their support for a state gubernatorial candidate and to demonstrate their lack of regard for Mrs. Richard Nixon, then about to leave Lexington from the airport after a public appearance in the city. When the demonstration had ended, the students got into their automobiles and formed a procession of six to 10 cars along the airport access road to the main highway. A state policeman, observing that one of the first cars in the entourage carried an expired Louisiana license plate, directed the driver, one Mendez, to pull off the road. He complied. Appellant Colten, followed by other motorists in the procession, also pulled off the highway, and Colten approached the officer to find out what was the matter. The policeman explained that the Mendez car bore an expired plate and that a traffic summons would be issued. Colten made some effort to enter into a conversation about the summons. His theory was that Mendez may have received an extension of time in which to obtain new plates. In order to avoid Colten and to complete the issuance of the summons, the policeman took Mendez to the patrol car. Meanwhile, other students had left their cars and additional policemen, having completed their duties at the airport and having noticed the roadside scene, stopped their cars in the traffic lane abreast of the students' vehicles. At least one officer took responsibility for directing traffic, although testimony differed as to the need for doing so. Testimony also differed as to the number of policemen and students present, how many students left their cars and how many were at one time or another standing in the roadway. A state police captain asked on four or five occasions that the group disperse. At least five times

police asked Colten to leave.[1] A state trooper made two requests, remarking at least once: "Now, this is none of your affair . . . get back in your car and please move on and clear the road." In response to at least one of these requests Colten replied that he wished to make a transportation arrangement for his friend Mendez and the occupants of the Mendez car, which he understood was to be towed away. Another officer asked three times that Colten depart and when Colten failed to move away he was arrested for violating Kentucky's disorderly conduct statute, Ky. Rev. Stat. § 437.016 (Supp. 1968). The arresting officer testified that Colten's response to the order had been to say that he intended to stay and see what might happen. Colten disputed this. He testified that he expressed a willingness to leave but wanted first to make a transportation arrangement. At trial he added that he feared violence on the part of the police.[2]

The complaint and warrant charging disorderly conduct, which carries a maximum penalty of six months in jail and a fine of $500, were addressed to the Quarterly

[1] This version of the facts is taken largely from the opinion of the Kentucky Court of Appeals. *Colten* v. *Commonwealth,* 467 S. W. 2d 374, 375–376 (Ky. 1971). Colten testified that only the arresting officer ordered him to leave and that the three orders were uttered in such rapid succession that he had little opportunity to comply. App. 49–51. This was disputed by a policeman who testified that earlier he twice asked appellant to leave and gave the admonition quoted in the text. *Id.,* at 23–24. Our own examination of the record indicates that the Kentucky courts' resolution of this factual dispute was a fair one. Cf. *Cox* v. *Louisiana,* 379 U. S. 536, 545 n. 8 (1965).

[2] In his brief appellant makes a passing reference to the possibility of violence on the part of police and suggests that he remained on the scene to avert misdeeds or to be a potential witness to them. Yet he builds no factual basis for a reasonable apprehension of violence and seemingly dispels whatever force such a contention might have when he states in his brief: "In the overwhelming majority of cases, that suspicion [of police brutality] is undoubtedly wrong, but it is there." Brief for Appellant 36.

Court of Fayette County, where Colten was tried, convicted, and fined $10. Exercising his right to a trial *de novo* in a court of general jurisdiction, Colten "appealed," as the Kentucky rules style this recourse, Ky. Rule Crim. Proc. 12.02, to the Criminal Division of the Fayette Circuit Court. By consent, trial was to the court and Colten was convicted of disorderly conduct and this time fined $50. The Kentucky Court of Appeals affirmed. *Colten* v. *Commonwealth,* 467 S. W. 2d 374 (1971). It rejected Colten's constitutional challenges to the statute and his claim that the punishment imposed was impermissible, under *North Carolina* v. *Pearce,* 395 U. S. 711 (1969). We noted probable jurisdiction. 404 U. S. 1014 (1972).

I

Colten was convicted of violating Ky. Rev. Stat. § 437.016 (1)(f) (Supp. 1968), which states:

> "(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> . . . . .
>
> "(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse . . . ."

The Kentucky Court of Appeals interpreted the statute in the following way:

> "As reasonably construed, the statute does not prohibit the lawful exercise of any constitutional right. We think that the plain meaning of the statute, in requiring that the proscribed conduct be done 'with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,' is that the specified intent must be the *predominant* intent. Predominance can be determined either (1) from the fact that no bona fide intent to exercise a constitu-

> tional right appears to have existed or (2) from the fact that the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise." 467 S. W. 2d, at 377.

The evidence warranted a finding, the Kentucky court concluded, that at the time of his arrest, "Colten was not undertaking to exercise any constitutionally protected freedom." Rather, he "appears to have had no purpose other than to cause inconvenience and annoyance. So the statute as applied here did not chill or stifle the exercise of any constitutional right." *Id.*, at 378.

Based on our own examination of the record, we perceive no justification for setting aside the conclusion of the state court that when arrested appellant was not engaged in activity protected by the First Amendment. Colten insists that in seeking to arrange transportation for Mendez and in observing the issuance of a traffic citation he was disseminating and receiving information. But this is a strained, near-frivolous contention and we have little doubt that Colten's conduct in refusing to move on after being directed to do so was not, without more, protected by the First Amendment. Nor can we believe that Colten, although he was not trespassing or disobeying any traffic regulation himself, could not be required to move on. He had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time. The State has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction. Here the police had cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident. We cannot disagree with the finding

below that the order to disperse was suited to the occasion. We thus see nothing unconstitutional in the manner in which the statute was applied.

II

Neither are we convinced that the statute is either impermissibly vague or broad. We perceive no violation of "[t]he underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss,* 347 U. S. 612, 617 (1954); cf. *Connally* v. *General Construction Co.,* 269 U. S. 385, 391 (1926). Here the statute authorized conviction for refusing to disperse with the intent of causing inconvenience, annoyance, or alarm. Any person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he could be convicted under subdivision (f) of Kentucky's statute if he fails to obey an order to move on. The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky court when it said: "We believe that citizens who desire to obey the statute will have no difficulty in understanding it . . . ." *Colten* v. *Commonwealth,* 467 S. W. 2d, at 378.

Colten also argues that the Kentucky statute is overbroad. He relies on *Cox* v. *Louisiana,* 379 U. S. 536 (1965), where the Court held unconstitutional a breach-of-peace statute construed to forbid causing agitation or

disquiet coupled with refusing to move on when ordered to do so. The Court invalidated the statute on the ground that it permitted conviction where the mere expression of unpopular views prompted the order that is disobeyed. Colten argues that the Kentucky statute must be stricken down for the same reason.

As the Kentucky statute was construed by the state court, however, a crime is committed only where there is no bona fide intention to exercise a constitutional right—in which event, by definition, the statute infringes no protected speech or conduct—or where the interest so clearly outweighs the collective interest sought to be asserted that the latter must be deemed insubstantial. The court hypothesized, for example, that one could be convicted for disorderly conduct if at a symphony concert he arose and began lecturing to the audience on leghorn chickens. 467 S. W. 2d, at 377. In so confining the reach of its statute, the Kentucky court avoided the shortcomings of the statute invalidated in the *Cox* case. Individuals may not be convicted under the Kentucky statute merely for expressing unpopular or annoying ideas. The statute comes into operation only when the individual's interest in expression, judged in the light of all relevant factors, is "minuscule" compared to a particular public interest in preventing that expression or conduct at that time and place. As we understand this case, appellant's own conduct was not immune under the First Amendment and neither is his conviction vulnerable on the ground that the statute threatens constitutionally protected conduct of others.[3]

[3] Appellant attacks on overbreadth grounds other subsections of the disorderly conduct statute, such as those that prohibit the making of an "unreasonable noise" and the use of "abusive or obscene language." Ky. Rev. Stat. §§ 437.016 (b), (c) (Supp. 1968). But Colten was not convicted of violating these subsections and they are not properly before us in this case.

III

Kentucky, like many other States,[4] has a two-tier system for adjudicating less serious criminal cases. In Kentucky, at the option of the arresting officer, those crimes classified under state law as misdemeanors [5] may be charged and tried in a so-called inferior court,[6] where, as in the normal trial setting, a defendant may choose to have a trial or to plead guilty. If convicted after trial or on a guilty plea, however, he has a right to a trial *de novo* in a court of general criminal jurisdiction, *Brown* v. *Hoblitzell,* 307 S. W. 2d 739 (Ky. 1957), so

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[4] *E. g.,* Ariz. Rev. Stat. Ann. § 22–371 *et seq.* (1956 and Supp. 1971–1972); Ark. Stat. Ann. § 44–501 *et seq.* (1964); Colo. Rule Crim. Proc. 37 (f); Fla. Stat. Ann. § 924.41 *et seq.* (Supp. 1972–1973); Ind. Ann. Stat. § 9–713 *et seq.* (1956 and Supp. 1971); Kan. Stat. Ann. § 22–3610 *et seq.* (Supp. 1971); Me. Dist. Ct. Crim. Rule 37 *et seq.;* Md. Ann. Code, Art. 5, § 43 (1968); Mich. Stat. Ann. § 28.1226 (Supp. 1972); Minn. Stat. §§ 488.20, 633.20 *et seq.* (1969); Miss. Code Ann. §§ 1201, 1202 (Supp. 1971); Mo. Sup. Ct. Rule 22; Mont. Rev. Codes Ann. § 95–2001 *et seq.* (1947); Neb. Rev. Stat. § 29–601 *et seq.* (1964); Nev. Rev. Stat. § 189.010 *et seq.* (1969); N. H. Rev. Stat. Ann. §§ 502:18, 502–A:11–12 (1968); N. M. Stat. Ann. § 36–15–1 *et seq.* (Supp. 1971); N. C. Gen. Stat. §§ 15–177 *et seq.,* 20–138 (1965 and Supp. 1971); N. D. Cent. Code § 33–12–40 *et seq.* (1960); Pa. Stat. Ann., Tit. 42, § 3001 *et seq.* (Supp. 1972–1973); Pa. Const., Sched. Art. 5, § 16 (r)(iii) (Philadelphia); Tex. Code Crim. Proc., Arts. 44.17, 45.10 (1966); Va. Code Ann. § 16.1–129 *et seq.* (1950); Wash. Rev. Code § 3.50.380 *et seq.* (Supp. 1971); W. Va. Code Ann. § 50–18–1 *et seq.* (1966 and Supp. 1971).

[5] Misdemeanors are defined as those crimes punishable by a maximum of one year in jail and a $500 fine. Ky. Rev. Stat. §§ 25.010, 26.010 (1962 and Supp. 1968).

[6] What the Kentucky Court of Appeals calls inferior courts include county, quarterly, justice's and police courts. In all cases in which the punishment is limited to a fine of $20, the inferior courts have original jurisdiction. Ky. Rev. Stat. § 25.010 (1962). In all other misdemeanor cases their jurisdiction is concurrent with that of the circuit courts.

long as he applies within the statutory time.[7] The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Ky. Rule Crim. Proc. 12.06. Prosecution and defense begin anew. By the same token neither the judge nor jury that determines guilt or fixes a penalty in the trial *de novo* is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance. A convicted defendant may seek review in the state appellate courts in the same manner as a person tried initially in the general criminal court. Ky. Rev. Stat. § 23.032 (Supp. 1968). However, a defendant convicted after a trial or plea in an inferior court may not seek ordinary appellate review of the inferior court's ruling. His recourse is the trial *de novo*.

While by definition two-tier systems throughout the States have in common the trial *de novo* feature,[8] there are differences in the kind of trial available in the inferior courts of first instance, whether known as county, municipal, police, or justice of the peace courts, or are otherwise referred to. Depending upon the jurisdiction and offense charged, many such systems provide as complete protection for a criminal defendant's constitutional rights as do courts empowered to try more serious crimes. Others, however, lack some of the safeguards provided in more serious criminal cases. Although appellant here was entitled to a six-man jury, cf. *Williams* v. *Florida,* 399 U. S. 78 (1970), which he waived, some

[7] Ky. Rev. Stat. § 23.032 (Supp. 1968). Kentucky denominates an application for a trial *de novo* an "appeal." However, the right to a new trial is unconditional and exists even when a defendant seeks redetermination of questions of law. Ky. Rules Crim. Proc. 12.02, 12.06.

[8] A general discussion of how these courts operate may be found in 47 Am. Jur. 2d, Justices of the Peace §§ 49–120.

States do not provide for trial by jury,[9] even in instances where the authorized punishment would entitle the accused to such tribunal. Cf. *Duncan* v. *Louisiana,* 391 U. S. 145 (1968). Some, including Kentucky, do not record proceedings[10] and the judges may not be trained for their positions either by experience or schooling.[11]

Two justifications are asserted for such tribunals: first, in this day of increasing burdens on state judiciaries, these courts are designed, in the interest of both the defendant and the State, to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available; second, if the defendant is not satisfied with the results of his first trial he has the unconditional right to a new trial in a superior court, unprejudiced by the proceedings or the outcome in the inferior courts. Colten, however, considers the Kentucky system to be infirm because the judge in a trial *de novo* is empowered to sentence anew and is not bound to stay within the limits of the sentence imposed by the inferior court. He bases his attack both on the Due Process Clause, as interpreted in *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), and on the Fifth Amendment's Double Jeopardy Clause. The

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[9] *E. g.,* Massachusetts, North Carolina, Pennsylvania. *Mann* v. *Commonwealth,* — Mass. —, 271 N. E. 2d 331 (1971); *State* v. *Spencer,* 276 N. C. 535, 173 S. E. 2d 765 (1970); Pa. Stat. Ann., Tit. 42, § 3001 *et seq.* (Supp. 1972–1973); Pa. Const., Sched. Art. 5, § 16 (r)(iii) (Philadelphia).

[10] *E. g.,* North Carolina, Virginia. *State* v. *Sparrow,* 276 N. C. 499, 173 S. E. 2d 897 (1970); *Evans* v. *City of Richmond,* 210 Va. 403, 171 S. E. 2d 247 (1969).

[11] See, *e. g., People v. Olary,* 382 Mich. 559, 170 N. W. 2d 842 (1969); *State* v. *DeBonis,* 58 N. J. 182, 276 A. 2d 137 (1971). However, the trial judge in the Fayette Quarterly Court, where Colten was tried, is a professional.

issues appellant raises have produced a division among the state courts that have considered them [12] as well as a conflict among the federal circuits.[13]

Colten rightly reads *Pearce* to forbid, following a successful appeal and reconviction, the imposition of a greater punishment than was imposed after the first trial, absent specified findings that have not been made here. He insists that the *Pearce* rule is applicable here and that there is no relevant difference between the *Pearce* model and the Kentucky two-tier trial *de novo* system. Both, he asserts, involve reconviction and resentencing, both provide the convicted defendant with the right to "appeal" and in both—even though under the Kentucky scheme the "appeal" is in reality a trial *de novo*—a penalty for the same crime is fixed twice, with the same potential for an increased penalty upon a successful "appeal."

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[12] *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), applies: *Bronstein* v. *Superior Court,* 106 Ariz. 251, 475 P. 2d 235 (1970); *State* v. *Shak,* 51 Haw. 626, 466 P. 2d 420 (1970); *Eldridge* v. *State,* 256 Ind. 113, 267 N. E. 2d 48 (1971); *Cherry* v. *State,* 9 Md. App. 416, 264 A. 2d 887 (1970); *Commonwealth* v. *Harper,* 219 Pa. Super. 100, 280 A. 2d 637 (1971).

Contra: Mann v. *Commonwealth,* — Mass. —, 271 N. E. 2d 331 (1971); *People* v. *Olary,* 382 Mich. 559, 170 N. W. 2d 842 (1969); *State* v. *Stanosheck,* 186 Neb. 17, 180 N. W. 2d 226 (1970); *State* v. *Sparrow,* 276 N. C. 499, 173 S. E. 2d 897 (1970); *Evans* v. *City of Richmond,* 210 Va. 403, 171 S. E. 2d 247 (1969).

New Mexico prohibits enhanced sentencing altogether. N. M. Stat. Ann. § 36–15–3 (Supp. 1971).

[13] *Pearce* applies: *Rice* v. *North Carolina,* 434 F. 2d 297 (CA4 1970), vacated and remanded on ground of possible mootness, 404 U. S. 244 (1971); *contra: Lemieux* v. *Robbins,* 414 F. 2d 353 (CA1 1969), cert. denied, 397 U. S. 1017 (1970). See also *Manns* v. *Allman,* 324 F. Supp. 1149 (WD Va. 1971), holding that *Pearce* does not apply where an enhanced penalty is imposed by a jury rather than a judge.

But *Pearce* did not turn simply on the fact of conviction, appeal, reversal, reconviction, and a greater sentence. The court was there concerned with two defendants who, after their convictions had been set aside on appeal, were reconvicted for the same offenses and sentenced to longer prison terms. In one case the term was increased from 10 to 25 years. Positing that a more severe penalty after reconviction would violate due process of law if imposed as purposeful punishment for having successfully appealed, the court concluded that such untoward sentences occurred with sufficient frequency to warrant the imposition of a prophylactic rule to ensure "that vindictiveness against a defendant for having successfully attacked his first conviction . . . [would] play no part in the sentence he receives after a new trial . . ." and to ensure that the apprehension of such vindictiveness does not "deter a defendant's exercise of the right to appeal or collaterally attack his first conviction . . . ." 395 U. S., at 725.

Our view of the Kentucky two-tier system of administering criminal justice, however, does not lead us to believe, and there is nothing in the record or presented in the briefs to show, that the hazard of being penalized for seeking a new trial, which underlay the holding of *Pearce,* also inheres in the *de novo* trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness. The possibility of vindictiveness, found to exist in *Pearce,* is not inherent in the Kentucky two-tier system.

We note first the obvious: that the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it

is not the court that is asked to do over what it thought it had already done correctly. Nor is the *de novo* court even asked to find error in another court's work. Rather, the Kentucky court in which Colten had the unrestricted right to have a new trial was merely asked to accord the same trial, under the same rules and procedures, available to defendants whose cases are begun in that court in the first instance. It would also appear that, however understandably a court of general jurisdiction might feel that the defendant who has had a due process trial ought to be satisfied with it, the *de novo* court in the two-tier system is much more likely to reflect the attitude of the Kentucky Court of Appeals in this case when it stated that "the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses." *Colten* v. *Commonwealth,* 467 S. W. 2d, at 379. We see no reason, and none is offered, to assume that the *de novo* court will deal any more strictly with those who insist on a trial in the superior court after conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior court and who choose to put the State to its proof in a trial subject to constitutional guarantees.

It may often be that the superior court will impose a punishment more severe than that received from the inferior court. But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty. The trial *de novo* represents a completely fresh determination of guilt or innocence. It is not an appeal on the record. As far as we know, the record from the lower court is not before the superior court and is irrelevant

to its proceedings. In all likelihood, the trial *de novo* court is not even informed of the sentence imposed in the inferior court and can hardly be said to have "enhanced" the sentence.[14] In Kentucky, disorderly conduct is punishable by six months in jail and a fine of $500. The inferior court fined Colten $10, the trial *de novo* court $50. We have no basis for concluding that the latter court did anything other than invoke the normal processes of a criminal trial and then sentence in accordance with the normal standards applied in that court to cases tried there in the first instance. We cannot conclude, on the basis of the present record or our understanding, that the prophylactic rule announced in *Pearce* is appropriate in the context of the system by which Kentucky administers criminal justice in the less serious criminal cases.

It is suggested, however, that the sentencing strictures imposed by *Pearce* are essential in order to minimize an asserted unfairness to criminal defendants who must endure a trial in an inferior court with less-than-adequate protections in order to secure a trial comporting completely with constitutional guarantees. We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy, and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may

[14] In Colten's case the superior court judge did know about the $10 fine. Colten's counsel in closing argument stated what the penalty had been, App. 93, although clearly he need not have done so.

also plead guilty without a trial and promptly secure a *de novo* trial in a court of general criminal jurisdiction. He cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel, whose advice will also be available in determining whether to seek a new trial, with the slate wiped clean, or to accept the penalty imposed by the inferior court. The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the defendant has the choice of beginning anew. In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court. We cannot say that the Kentucky trial *de novo* system, as such, is unconstitutional or that it presents hazards warranting the restraints called for in *North Carolina* v. *Pearce,* particularly since such restraints might, to the detriment of both defendant and State, diminish the likelihood that inferior courts would impose lenient sentences whose effect would be to limit the discretion of a superior court judge or jury if the defendant is retried and found guilty.

Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The *Pearce* Court rejected the same contention in the context of that case, 395 U. S., at 719–720. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the situation in *Pearce,* where reversal of the first conviction was for constitutional error. The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately

thereafter any consequence that would otherwise follow from tendering the plea.

The judgment of the Kentucky Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

This case arose in the aftermath of a visit of the President's wife to Lexington, Kentucky, where nothing untoward happened. After her plane had left, appellant and a group of his friends got into "some six to ten cars" and started down the access road leading from the airport to the main highway. The lead car was stopped by the police because of an expired license plate and at the officer's request, pulled onto the shoulder of the access road. Appellant, who followed, also pulled onto the shoulder as did the other cars in the group. So there were no cars belonging to appellant's group blocking traffic.

The people in the cars, however, walked around, some talking with the police, and appellant talking mostly with the driver of the lead car. Appellant claimed that he only wanted to advise the man who was getting the citation of his rights, and to help arrange for the driver and passengers in the lead car to get to Lexington. The Court of Appeals of Kentucky, however, said that "Colten's real intent was simply to aggravate, harass, annoy and inconvenience the police, for no purpose other than the pleasure of aggravation, harassment, annoyance and inconvenience." 467 S. W. 2d 374, 376.

The statute under which petitioner was convicted read in relevant part as follows: [1]

> "(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> . . . . . .
>
> "(f) Congregates with other persons in a public

[1] Ky. Rev. Stat. § 437.016 (Supp. 1968).

> place and refuses to comply with a lawful order of the police to disperse . . . ."

The Court of Appeals sustained the statute as applied because the inconvenience [2] and annoyance to the police far outweighed appellant's speech which fell "far below the level of minimum social value." 467 S. W. 2d, at 377. That court, citing our obscenity cases, said if "the lack of redeeming social value is a basis upon which the right of freedom of speech may be required to yield to the protection of contemporary standards of morality . . . it would seem that the public's interest in being protected from inconvenience, annoyance or alarm should prevail over any claimed right to utter speech that has no social value." *Ibid.*

But the speech involved here was nonerotic, having no suggestion or flavor of the pornographic.

The speech here was quiet, not boisterous, and it was devoid of "fighting words."

Moreover, this was not a case where speech had moved into action, involving overt acts. There were no fisticuffs, no disorderly conduct in the normal meaning of the words.

The Court of Appeals said "Colten was not seeking to express a thought to any listener or to disseminate any idea." 467 S. W. 2d, at 378. Nor was he, it said, "exercising the right of peaceable assembly." *Ibid.*

He was, however, speaking to a representative of government, the police. And it is to government that one goes "for a redress of grievances," to use an almost forgotten phrase of the First Amendment. But it is said that the purpose was "to cause inconvenience and an-

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[2] Neither appellant nor any in his group blocked traffic, their cars being parked on the shoulder of the road. Any blocking of traffic was caused by police who pulled up to see what was going on, leaving their patrol cars in the access road. See 467 S. W. 2d 374, 376.

noyance." Since when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us? The constitutional theory is that we the people are the sovereigns, the state and federal officials only our agents. We who have the final word can speak softly or angrily. We can seek to challenge and annoy, as we need not stay docile and quiet. The situation might have indicated that Colten's techniques were ill-suited to the mission he was on, that diplomacy would have been more effective. But at the constitutional level speech need not be a sedative; it can be disruptive. As we said in *Terminiello* v. *Chicago,* 337 U. S. 1, 4:

> "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

Under that test this conviction should be set aside.

MR. JUSTICE MARSHALL, dissenting.

In my view, *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), requires a reversal of this case.

In this case the Court correctly evaluates Kentucky's procedure: "[A] defendant convicted after a trial or plea in an inferior court may not seek ordinary appellate review of the inferior court's ruling. His recourse is the trial *de novo.*" From this the conclusion is reached that the "trial *de novo*" is not an appeal. What, then, is it?

The pertinent Kentucky Rules provide:

12.02 *Manner of Taking*

"(1) An appeal to the circuit court is taken by filing with the clerk thereof a certified copy of the judgment and the amount of costs, and causing to be executed before the clerk a bond to the effect that the defendant will pay the costs of the appeal and perform the judgment which may be rendered against him on the appeal; whereupon, the clerk shall issue an order to the judge or the justice rendering the judgment, to stay proceedings thereon, and to transmit to the office of said clerk all the original papers in the prosecution.

"(2) The applicable provisions governing bail shall apply to the bond provided for in subsection (1).

"(3) After the service of the order to stay proceedings, no execution shall be issued from the inferior court, and any officer on whom the order is served shall return the execution in his hands as suspended by appeal."

12.06 *Schedule and Manner of Trial; Judgment*

"Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court, and thereupon he shall be adjudged to pay the costs of the appeal. If an appeal taken to the circuit court be dismissed, the judgment of the court from which it was taken shall stand affirmed and the costs of the appeal shall be paid by the party whose appeal is dismissed."

In *Pearce* this Court reaffirmed the restrictions upon heavier sentences after appeal:

> "It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, 'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' *United States* v. *Jackson,* 390 U. S. 570, 581. And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.' *Id.,* at 582. See also *Griffin* v. *California,* 380 U. S. 609; cf. *Johnson* v. *Avery,* 393 U. S. 483. But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law. 'A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant.' *Nichols* v. *United States,* 106 F. 672, 679. A court is 'without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice.' *Worcester* v. *Commissioner,* 370 F. 2d 713, 718. See *Short* v. *United States,* 120 U. S.

> App. D. C. 165, 167, 344 F. 2d 550, 552. 'This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin* v. *Illinois,* 351 U. S. 12; *Douglas* v. *California,* 372 U. S. 353; *Lane* v. *Brown,* 372 U. S. 477; *Draper* v. *Washington,* 372 U. S. 487.' *Rinaldi* v. *Yeager,* 384 U. S. 305, 310–311." 395 U. S., at 723–725.

This Court today seeks to escape this determination by such conclusions as:

> "Our view of the Kentucky two-tier system of administering criminal justice, however, does not lead us to believe, and there is nothing in the record or presented in the briefs to show, that the hazard of being penalized for seeking a new trial, which underlay the holding of *Pearce,* also inheres in the *de novo* trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness. The possibility of vindictiveness, found to exist in *Pearce,* is not inherent in the Kentucky two-tier system."

To the contrary, appellant's Jurisdictional Statement cites us to an order of the same judge who tried this case *"de novo"* in which he accepted a motion to dismiss an appeal in a similar case with the following statement:

> "The Commonwealth Attorney has advised the Court that he does not wish to oppose the defendant's motion to dismiss.
>
> "While the defendant may be correct in his assumption that the citizens of this community have a hostile attitude toward students who would at-

> tempt to disrupt the university, it may be that this hostility has been earned, and it is conceivable that a jury composed of citizens of this community might impose a more severe sentence than that imposed in the court below. Nonetheless, the Court after having reviewed the law submitted by the defendant and having conducted its own research of the law is of the opinion that the defendant has a right to dismiss his appeal and that he cannot be forced into a new trial if he does not desire to continue his appeal. For that reason the defendant's motion to have his appeal dismissed be and the same is hereby granted."

The record in this case also shows that the trial judge was informed of the lower $10 fine in the original trial and consequently knowingly increased it to $50. Finally, it should not be forgotten that under this Court's ruling today he could have increased it to $500 plus six months in jail.

The Court suggests that for some reason there is less danger of vindictive sentencing on the second trial in this context than after an ordinary appeal. Specifically, the Court faults the appellant for failing to present evidence that the danger of vindictiveness is as great here as in the precise context presented in *Pearce*. But *Pearce* did not rest on evidence that most trial judges are hostile to defendants who obtain a new trial after appeal. *Pearce* was based, rather, on the recognition that whenever a defendant is tried twice for the same offense, there is inherent in the situation the danger of vindictive sentencing the second time around, and that this danger will deter some defendants from seeking a second trial. This danger, with its deterrent effect, is exactly the same even though the second trial takes place in a different court from the first. Certainly a defendant has good reason to fear that his case will

not be well received by a second court after he rejects a disposition as favorable as the sentence originally imposed in this case.

Pearce was directed toward a new trial after an appellate reversal. This case involves a new trial without an appellate reversal. The core problem is the second trial. In both cases we have a second full and complete trial. *Pearce* should control.

JAMES, JUDICIAL ADMINISTRATOR, ET AL. *v.* STRANGE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 71-11. Argued March 22, 1972—Decided June 12, 1972

Kansas recoupment statute enabling State to recover in subsequent civil proceedings legal defense fees for indigent defendants, invalidated by District Court as an infringement on the right to counsel, *held* to violate the Equal Protection Clause in that, by virtue of the statute, indigent defendants are deprived of the array of protective exemptions Kansas has erected for other civil judgment debtors. Pp. 129–142.

323 F. Supp. 1230, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Edward G. Collister, Jr., Assistant Attorney General of Kansas, argued the cause for appellants. With him on the brief were *Vern Miller,* Attorney General, and *Matthew J. Dowd,* Assistant Attorney General.

John E. Wilkinson argued the cause and filed a brief for appellee.

Marshall J. Hartman filed a brief for the National Legal Aid and Defender Association as *amicus curiae.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a constitutional challenge to a Kansas recoupment statute, whereby the State may recover in subsequent civil proceedings counsel and other legal defense fees expended for the benefit of indigent defendants. The three-judge court below held the statute unconstitutional, finding it to be an impermissible burden upon the right to counsel established in *Gideon*

v. *Wainwright,* 372 U. S. 335 (1963).[1] The State appealed and we noted jurisdiction, 404 U. S. 982.

The relevant facts are not disputed. Appellee Strange was arrested and charged with first-degree robbery under Kansas law. He appeared before a magistrate, professed indigency, and accepted appointed counsel under the Kansas Aid to Indigent Defendants Act.[2] Appellee was then tried in the Shawnee County District Court on the reduced charge of pocket picking. He pleaded guilty and received a suspended sentence and three years' probation.

Thereafter, appellee's counsel applied to the State for payment for his services and received $500 from the Aid to Indigent Defendants Fund. Pursuant to Kansas' recoupment statute, the Kansas Judicial Administrator requested appellee to reimburse the State within 60 days or a judgment for the $500 would be docketed against him. Appellee contends this procedure violates his constitutional rights.

I

It is necessary at the outset to explain the terms and operation of the challenged statute.[3] When the State

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[1] The opinion of the three-judge court is reported in 323 F. Supp. 1230 (Kan. 1971).

[2] Kan. Stat. Ann. §§ 22–4501 to 22–4515 (Supp. 1971).

[3] Kan. Stat. Ann. § 22–4513 (Supp. 1971). The statute reads as follows:

"(a) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10, . . . such defendant shall be liable to the state of Kansas for a sum equal to such expenditure, and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. Within thirty (30) days after such expenditure, the judicial administrator shall send a notice by certified mail to the person on whose behalf such expenditure was made, which

provides an indigent defendant with counsel or other legal services, the defendant becomes obligated to the State for the amount expended in his behalf. Within 30 days

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notice shall state the amount of the expenditure and shall demand that the defendant pay said sum to the state of Kansas for the benefit of the fund to aid indigent defendants within sixty (60) days after receipt of such notice. The notice shall state that such sum became due on the date of the expenditure and that the sum demanded will bear interest at six percent (6%) per annum from the due date until paid. Failure to receive any such notice shall not relieve the person to whom it is addressed from the payment of the sum claimed and any interest due thereon.

"Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, the judicial administrator shall certify an abstract of the total amount of the unpaid demand and interest thereon to the clerk of the district court of the county in which counsel was appointed or the expenditure authorized by the court, and such clerk shall enter the total amount thereof on his judgment docket and said total amount, together with the interest thereon at the rate of six percent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment under the code of civil procedure and shall become a lien on real estate from and after the time of filing thereof. A transcript of said judgment may be filed in another county and become a lien upon real estate, located in such county, in the same manner as is provided in case of other judgments. Execution, garnishment, or other proceedings in aid of execution may issue within the county, or to any other county, on said judgment in like manner as on judgments under the code of civil procedure. None of the exemptions provided for in the code of civil procedure shall apply to any such judgment, but no such judgment shall be levied against a homestead. If execution shall not be sued out within five (5) years from the date of the entry of any such judgment, or if five (5) years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on real estate of the judgment debtor. Such dormant judgment may be revived in like manner as dormant judgments under the code of civil procedure.

"(b) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense

of the expenditure, the defendant is notified of his debt and given 60 days to repay it.[4] If the sum remains unpaid after the 60-day period, a judgment is docketed against defendant for the unpaid amount. Six percent annual interest runs on the debt from the date the expenditure was made. The debt becomes a lien on the real estate of defendant and may be executed by garnishment or in any other manner provided by the Kansas Code of Civil Procedure. The indigent defendant is not, however, accorded any of the exemptions provided by that code for other judgment debtors except the homestead exemption. If the judgment is not executed within five years, it becomes dormant and ceases to operate as a lien on the debtor's real estate, but may be revived in the same manner as other dormant judgments under the code of civil procedure.[5]

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services to any defendant, as authorized by section 10, . . . a sum equal to such expenditure may be recovered by the state of Kansas for the benefit of the aid to indigent defendants fund from any persons to whom the indigent defendant shall have transferred any of his property without adequate monetary consideration after the commission of the alleged crime, to the extent of the value of such transfer, and such persons are hereby made liable to reimburse the state of Kansas for such expenditures with interest at six percent (6%) per annum. Any action to recover judgment for such expenditures shall be prosecuted by the attorney general, who may require the assistance of the county attorney of the county in which the action is to be filed, and such action shall be governed by the provisions of the code of civil procedure relating to actions for the recovery of money. No action shall be brought against any person under the provisions of this section to recover for sums expended on behalf of an indigent defendant, unless such action shall have been filed within two (2) years after the date of the expenditure from the fund to aid indigent defendants."

[4] Failure to receive notice, however, does not relieve the person to whom it is addressed of the obligation.

[5] A dormant judgment may be revived within two years of the date on which the judgment became dormant. Kan. Stat. Ann. § 60–2404 (1964).

Several features of this procedure merit mention. The entire program is administered by the judicial administrator, a public official, but appointed counsel are private practitioners. The statute apparently leaves to administrative discretion whether, and under what circumstances, enforcement of the judgment will be sought. Recovered sums do, however, revert to the Aid to Indigent Defendants Fund.

The Kansas statute is but one of many state recoupment laws applicable to counsel fees and expenditures paid for indigent defendants.[6] The statutes vary widely in their terms. Under some statutes, the indigent's liability is to the county in which he is tried; in others to the State. Alabama and Indiana make assessment and recovery of an indigent's counsel fees discretionary with the court. Florida's recoupment law has no statute of limitations and the State is deemed to have a perpetual lien against the defendant's real and personal property and estate.[7] Idaho, on the other hand, has a five-year statute of limitations on the re-

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[6] There is also a federal reimbursement provision, 18 U. S. C. § 3006A (f):

"Receipt of other payments.—Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant."

[7] The board of county commissioners has discretion to compromise or release the lien, however. Fla. Stat. Ann. § 27.56 (Supp. 1972–1973).

covery of an "indigent's" concealed assets at the time of trial and a three-year statute for the recovery of later acquired ones. In Virginia and West Virginia, the amount paid to court-appointed counsel is assessed only against convicted defendants as a part of costs, although the majority of state recoupment laws apply whether or not the defendant prevails. It is thus apparent that state recoupment laws and procedures differ significantly in their particulars.[8] Given the wide differences in the features of these statutes, any broadside pronouncement on their general validity would be inappropriate.

We turn therefore to the Kansas statute, aware that our reviewing function is a limited one. We do not inquire whether this statute is wise or desirable, or "whether it is based on assumptions scientifically substantiated." *Roth* v. *United States,* 354 U. S. 476, 501 (1957) (separate opinion of Harlan, J.). Misguided laws may nonetheless be constitutional. It has been noted both in the briefs and at argument that only $17,000 has been recovered under the statute in its almost two years of operation, and that this amount is negligible compared to the total expended.[9] Our task, however, is not to weigh this statute's effectiveness but its constitutionality.

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[8] State recoupment statutes, including those quoted above, are as follows:

Ala. Code, Tit. 15, § 318 (12) (Supp. 1969); Alaska Stat. § 12.55.020 (1962); Fla. Stat. Ann. § 27.56 (Supp. 1972–1973); Idaho Code § 19–858 (Supp. 1971); Ind. Ann. Stat. § 9–3501 (Supp. 1970); Iowa Code Ann. § 775.5 (Supp. 1972); Md. Ann. Code, Art. 26, § 12C (Supp. 1971); N. M. Stat. Ann. § 41–22–7 (Supp. 1971); N. D. Cent. Code § 29–07–01.1 (Supp. 1971); Ohio Rev. Code Ann. § 2941.51 (Supp. 1971); S. C. Code Ann. § 17–283 (Supp. 1971); Tex. Code Crim. Proc., Art. 1018 (1966); Va. Code Ann. § 14.1–184 (Supp. 1971); W. Va. Code Ann. § 62–3–1 (Supp. 1971); Wis. Stat. Ann. § 256.66 (1971).

[9] For fiscal 1971 $400,000 was appropriated to fund the program.

Whether the returns under the statute justify the expense, time, and efforts of state officials is for the ongoing supervision of the legislative branch.

The court below invalidated this statute on the grounds that it "needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel as explicated in Gideon v. Wainwright, supra." 323 F. Supp. 1230, 1233. In *Gideon,* counsel had been denied an indigent defendant charged with a felony because his was not a capital case. This Court often has voided state statutes and practices which denied to accused indigents the means to present effective defenses in courts of law. *Douglas* v. *California,* 372 U. S. 353 (1963); *Draper* v. *Washington,* 372 U. S. 487 (1963); *Lane* v. *Brown,* 372 U. S. 477 (1963); *Griffin* v. *Illinois,* 351 U. S. 12 (1956). Here, however, Kansas has enacted laws both to provide and compensate from public funds counsel for the indigent.[10] There is certainly no denial of the right to counsel in the strictest sense. Whether the statutory obligations for repayment impermissibly deter the exercise of this right is a question we need not reach, for we find the statute before us constitutionally infirm on other grounds.

II

Appellants have asserted in argument before this Court that the statute "has attempted to treat them [indigent defendants] the same as would any civil judgment debtor be treated in the State courts . . . ." [11] Again, in their brief appellants assert that "[f]or all practical purposes the methods available for enforcement of the judgment are the same as those provided by the Code of Civil

[10] See n. 2, *supra.*

[11] Tr. of Oral Arg. 9. The State concedes that exemptions for other civil judgment debtors are broader than for indigent defendants, *id.,* at 10, a matter we will address forthwith.

Procedures [*sic*] or any other civil judgment."[12] The challenged portion of the statute thrice alludes to means of debt recovery prescribed by the Kansas Code of Civil Procedure.[13]

Yet the ostensibly equal treatment of indigent defendants with other civil judgment debtors recedes sharply as one examines the statute more closely. The statute stipulates that save for the homestead, "[n]one of the exemptions provided for in the code of civil procedure shall apply to any such judgment . . . ."[14] This provision strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor's personal clothing, books, and tools of trade. For the head of a family, the exemptions afforded other judgment debtors become more extensive, and cover furnishings, food, fuel, clothing, means of transportation, pension funds, and even a family burial plot or crypt.[15]

Of the above exemptions, none is more important to a debtor than the exemption of his wages from unrestricted garnishment. The debtor's wages are his sustenance, with which he supports himself and his family. The average low income wage earner spends nearly nine-tenths of those wages for items of immediate consumption.[16] This Court has recognized the potential of

[12] Brief for Appellants 7.

[13] See Kan. Stat. Ann. §§ 60–701 to 60–724, 60–2401 to 60–2419 (1964 and Supp. 1971).

[14] The exemptions in the civil code are set forth in Kan. Stat. Ann. §§ 60–2301 to 60–2311 (1964 and Supp. 1971).

[15] Kan. Stat. Ann. §§ 60–2304 and 60–2308 (1964 and Supp. 1971).

[16] Bureau of Labor Statistics, Handbook of Labor Statistics 281 (1968). Low-wage earners are defined as families with after-tax income of less than $5,000.

certain garnishment proceedings to "impose tremendous hardships on wage earners with families to support." *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 340 (1969).[17] Kansas has likewise perceived the burden to a debtor and his family when wages may be subject to wholesale garnishment. Consequently, under its code of civil procedure, the maximum which can be garnished is the lesser of 25% of a debtor's weekly disposable earnings or the amount by which those earnings exceed 30 times the federal minimum hourly wage. No one creditor may issue more than one garnishment during any one month, and no employer may discharge an employee because his earnings have been garnished for a single indebtedness.[18] For Kansas to deny protections such as these to the once criminally accused is to risk denying him the means needed to keep himself and his family afloat.

The indigent's predicament under this statute comes into sharper focus when compared with that of one who has hired counsel in his defense. Should the latter prove unable to pay and a judgment be obtained against him, his obligation would become enforceable under the relevant provisions of the Kansas Code of Civil Proce-

[17] The Court in *Sniadach* held that Wisconsin's prejudgment wage garnishment procedure, as a taking of property without notice and prior hearing, violated the Due Process Clause of the Fourteenth Amendment.

[18] Kan. Stat. Ann. §§ 60–2310 (b) and 60–2311 (Supp. 1971). Section 60–2310 also provides further debtor protection from wage garnishment at a time of disabling personal sickness and from professional collecting agencies. See Kan. Stat. Ann. §§ 60–2310 (c) and (d) (Supp. 1971). See also Bennett, the 1970 Kansas Legislature in Review, 39 J. B. A. K. 107, 178 (1970), which points out that the State's restrictions on garnishments have been made to conform to Tit. III of the federal Consumer Credit Protection Act, 82 Stat. 163. Kansas, however, provided significant wage exemptions from garnishment long before the federal Act was passed.

dure. But, unlike the indigent under the recoupment statute, the code's exemptions would protect this judgment debtor.

It may be argued that an indigent accused, for whom the State has provided counsel, is in a different class with respect to collection of his indebtedness than a judgment creditor whose obligation arose from a private transaction. But other Kansas statutes providing for recoupment of public assistance to indigents do not include the severe provisions imposed on indigent defendants in this case. Kansas has enacted, as have many other States, laws for state recovery of public welfare assistance when paid to an ineligible recipient.[19] Yet

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[19] Kan. Stat. Ann. § 39–719b (1964); § 59–2006 (Supp. 1971). Section 39–719b deals mainly with the recovery of assistance from an ineligible recipient. Yet, even when the welfare recipient is deemed to have defrauded the State, he still escapes the immediate interest accumulations and denial of exemptions imposed on indigent defendants:

"§ 39–719b. Duty of recipient to report changes; action by board; recovery of assistance obtained by ineligible recipient. If at any time during the continuance of assistance to any person, the recipient thereof becomes possessed of any property or income in excess of the amount ascertained at the time of granting assistance, it shall be the duty of the recipient to notify the county board of social welfare immediately of the receipt or possession of such property or income and said county board may, after investigation, cancel the assistance in accordance with the circumstances.

"Any assistance paid shall be recoverable by the county board as a debt due to the state and the county in proportion to the amount of the assistance paid by each, respectively: If during the life or on the death of any person receiving assistance, it is found that the recipient was possessed of income or property in excess of the amount reported or ascertained at the time of granting assistance, and if it be shown that such assistance was obtained by an ineligible recipient, the total amount of the assistance may be recovered by the state department of social welfare as a fourth class claim from the estate of the recipient or in an action brought against the recipient while living."

the Kansas welfare recipient, unlike the indigent defendant, is not denied the customary exemptions.[20]

We recognize, of course, that the State's claim to reimbursement may take precedence, under appropriate circumstances, over the claims of private creditors and that enforcement procedures with respect to judgments need not be identical.[21] This does not mean, however, that a State may impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor. The State

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[20] There appears to be a further discrimination against the indigent defendant as contrasted with the delinquent welfare recipient. The recoupment statute applicable to indigent defendants provides for the accumulation of 6% annual interest from the date expenditures are made for counsel or other legal defense costs. Kan. Stat. Ann. § 22–4513 (Supp. 1971). The interest build-up for the indigent defendant would not be insubstantial. In the five years before the judgment became dormant, interest accumulations could lift appellee's $500 debt to almost $670. If the dormant judgment is revived within the statutorily prescribed two years, the principal and interest might total over $750. (The interest presumably would run while the judgment was dormant since "[a] dormant judgment may be revived and have the same force and effect as if it had not become dormant . . . ." Kan. Stat. Ann. § 60–2404 (Supp. 1971)).

Kansas also has a statute providing that all judgments shall bear 8% interest from the day on which they are rendered. Kan. Stat. Ann. § 16–204 (Supp. 1971) (recently amended from 6%). Presumably this statute would cover the "debts" of welfare recipients once they are reduced to judgment. The debt of the indigent defendant, however, runs from the date the assistance is granted, while any interest on the debt of a welfare recipient would presumably run from the date of judgment.

[21] For example, Kansas does not extend its exemptions with respect to wage garnishment to any debt due for any state or federal tax, Kan. Stat. Ann. § 60–2310 (e)(3) (Supp. 1971). This type of public debt, however, differs from the instant case in representing a wrongful withholding from the State of a tax on assets in the actual possession of the taxpayer and not, as here, a debt contracted under circumstances of indigency.

itself in the statute before us analogizes the judgment lien against the indigent defendant to other "judgments under the code of civil procedure." But the statute then strips the indigent defendant of the very exemptions designed primarily to benefit debtors of low and marginal incomes.

The Kansas statute provides for recoupment whether the indigent defendant is acquitted or found guilty. If acquitted, the indigent finds himself obligated to repay the State for a service the need for which resulted from the State's prosecution. It is difficult to see why such a defendant, adjudged to be innocent of the State's charge, should be denied basic exemptions accorded all other judgment debtors. The indigent defendant who is found guilty is uniquely disadvantaged in terms of the practical operation of the statute. A criminal conviction usually limits employment opportunities. This is especially true where a prison sentence has been served. It is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship. There is limited incentive to seek legitimate employment when, after serving a sentence during which interest has accumulated on the indebtedness for legal services, the indigent knows that his wages will be garnished without the benefit of any of the customary exemptions.

Appellee in this case has now married, works for a modest wage, and has recently become a father. To deprive him of all protection for his wages and intimate personalty discourages the search for self-sufficiency which might make of the criminally accused a contributing citizen. Not only does this treatment not accord with the treatment of indigent recipients of public wel-

fare or with that of other civil judgment debtors,[22] but the Kansas statute also appears to be alone among recoupment laws applicable to indigent defendants in expressly denying them the benefit of basic debtor exemptions.[23]

III

In *Rinaldi* v. *Yeager,* 384 U. S. 305 (1966), the Court considered a situation comparable in some respects to the case at hand. *Rinaldi* involved a New Jersey statute which required only those indigent defendants who were sentenced to confinement in state institutions to reimburse the State the costs of a transcript on appeal. In *Rinaldi,* as here, a broad ground of decision was urged, namely, that the statute unduly burdened an indigent's right to appeal. The Court found, however, a different basis for decision, holding that "[t]o fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions . . . is to make an invidious discrimination" in violation of the Equal Protection Clause. *Id.,* at 309.

Rinaldi affirmed that the Equal Protection Clause "imposes a requirement of some rationality in the nature of the class singled out." *Id.,* at 308–309. This requirement is lacking where, as in the instant case, the State has subjected indigent defendants to such discriminatory conditions of repayment. This case, to be sure, differs from *Rinaldi* in that here all indigent defendants are treated alike. But to impose these harsh conditions on a class of debtors who were provided counsel as required

[22] The statutes of various other States, *e. g.,* Alaska, South Carolina, and West Virginia, provide, as does Kansas, for recovery against indigent defendants in the same manner as on other judgments. Unlike Kansas, however, these States do not expressly subject indigents to conditions to which other civil judgment debtors are not liable. See n. 8, *supra,* for citations.

[23] See n. 8, *supra,* for citations.

by the Constitution is to practice, no less than in *Rinaldi*, a discrimination which the Equal Protection Clause proscribes.

The Court assumed in *Rinaldi, arguendo,* "that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures." *Id.*, at 309. We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases [24] and stages of prosecution.[25] Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs. Finally, federal dominance of the Nation's major revenue sources has encouraged state and local governments to seek new methods of conserving public funds, not only through the recoupment of indigents' counsel fees but of other forms of public assistance as well.

We thus recognize that state recoupment statutes may betoken legitimate state interests. But these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors to whom the statute itself repeatedly makes reference. State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-

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[24] *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Douglas* v. *California,* 372 U. S. 353 (1963); *Argersinger* v. *Hamlin, ante,* p. 25.

[25] *Coleman* v. *Alabama,* 399 U. S. 1 (1970); *Mempa* v. *Rhay,* 389 U. S. 128 (1967); *United States* v. *Wade,* 388 U. S. 218 (1967); *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

sufficiency and self-respect. The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.

The judgment of the court below is affirmed.

Syllabus

ADAMS, WARDEN *v.* WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 70–283. Argued April 10, 1972—Decided June 12, 1972

Acting on a tip supplied moments earlier by an informant known to him, a police officer asked respondent to open his car door. Respondent lowered the window, and the officer reached into the car and found a loaded handgun (which had not been visible from the outside) in respondent's waistband, precisely where the informant said it would be. Respondent was arrested for unlawful possession of the handgun. A search incident to the arrest disclosed heroin on respondent's person (as the informant had reported), as well as other contraband in the car. Respondent's petition for federal habeas corpus relief was denied by the District Court. The Court of Appeals reversed, holding that the evidence that had been used in the trial resulting in respondent's conviction had been obtained by an unlawful search. *Held:* As *Terry* v. *Ohio,* 392 U. S. 1, recognizes, a policeman making a reasonable investigatory stop may conduct a limited protective search for concealed weapons when he has reason to believe that the suspect is armed and dangerous. Here the information from the informant had enough indicia of reliability to justify the officer's forcible stop of petitioner and the protective seizure of the weapon, which afforded reasonable ground for the search incident to the arrest that ensued. Pp. 145–149.

441 F. 2d 394, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 149. BRENNAN, J., filed a dissenting opinion, *post,* p. 151. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 153.

Donald A. Browne argued the cause and filed briefs for petitioner.

Edward F. Hennessey argued the cause and filed a brief for respondent.

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Petersen,* and *Beatrice Rosenberg* for the United States; by *Frank S. Hogan, pro se, Michael R. Juviler,* and *Herman Kaufman* for the District Attorney of New York County; and by *Frank G. Carrington, Jr., Alan S. Ganz, Wayne W. Schmidt,* and *Glen R. Murphy* for Americans for Effective Law Enforcement, Inc., et al.

Burt Neuborne and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Robert Williams was convicted in a Connecticut state court of illegal possession of a handgun found during a "stop and frisk," as well as of possession of heroin that was found during a full search incident to his weapons arrest. After respondent's conviction was affirmed by the Supreme Court of Connecticut, 157 Conn. 114, 249 A. 2d 245 (1968), this Court denied certiorari. 395 U. S. 927 (1969). Williams' petition for federal habeas corpus relief was denied by the District Court and by a divided panel of the Second Circuit, 436 F. 2d 30 (1970), but on rehearing *en banc* the Court of Appeals granted relief. 441 F. 2d 394 (1971). That court held that evidence introduced at Williams' trial had been obtained by an unlawful search of his person and car, and thus the state court judgments of conviction should be set aside. Since we conclude that the policeman's actions here conformed to the standards this Court laid down in *Terry* v. *Ohio,* 392 U. S. 1 (1968), we reverse.

Police Sgt. John Connolly was alone early in the morning on car patrol duty in a high-crime area of Bridgeport, Connecticut. At approximately 2:15 a.m. a person known to Sgt. Connolly approached his cruiser

and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist.

After calling for assistance on his car radio, Sgt. Connolly approached the vehicle to investigate the informant's report. Connolly tapped on the car window and asked the occupant, Robert Williams, to open the door. When Williams rolled down the window instead, the sergeant reached into the car and removed a fully loaded revolver from Williams' waistband. The gun had not been visible to Connolly from outside the car, but it was in precisely the place indicated by the informant. Williams was then arrested by Connolly for unlawful possession of the pistol. A search incident to that arrest was conducted after other officers arrived. They found substantial quantities of heroin on Williams' person and in the car, and they found a machete and a second revolver hidden in the automobile.

Respondent contends that the initial seizure of his pistol, upon which rested the later search and seizure of other weapons and narcotics, was not justified by the informant's tip to Sgt. Connolly. He claims that absent a more reliable informant, or some corroboration of the tip, the policeman's actions were unreasonable under the standards set forth in *Terry* v. *Ohio, supra.*

In *Terry* this Court recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.,* at 22. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.

See *id.*, at 23. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *Id.*, at 21–22; see *Gaines* v. *Craven*, 448 F. 2d 1236 (CA9 1971); *United States* v. *Unverzagt*, 424 F. 2d 396 (CA8 1970).

The Court recognized in *Terry* that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect. "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," he may conduct a limited protective search for concealed weapons. 392 U. S., at 24. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. So long as the officer is entitled to make a forcible stop,[1] and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose. *Id.*, at 30.

Applying these principles to the present case, we believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. Indeed, under

[1] Petitioner does not contend that Williams acted voluntarily in rolling down the window of his car.

Connecticut law, the informant might have been subject to immediate arrest for making a false complaint had Sgt. Connolly's investigation proved the tip incorrect.[2] Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, see, *e. g., Spinelli* v. *United States,* 393 U. S. 410 (1969); *Aguilar* v. *Texas,* 378 U. S. 108 (1964), the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.

In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.

While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly

[2] Section 53–168 of the Connecticut General Statutes, in force at the time of these events, provided that a "person who knowingly makes to any police officer . . . a false report or a false complaint alleging that a crime or crimes have been committed" is guilty of a misdemeanor.

had ample reason to fear for his safety.[3] When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable. The loaded gun seized as a result of this intrusion was therefore admissible at Williams' trial. *Terry* v. *Ohio,* 392 U. S., at 30.

Once Sgt. Connolly had found the gun precisely where the informant had predicted, probable cause existed to arrest Williams for unlawful possession of the weapon. Probable cause to arrest depends "upon whether, at the moment the arrest was made . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck* v. *Ohio,* 379 U. S. 89, 91 (1964). In the present case the policeman found Williams in possession of a gun in precisely the place predicted by the informant. This tended to corroborate the reliability of the informant's further report of narcotics and, together with the surrounding circumstances, certainly suggested no lawful explanation for possession of the

[3] Figures reported by the Federal Bureau of Investigation indicate that 125 policemen were murdered in 1971, with all but five of them having been killed by gunshot wounds. Federal Bureau of Investigation Law Enforcement Bulletin, Feb. 1972, p. 33. According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. Crim. L. C. & P. S. 93 (1963).

gun. Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. See *Draper* v. *United States,* 358 U. S. 307, 311–312 (1959). Rather, the court will evaluate generally the circumstances at the time of the arrest to decide if the officer had probable cause for his action:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States,* 338 U. S. 160, 175 (1949).

See also *id.,* at 177. Under the circumstances surrounding Williams' possession of the gun seized by Sgt. Connolly, the arrest on the weapons charge was supported by probable cause, and the search of his person and of the car incident to that arrest was lawful. See *Brinegar* v. *United States, supra; Carroll* v. *United States,* 267 U. S. 132 (1925). The fruits of the search were therefore properly admitted at Williams' trial, and the Court of Appeals erred in reaching a contrary conclusion.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

My views have been stated in substance by Judge Friendly, dissenting, in the Court of Appeals. 436 F. 2d 30, 35. Connecticut allows its citizens to carry weapons, concealed or otherwise, at will, provided they have a permit. Conn. Gen. Stat. Rev. §§ 29–35, 29–38. Connecticut law gives its police no authority to frisk a person for a permit. Yet the arrest was for illegal possession of a gun. The only basis for that arrest was the informer's

tip on the narcotics. Can it be said that a man in possession of narcotics will not have a permit for his gun? Is that why the arrest for possession of a gun in the free-and-easy State of Connecticut becomes constitutional?

The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.

The leading case is *United States* v. *Miller*, 307 U. S. 174, upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence that a sawed-off shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.*, at 178. The Second Amendment, it was held, "must be interpreted and applied" with the view of maintaining a "militia."

> "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be

secured through the Militia—civilians primarily, soldiers on occasion." *Id.,* at 178–179.

Critics say that proposals like this water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia. But if watering-down is the mood of the day, I would prefer to water down the Second rather than the Fourth Amendment. I share with Judge Friendly a concern that the easy extension of *Terry* v. *Ohio,* 392 U. S. 1, to "possessory offenses" is a serious intrusion on Fourth Amendment safeguards. "If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows 'that criminal activity may be afoot.' " 436 F. 2d, at 39, quoting *Terry* v. *Ohio, supra,* at 30.

MR. JUSTICE BRENNAN, dissenting.

The crucial question on which this case turns, as the Court concedes, is whether, there being no contention that Williams acted voluntarily in rolling down the window of his car, the State had shown sufficient cause to justify Sgt. Connolly's "forcible" stop. I would affirm, believing, for the following reasons stated by Judge, now Chief Judge, Friendly, dissenting, 436 F. 2d 30, 38–39, that the State did not make that showing:

> "To begin, I have the gravest hesitancy in extending [*Terry* v. *Ohio,* 392 U. S. 1 (1968)] to crimes like the possession of narcotics . . . . There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true. Against that we have here the added fact of the report that Williams had a gun on his person. . . . [But] Connecticut allows its citizens to carry weapons, concealed or

otherwise, at will, provided only they have a permit, Conn. Gen. Stat. §§ 29–35 and 29–38, and gives its police officers no special authority to stop for the purpose of determining whether the citizen has one. . . .

"If I am wrong in thinking that *Terry* should not be applied at all to mere possessory offenses, . . . I would not find the combination of Officer Connolly's almost meaningless observation and the tip in this case to be sufficient justification for the intrusion. The tip suffered from a threefold defect, with each fold compounding the others. The informer was unnamed, he was not shown to have been reliable with respect to guns or narcotics, and he gave no information which demonstrated personal knowledge or—what is worse—could not readily have been manufactured by the officer after the event. To my mind, it has not been sufficiently recognized that the difference between this sort of tip and the accurate prediction of an unusual event is as important on the latter score as on the former. [In *Draper* v. *United States,* 358 U. S. 307 (1959),] Narcotics Agent Marsh would hardly have been at the Denver Station at the exact moment of the arrival of the train Draper had taken from Chicago unless *someone* had told him *something* important, although the agent might later have embroidered the details to fit the observed facts. . . . There is no such guarantee of a patrolling officer's veracity when he testifies to a 'tip' from an unnamed informer saying no more than that the officer will find a gun and narcotics on a man across the street, as he later does. If the state wishes to rely on a tip of that nature to validate a stop and frisk, revelation of the name of the informer or demonstration that his name is unknown and could

not reasonably have been ascertained should be the price.

"Terry v. Ohio was intended to free a police officer from the rigidity of a rule that would prevent his doing anything to a man reasonably suspected of being about to commit or having just committed a crime of violence, no matter how grave the problem or impelling the need for swift action, unless the officer had what a court would later determine to be probable cause for arrest. It was meant for the serious cases of imminent danger or of harm recently perpetrated to persons or property, not the conventional ones of possessory offenses. If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows 'that criminal activity may be afoot.' 392 U. S., at 30. . . . I greatly fear that if the [contrary view] should be followed, *Terry* will have opened the sluicegates for serious and unintended erosion of the protection of the Fourth Amendment."

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Four years have passed since we decided *Terry* v. *Ohio,* 392 U. S. 1 (1968), and its companion cases, *Sibron* v. *New York* and *Peters* v. *New York,* 392 U. S. 40 (1968). They were the first cases in which this Court explicitly recognized the concept of "stop and frisk" and squarely held that police officers may, under appropriate circumstances, stop and frisk persons suspected of criminal activity even though there is less than probable cause for an arrest. This case marks our first opportunity to give some flesh to the bones of *Terry*

et al. Unfortunately, the flesh provided by today's decision cannot possibly be made to fit on *Terry*'s skeletal framework.

"[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'" *Coolidge* v. *New Hampshire,* 403 U. S. 443, 454–455 (1971). In *Terry* we said that "we do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." 392 U. S., at 20. Yet, we upheld the stop and frisk in *Terry* because we recognized that the realities of on-the-street law enforcement require an officer to act at times on the basis of strong evidence, short of probable cause, that criminal activity is taking place and that the criminal is armed and dangerous. Hence, *Terry* stands only for the proposition that police officers have a "narrowly drawn authority to . . . search for weapons" without a warrant. *Id.,* at 27.

In today's decision the Court ignores the fact that *Terry* begrudgingly accepted the necessity for creating an exception from the warrant requirement of the Fourth Amendment and treats this case as if warrantless searches were the rule rather than the "narrowly drawn" exception. This decision betrays the careful balance that *Terry* sought to strike between a citizen's right to privacy and his government's responsibility for effective law enforcement and expands the concept of warrantless

searches far beyond anything heretofore recognized as legitimate. I dissent.

I

A. The Court's opinion states the facts and I repeat only those that appear to me to be relevant to the Fourth Amendment issues presented.

Respondent was sitting on the passenger side of the front seat of a car parked on the street in a "high crime area" in Bridgeport, Connecticut, at 2:15 a. m. when a police officer approached his car. During a conversation that had just taken place nearby, the officer was told by an informant that respondent had narcotics on his person and that he had a gun in his waistband. The officer saw that the motor was not running, that respondent was seated peacefully in the car, and that there was no indication that he was about to leave the scene. After the officer asked respondent to open the door, respondent rolled down his window instead and the officer reached into the car and pulled a gun from respondent's waistband. The officer immediately placed respondent under arrest for carrying the weapon and searched him, finding heroin in his coat. More heroin was found in a later search of the automobile. Respondent moved to suppress both the gun and the heroin prior to trial. His motion was denied and he was convicted of possessing both items.

B. The Court erroneously attempts to describe the search for the gun as a protective search incident to a reasonable investigatory stop. But, as in *Terry, Sibron* and *Peters, supra,* there is no occasion in this case to determine whether or not police officers have a right to seize and to restrain a citizen in order to interrogate him. The facts are clear that the officer intended to make the search as soon as he approached the respondent. He asked no questions; he made no investigation; he simply searched.

There was nothing apart from the information supplied by the informant to cause the officer to search. Our inquiry must focus, therefore, as it did in *Terry* on whether the officer had sufficient facts from which he could reasonably infer that respondent was not only engaging in illegal activity, but also that he was armed and dangerous. The focus falls on the informant.

The only information that the informant had previously given the officer involved homosexual conduct in the local railroad station. The following colloquy took place between respondent's counsel and the officer at the hearing on respondent's motion to suppress the evidence that had been seized from him.

> "Q. Now, with respect to the information that was given you about homosexuals in the Bridgeport Police Station [*sic*], did that lead to an arrest? A. No.
>
> "Q. An arrest was not made. A. No. There was no substantiating evidence.
>
> . . . . .
>
> "Q. There was no substantiating evidence? A. No.
>
> "Q. And what do you mean by that? A. I didn't have occasion to witness these individuals committing any crime of any nature.
>
> "Q. In other words, after this person gave you the information, you checked for corroboration before you made an arrest. Is that right? A. Well, I checked to determine the possibility of homosexual activity.
>
> "Q. And since an arrest was made, I take it you didn't find any substantiating information. A. I'm sorry counselor, you say since an arrest was made.
>
> "Q. Was not made. Since an arrest was not made, I presume you didn't find any substantiating information. A. No.

"Q. So that, you don't recall any other specific information given you about the commission of crimes by this informant. A. No.

"Q. And you still thought this person was reliable. A. Yes." [1]

Were we asked to determine whether the information supplied by the informant was sufficient to provide probable cause for an arrest and search, rather than a stop and frisk, there can be no doubt that we would hold that it was insufficient. This Court has squarely held that a search and seizure cannot be justified on the basis of conclusory allegations of an unnamed informant who is allegedly credible. *Aguilar* v. *Texas,* 378 U. S. 108 (1964). In the recent case of *Spinelli* v. *United States,* 393 U. S. 410 (1969), Mr. Justice Harlan made it plain beyond any doubt that where police rely on an informant to make a search and seizure, they must know that the informant is generally trustworthy and that he has obtained his information in a reliable way. *Id.,* at 417. Since the testimony of the arresting officer in the instant case patently fails to demonstrate that the informant was known to be trustworthy and since it is also clear that the officer had no idea of the source of the informant's "knowledge," a search and seizure would have been illegal.

Assuming, *arguendo,* that this case truly involves, not an arrest and a search incident thereto, but a stop and frisk,[2] we must decide whether or not the information possessed by the officer justified this interference with respondent's liberty. *Terry,* our only case to actually

[1] App., 96–97.

[2] *Terry* v. *Ohio,* 392 U. S. 1 (1968), makes it clear that a stop and frisk is a search and seizure within the meaning of the Fourth Amendment. When I use the term stop and frisk herein, I merely intend to emphasize that it is, as *Terry* held, a lesser intrusion than a full-scale search and seizure.

uphold a stop and frisk,[3] is not directly in point, because the police officer in that case acted on the basis of his own personal observations. No informant was involved. But the rationale of *Terry* is still controlling, and it requires that we condemn the conduct of the police officer in encountering the respondent.

Terry did not hold that whenever a policeman has a hunch that a citizen is engaging in criminal activity, he may engage in a stop and frisk. It held that if police officers want to stop and frisk, they must have specific facts from which they can reasonably infer that an individual is engaged in criminal activity and is armed and dangerous.[4] It was central to our decision in *Terry* that the police officer acted on the basis of his own personal observations and that he carefully scrutinized the conduct of his suspects before interfering with them in any way. When we legitimated the conduct of the officer in *Terry* we did so because of the substantial *reliability* of the information on which the officer based his decision to act.

If the Court does not ignore the care with which we examined the knowledge possessed by the officer in *Terry* when he acted, then I cannot see how the actions of the officer in this case can be upheld. The Court explains what the officer knew about respondent before accosting him. But what is more significant is what he did not know. With respect to the scene generally, the officer had no idea how long respondent had been in the car, how long the car had been parked, or to whom the car belonged. With respect to the gun,[5] the officer did not

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[3] In *Sibron* v. *New York*, 392 U. S. 40 (1968), the Court held that the action of the policeman could not be justified as a stop and frisk. In *Peters* v. *New York*, 392 U. S. 40 (1968), the Court sustained the validity of a search and seizure by holding that it was incident to a legal arrest.

[4] *Terry* v. *Ohio*, 392 U. S., at 29; *Sibron* v. *New York*, 392 U. S., at 64.

[5] The fact that the respondent carried his gun in a high-crime area

know if or when the informant had ever seen the gun, or whether the gun was carried legally, as Connecticut law permitted, or illegally.[6] And with respect to the narcotics, the officer did not know what kind of narcotics respondent allegedly had, whether they were legally or illegally possessed, what the basis of the informant's knowledge was, or even whether the informant was capable of distinguishing narcotics from other substances.[7]

Unable to answer any of these questions, the officer nevertheless determined that it was necessary to intrude on respondent's liberty. I believe that his determination was totally unreasonable. As I read *Terry,* an officer may act on the basis of *reliable* information short of probable cause to make a stop, and ultimately a frisk, if necessary; but the officer may not use unreliable, unsubstantiated, conclusory hearsay to justify an invasion of liberty. *Terry* never meant to approve the kind of knee-jerk police reaction that we have before us in this case.

Even assuming that the officer had some legitimate reason for relying on the informant, *Terry* requires, before any stop and frisk is made, that the reliable information in the officer's possession demonstrate that the suspect is both armed and *dangerous.*[8] The fact remains that

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is irrelevant. In such areas it is more probable than not that citizens would be more likely to carry weapons authorized by the State to protect themselves.

[6] See Conn. Gen. Stat. Rev. § 29–35.

[7] Connecticut permits possession of certain narcotics under specified circumstances—*e. g.,* pursuant to a doctor's prescription. See Conn. Gen. Stat. Rev. §§ 19–443, 19–456 (c), 19–481.

[8] The Court virtually ignores the requirement that the suspect be dangerous, as well as armed. Other courts have followed *Terry* more closely. See, *e. g., Commonwealth* v. *Bourke,* 218 Pa. Super. 320, 323, 280 A. 2d 425, 427 (1971); *Commonwealth* v. *Clarke,* 219 Pa. Super. 340, 343, 280 A. 2d 662, 663 (1971); *Finley* v. *People,* 176 Colo. 1, 488 P. 2d 883 (1971). See also *State* v. *Goudy,* 52 Haw. 497, 505, 479 P. 2d 800, 805 (1971) (Abe, J., dissenting).

Connecticut specifically authorizes persons to carry guns so long as they have a permit. Thus, there was no reason for the officer to infer from anything that the informant said that the respondent was dangerous. His frisk was, therefore, illegal under *Terry*.

II

Even if I could agree with the Court that the stop and frisk in this case was proper, I could not go further and sustain the arrest and the subsequent searches. It takes probable cause to justify an arrest and search and seizure incident thereto. Probable cause means that the "facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed . . . ." *Stacey* v. *Emery*, 97 U. S. 642, 645 (1878). "[G]ood faith is not enough to constitute probable cause." *Director General* v. *Kastenbaum*, 263 U. S. 25, 28 (1923).

Once the officer seized the gun from respondent, it is uncontradicted that he did not ask whether respondent had a license to carry it, or whether respondent carried it for any other legal reason under Connecticut law. Rather, the officer placed him under arrest immediately and hastened to search his person. Since Connecticut has not made it illegal for private citizens to carry guns, there is nothing in the facts of this case to warrant a man "of prudence and caution" to believe that any offense had been committed merely because respondent had a gun on his person.[9] Any implication that respondent's silence

[9] The Court appears to rely on the fact that the existence of the gun corroborated the information supplied to the officer by the informant. It cannot be disputed that there is minimal corroboration here, but the fact remains that the officer still lacked any knowledge that respondent had done anything illegal. Since carrying a gun is not *per se* illegal in Connecticut, the fact that respondent carried

was some sort of a tacit admission of guilt would be utterly absurd.

It is simply not reasonable to expect someone to protest that he is not acting illegally before he is told that he is suspected of criminal activity. It would have been a simple matter for the officer to ask whether respondent had a permit, but he chose not to do so. In making this choice, he clearly violated the Fourth Amendment.

This case marks a departure from the mainstream of our Fourth Amendment cases. In *Johnson* v. *United States,* 333 U. S. 10 (1948), for example, the arresting officer had an informant's tip and actually smelled opium coming from a room. This Court still found the arrest unlawful. And in *Spinelli* v. *United States,* 393 U. S. 410, we found that there was no probable cause even where an informant's information was corroborated by personal observation. If there was no probable cause in those cases, I find it impossible to understand how there can be probable cause in this case.

III

MR. JUSTICE DOUGLAS was the sole dissenter in *Terry.* He warned of the "powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees . . . ." 392 U. S., at 39. While I took the position then that we were not watering down rights, but were hesitantly and cautiously striking a necessary balance between the rights of American citizens to be free from government intrusion into their

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a gun is no more relevant to probable cause than the fact that his shirt may have been blue, or that he was wearing a jacket. Moreover, the fact that the informant can identify a gun on sight does not indicate an ability to do the same with narcotics. The corroboration of this one fact is a far cry from the corroboration that the Court found sufficient to sustain an arrest in *Draper* v. *United States,* 358 U. S. 307 (1959).

privacy and their government's urgent need for a narrow exception to the warrant requirement of the Fourth Amendment, today's decision demonstrates just how prescient MR. JUSTICE DOUGLAS was.

It seems that the delicate balance that *Terry* struck was simply too delicate, too susceptible to the "hydraulic pressures" of the day. As a result of today's decision, the balance struck in *Terry* is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent the kind of arbitrary and oppressive police action involved herein, is dealt a serious blow. Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.

Syllabus

MOOSE LODGE NO. 107 *v.* IRVIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 70–75. Argued February 28, 1972—Decided June 12, 1972

Appellee Irvis, a Negro guest of a member of appellant, a private club, was refused service at the club's dining room and bar solely because of his race. In suing for injunctive relief, appellee contended that the discrimination was state action, and thus a violation of the Equal Protection Clause of the Fourteenth Amendment, because the Pennsylvania liquor board had issued appellant a private club liquor license. The District Court found appellant's membership and guest practices discriminatory, agreed with appellee's view that state action was present, and declared the liquor license invalid as long as appellant continued its discriminatory practices. Appellant's motion to have the final decree limited to its guest policy was opposed by appellee, and the court denied the motion. Following the District Court's decision, the applicable bylaws were amended to exclude as guests those who would be excluded as members. *Held:*

1. Appellee, who had not applied for or been denied membership in appellant private club, had no standing to contest appellant's membership practices. He did, however, have standing to litigate the constitutional validity of appellant's discriminatory policies toward members' guests, and his opposition to amendment of the judgment did not constitute a disclaimer of injunctive relief directed at appellant's guest policies. Pp. 165–171.

2. The operation of Pennsylvania's regulatory scheme enforced by the state liquor board, except as noted below, does not sufficiently implicate the State in appellant's discriminatory guest practices so as to make those practices "state action" within the purview of the Equal Protection Clause, and there is no suggestion in the record that the State's regulation of the sale of liquor is intended overtly or covertly to encourage discrimination. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, distinguished. Pp. 171–177.

3. Pennsylvania liquor board's regulation requiring that "every club licensee shall adhere to all the provisions of its constitution and by-laws" in effect placed state sanctions behind the discriminatory guest practices that were enacted after the District Court's

decision, and enforcement of that regulation should be enjoined to the extent that it requires appellant to adhere to those practices. Pp. 177–179.

318 F. Supp. 1246, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 179. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 184.

Frederick Bernays Wiener argued the cause for appellant. With him on the briefs were *Clarence J. Ruddy, Robert E. Woodside,* and *Thomas D. Caldwell, Jr.*

Harry J. Rubin argued the cause for appellees and filed briefs for appellee Irvis. *J. Shane Creamer,* Attorney General of Pennsylvania, and *Peter W. Brown* and *Salvatore J. Cucinotta,* Deputy Attorneys General, filed a brief for appellees Scott et al.

Robert A. Yothers filed a brief for the Benevolent and Protective Order of Elks of the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *John T. Rigby* for the Lawyers' Committee for Civil Rights Under Law, and by *Samuel Rabinove, Paul S. Berger, Joseph B. Robison, Arnold Forster, Paul Hartman,* and *Joseph Z. Fleming* for the American Jewish Committee et al.

William H. Botzer and *Jack P. Janetatos* filed a brief for the Washington State Federation of Fraternal, Patriotic, City and Country Clubs as *amicus curiae.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Irvis, a Negro (hereafter appellee), was refused service by appellant Moose Lodge, a local branch of the national fraternal organization located in Harrisburg,

Pennsylvania. Appellee then brought this action under 42 U. S. C. § 1983 for injunctive relief in the United States District Court for the Middle District of Pennsylvania. He claimed that because the Pennsylvania liquor board had issued appellant Moose Lodge a private club license that authorized the sale of alcoholic beverages on its premises, the refusal of service to him was "state action" for the purposes of the Equal Protection Clause of the Fourteenth Amendment. He named both Moose Lodge and the Pennsylvania Liquor Authority as defendants, seeking injunctive relief that would have required the defendant liquor board to revoke Moose Lodge's license so long as it continued its discriminatory practices. Appellee sought no damages.

A three-judge district court, convened at appellee's request, upheld his contention on the merits, and entered a decree declaring invalid the liquor license issued to Moose Lodge "as long as it follows a policy of racial discrimination in its membership or operating policies or practices." Moose Lodge alone appealed from the decree, and we postponed decision as to jurisdiction until the hearing on the merits, 401 U. S. 992. Appellant urges, in the alternative, that we either vacate the judgment below because there is not presently a case or controversy between the parties, or that we reverse on the merits.

I

The District Court in its opinion found that "a Caucasian member in good standing brought plaintiff, a Negro, to the Lodge's dining room and bar as his guest and requested service of food and beverages. The Lodge through its employees refused service to plaintiff solely because he is a Negro." 318 F. Supp. 1246, 1247. It is undisputed that each local Moose Lodge is bound by the constitution and general bylaws of

the Supreme Lodge, the latter of which contain a provision limiting membership in the lodges to white male Caucasians. The District Court in this connection found that "[t]he lodges accordingly maintain a policy and practice of restricting membership to the Caucasian race and permitting members to bring only Caucasian guests on lodge premises, particularly to the dining room and bar." *Ibid.*

The District Court ruled in favor of appellee on his Fourteenth Amendment claim, and entered the previously described decree. Following its loss on the merits in the District Court, Moose Lodge moved to modify the final decree by limiting its effect to discriminatory policies with respect to the service of guests. Appellee opposed the proposed modification, and the court denied the motion.

The District Court did not find, and it could not have found on this record, that appellee had sought membership in Moose Lodge and been denied it. Appellant contends that because of this fact, appellee had no standing to litigate the constitutional issue respecting Moose Lodge's membership requirements, and that therefore the decree of the court below erred insofar as it decided that issue.

Any injury to appellee from the conduct of Moose Lodge stemmed, not from the lodge's membership requirements, but from its policies with respect to the serving of guests of members. Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others. *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 558 (1937); *Erie R. Co.* v. *Williams,* 233 U. S. 685, 697 (1914). While this Court has held that in exceptional situations a concededly injured party may rely on the constitutional rights of a third party in obtaining relief, *Barrows* v.

Jackson, 346 U. S. 249 (1953),[1] in this case appellee was not injured by Moose Lodge's membership policy since he never sought to become a member.

Appellee relies on *Flast* v. *Cohen,* 392 U. S. 83 (1968), and *Law Students Research Council* v. *Wadmond,* 401 U. S. 154 (1971), to support the breadth of the District Court's decree. *Flast* v. *Cohen* held that a federal taxpayer had standing *qua* taxpayer to challenge the expenditure of federal funds authorized by Congress under the taxing and spending clause of the Constitution. The Court in *Flast* pointed out:

> "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* v. *Board of Education,* 342 U. S. 429 (1952)." 392 U. S., at 102.

The taxpayer's claim in *Flast,* of course, was that the proposed expenditure violated the Establishment Clause of the First Amendment to the Constitution, a clause which by its terms prohibits taxing and spending in aid of religion.

The Court in *Law Students Research Council* v. *Wadmond, supra,* noted that while appellants admitted that no person involved in that litigation had been refused admission to the New York bar, they claimed that the existence of New York's system of screening applicants for admission to the bar worked a chilling effect upon the free exercise of the rights of speech and association of students who must anticipate having to meet its

[1] Our recent opinion in *Sierra Club* v. *Morton,* 405 U. S. 727, referred to a similar relationship between the standing of the plaintiff and the argument of which he might avail himself where judicial review of agency action is sought. *Id.,* at 737.

requirements. The Court then went on to decide the merits of the students' contention. While the doctrine of "overbreadth" has been held by this Court in prior decisions to accord standing by reason of the "chilling effect" that a particular law might have upon the exercise of the First Amendment rights, that doctrine has not been applied to constitutional litigation in areas other than those relating to the First Amendment.

We believe that Moose Lodge is correct, therefore, in contending that the District Court in its decree went beyond the vindication of any claim that appellee had standing to litigate. Appellee did, however, have standing to litigate the constitutional validity of Moose Lodge's policies relating to the service of guests of members. The language of the decree, insofar as it referred to Moose Lodge's "policy of racial discrimination in its membership or operating policies or practices" is sufficiently broad to encompass practices relating to the service of guests of members, as well as policies and practices relating to the acceptance of members. But Moose Lodge claims that, because of the position appellee took on the motion to modify the decree, he in effect disclaimed any interest in obtaining relief based solely on the Lodge's practice with respect to serving the guests of members.

Appellee in his brief on this point says:

> "[Moose Lodge's argument as to mootness] is based upon Moose Lodge's motion to modify the decree . . . and somehow to allow it to change its operations and to permit Irvis to be brought to the Moose Lodge's premises as a guest. But, as Irvis pointed out in his answer to this motion . . . nothing at all would be changed even if this were done because the vice of racial discrimination arose from the privileges of membership, either those accruing to a person in his own enjoyment of them or those

> accruing to a person in his ability to bring a guest or guests to Moose Lodge. Nothing in the suggested modification would make repetition impossible because the fact that Irvis was a guest was purely happenstance. Whether he be barred because no member would invite him or because he has no opportunity to become a member, the situation remains unchanged." (Brief for Appellee 41.)

During oral argument of the case here, counsel for appellee was asked to explain why he opposed the motion to modify made in the lower court, and he responded as follows:

> "The motion to modify which would have allowed Mr. Irvis or any others to be admitted as a guest would have done nothing to remove the Commonwealth of Pennsylvania from the discriminatory actions of the Moose Lodge.
>
> "That is, it still would have been a matter of being dependent upon a white member of the Moose Lodge to invite him there. It would have been a matter of no particular Negro being sure that the Moose Lodge would or would not discriminate. The Commonweath of Pennsylvania would still be issuing that license to a discriminating private club. And I think it's worth noting that at the time this motion to modify was being presented, the Moose Lodge was in the process of amending its by-laws to forbid Negroes from being guests. So, at the same time they were saying let us modify the decree so that we can admit Mr. Irvis as a guest, their by-laws were being amended to say no Negroes can come in as guests, let alone members.
>
> "We feel that the idea that he should then be allowed to come in as a guest through a modification of the decree does not go to the heart of the

problem. It does not supply the type of redress that we think cuts through the problem of state participation or support for the discrimination of the Moose Lodge, and that is why we oppose it." Tr. of Oral Arg. 31–32.

We are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument. However, upon examination of this answer it reflects substantially the same position as appellee took in his brief here. While it is possible to infer from these statements that appellee is simply not interested in obtaining any relief as to guest practices of Moose Lodge if he should prevail on the merits, it is equally possible to read them as being tactical arguments designed to avoid having to settle for half a loaf when he might obtain the whole loaf.

The mere refusal by appellee to consent to the proposed amendment of the judgment by itself could not be construed as a waiver or disclaimer of injunctive relief directed solely to Moose Lodge's practice with respect to the service of guests. Appellee's complaint, while directed primarily at membership policies of Moose Lodge, contained a customary prayer for other relief which was broad enough to embrace relief with respect to the practices of the lodge in serving guests of members. The District Court in its decree used language that was clearly broad enough to include such practices, as well as the membership policies of Moose Lodge. Having thus prayed for such relief in his complaint, and having obtained it from the District Court, nothing less than an explicit renunciation of any claim or desire for such relief here would justify our concluding that there was no longer a case or controversy with respect to Moose Lodge's practices in serving guests of members. We do not believe that a fair reading of appellee's

argument in opposition to the motion to amend the judgment below, or of the statements made in his brief and oral argument here, amount to such an explicit renunciation.

Because appellee had no standing to litigate a constitutional claim arising out of Moose Lodge's membership practices, the District Court erred in reaching that issue on the merits. But it did not err in reaching the constitutional claim of appellee that Moose Lodge's guest-service practices under these circumstances violated the Fourteenth Amendment. Nothing in the positions taken by the parties since the entry of the District Court decree has mooted that claim, and we therefore turn to its disposition.

II

Moose Lodge is a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well-defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only by invitation of a member or upon invitation of the house committee.

Appellee, while conceding the right of private clubs to choose members upon a discriminatory basis, asserts that the licensing of Moose Lodge to serve liquor by the Pennsylvania Liquor Control Board amounts to such state involvement with the club's activities as to make its discriminatory practices forbidden by the Equal Protection Clause of the Fourteenth Amendment. The relief sought and obtained by appellee in the District Court was an injunction forbidding the licensing by the liquor authority of Moose Lodge until it ceased its discriminatory practices. We conclude that Moose Lodge's refusal to serve food and beverages to a guest

by reason of the fact that he was a Negro does not, under the circumstances here presented, violate the Fourteenth Amendment.

In 1883, this Court in *The Civil Rights Cases,* 109 U. S. 3, set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discriminatory or wrongful," against which that clause "erects no shield," *Shelley* v. *Kraemer,* 334 U. S. 1, 13 (1948). That dichotomy has been subsequently reaffirmed in *Shelley* v. *Kraemer, supra,* and in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961).

While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "state action," on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority, supra,* at 722.

Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. *Shelley* v. *Kraemer, supra.* The Court held in *Burton* v. *Wilmington Parking Authority, supra,* that a private restaurant owner who refused service because of a customer's race violated the Fourteenth Amendment, where the restaurant was located in a building owned by a state-created parking authority and leased from the authority. The Court, after a comprehensive review of the relationship between the lessee and the parking authority concluded that the latter had "so far insinuated itself into a position of interdependence with Eagle [the restaurant owner] that it must be recognized as a joint participant in the challenged

activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U. S., at 725.

The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases, supra,* and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," *Reitman* v. *Mulkey,* 387 U. S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

Our prior decisions dealing with discriminatory refusal of service in public eating places are significantly different factually from the case now before us. *Peterson* v. *City of Greenville,* 373 U. S. 244 (1963), dealt with the trespass prosecution of persons who "sat in" at a restaurant to protest its refusal of service to Negroes. There the Court held that although the ostensible initiative for the trespass prosecution came from the proprietor, the existence of a local ordinance requiring segregation of races in such places was tantamount to the State having "commanded a particular result," 373 U. S., at 248. With one exception, which is discussed *infra,* at 178–179, there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination.

In *Burton, supra,* the Court's full discussion of the facts in its opinion indicates the significant differences between that case and this:

> "The land and building were publicly owned. As an entity, the building was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions.' [Citation omitted.] The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. Assuming that the distinction would be significant, [citation omitted] the commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. Guests of the restaurant are afforded a convenient place to park their automobiles, even if they cannot enter the restaurant directly from the parking area. Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities. Should any improvements effected in the leasehold by Eagle become part of the realty, there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency. Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that

> profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." 365 U. S., at 723–724.

Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton,* where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees such as the owner of the Eagle Restaurant. Unlike *Burton,* the Moose Lodge building is located on land owned by it, not by any public authority. Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large.[2] Nor is it located and operated in such surroundings that although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the State. In short, while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building.

With the exception hereafter noted, the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor.[3] There is

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[2] The Pennsylvania courts have found that Local 107 is not a "place of public accommodation" within the terms of the Pennsylvania Human Relations Act, Pa. Stat. Ann., Tit. 43, § 951 *et seq.* (1964). *Pennsylvania Human Relations Comm'n* v. *The Loyal Order of Moose, Lodge No. 107,* Ct. Common Pleas, Dauphin County, aff'd, 220 Pa. Super. 356, 286 A. 2d 374 (1971).

[3] Unlike the situation in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451 (1952), where the regulatory agency had affirmatively ap-

no suggestion in this record that Pennsylvania law, either as written or as applied, discriminates against minority groups either in their right to apply for club licenses themselves or in their right to purchase and be served liquor in places of public accommodation. The only effect that the state licensing of Moose Lodge to serve liquor can be said to have on the right of any other Pennsylvanian to buy or be served liquor on premises other than those of Moose Lodge is that for some purposes club licenses are counted in the maximum number of licenses that may be issued in a given municipality. Basically each municipality has a quota of one retail license for each 1,500 inhabitants. Licenses issued to hotels, municipal golf courses, and airport restaurants are not counted in this quota, nor are club licenses until the maximum number of retail licenses is reached. Beyond that point, neither additional retail licenses nor additional club licenses may be issued so long as the number of issued and outstanding retail licenses remains at or above the statutory maximum.

The District Court was at pains to point out in its opinion what it considered to be the "pervasive" nature of the regulation of private clubs by the Pennsylvania Liquor Control Board. As that court noted, an applicant for a club license must make such physical alterations in its premises as the board may require, must file a list of the names and addresses of its members and employees, and must keep extensive financial records. The board is granted the right to inspect the licensed premises at any time when patrons, guests, or members are present.

However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster

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proved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge.

or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. The limited effect of the prohibition against obtaining additional club licenses when the maximum number of retail licenses allotted to a municipality has been issued, when considered together with the availability of liquor from hotel, restaurant, and retail licensees, falls far short of conferring upon club licensees a monopoly in the dispensing of liquor in any given municipality or in the State as a whole. We therefore hold that, with the exception hereafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter "state action" within the ambit of the Equal Protection Clause of the Fourteenth Amendment.

The District Court found that the regulations of the Liquor Control Board adopted pursuant to statute affirmatively require that "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-Laws." [4] Appellant argues that the purpose of this provision "is purely and simply and plainly the prevention of subterfuge," pointing out that the *bona fides* of a private club, as opposed to a place of public accommodation masquerading as a private club, is a matter with which the State Liquor Control Board may legitimately concern itself. Appellee concedes this to be the case, and expresses disagreement with the District Court on this point. There can be no doubt that the label "private club" can be and has been used to evade both regulations of state and local liquor authorities, and statutes requiring places of public accommodation to serve all persons without regard to race, color, religion, or na-

[4] Regulations of the Pennsylvania Liquor Control Board § 113.09 (June 1970 ed.).

tional origin. This Court in *Daniel* v. *Paul*, 395 U. S. 298 (1969), had occasion to address this issue in connection with the application of Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U. S. C. § 2000a *et seq.*

The effect of this particular regulation on Moose Lodge under the provisions of the constitution placed in the record in the court below would be to place state sanctions behind its discriminatory membership rules, but not behind its guest practices, which were not embodied in the constitution of the lodge. Had there been no change in the relevant circumstances since the making of the record in the District Court, our holding in Part I of this opinion that appellee has standing to challenge only the guest practices of Moose Lodge would have a bearing on our disposition of this issue. Appellee stated upon oral argument, though, and Moose Lodge conceded in its brief [5] that the bylaws of the Supreme Lodge have been altered since the lower court decision to make applicable to guests the same sort of racial restrictions as are presently applicable to members.[6]

Even though the Liquor Control Board regulation in question is neutral in its terms, the result of its application in a case where the constitution and bylaws of a

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[5] Brief for Appellant 10.

[6] Section 92.1 of the General Laws of the Loyal Order of Moose presently provides in relevant part as follows:

"Sec. 92.1—*To Prevent Admission of Non Members*—There shall never at any time be admitted to any social club or home maintained or operated by any lodge, any person who is not a member of some lodge in good standing. The House Committee may grant guest privileges to persons who are eligible for membership in the fraternity consistent with governmental laws and regulations. A member shall accompany such guest and shall be responsible for the actions of said guest, and upon the member leaving, the guest must also leave. It is the duty of each member of the Order when so requested to submit for inspection his receipt for dues to any member of any House Committee or its authorized employee."

club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule. State action, for purposes of the Equal Protection Clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action. *Robinson* v. *Florida,* 378 U. S. 153, 156 (1964). *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), makes it clear that the application of state sanctions to enforce such a rule would violate the Fourteenth Amendment. Although the record before us is not as clear as one would like, appellant has not persuaded us that the District Court should have denied any and all relief.

Appellee was entitled to a decree enjoining the enforcement of § 113.09 of the regulations promulgated by the Pennsylvania Liquor Control Board insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and bylaws containing racially discriminatory provisions. He was entitled to no more. The judgment of the District Court is reversed, and the cause remanded with instructions to enter a decree in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL joins, dissenting.

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups.[1] The associational

[1] It has been stipulated that Moose Lodge No. 107 "is, in all respects, private in nature and does not appear to have any public characteristics." App. 23. The cause below was tried solely on the theory that granting a Pennsylvania liquor license to a club assumed to be purely private was sufficient state involvement to trigger the Equal Protection Clause. There was no occasion to consider the

rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

The problem is different, however, where the public domain is concerned. I have indicated in *Garner* v. *Louisiana,* 368 U. S. 157, and *Lombard* v. *Louisiana,* 373 U. S. 267, that where restaurants or other facilities serving the public are concerned and licenses are obtained from the State for operating the business, the "public" may not be defined by the proprietor to include only people of his choice; nor may a state or municipal service be granted only to some. *Evans* v. *Newton,* 382 U. S. 296, 298–299.

Those cases are not precisely apposite, however, for a private club, by definition, is not in the public domain. And the fact that a private club gets some kind of permit from the State or municipality does not make it *ipso facto* a public enterprise or undertaking, any more than the grant to a householder of a permit to operate an incinerator puts the householder in the public domain. We must, therefore, examine whether there are special circumstances involved in the Pennsylvania scheme which differentiate the liquor license possessed by Moose Lodge from the incinerator permit.

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question whether, perhaps because of a role as a center of community activity, Moose Lodge No. 107 was in fact "private" for equal protection purposes. The decision today, therefore, leaves this question open. See Comment, Current Developments in State Action and Equal Protection of the Law, 4 Gonzaga L. Rev. 233, 271–286.

Pennsylvania has a state store system of alcohol distribution. Resale is permitted by hotels, restaurants, and private clubs which all must obtain licenses from the Liquor Control Board. The scheme of regulation is complete and pervasive; and the state courts have sustained many restrictions on the licensees. See *Tahiti Bar Inc. Liquor License Case,* 395 Pa. 355, 150 A. 2d 112. Once a license is issued the licensee must comply with many detailed requirements or risk suspension or revocation of the license. Among these requirements is Regulation § 113.09 which says: "Every club licensee shall adhere to all of the provisions of its Constitution and By-laws." This regulation means, as applied to Moose Lodge, that it must adhere to the racially discriminatory provision of the Constitution of its Supreme Lodge that "[t]he membership of lodges shall be composed of male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone of any other than the Caucasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being."

It is argued that this regulation only aims at the prevention of subterfuge and at enforcing Pennsylvania's differentiation between places of public accommodation and bona fide private clubs. It is also argued that the regulation only gives effect to the constitutionally protected rights of privacy and of association. But I cannot so read the regulation. While those other purposes are embraced in it, so is the restrictive membership clause. And we have held that "a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act." *Adickes* v. *Kress & Co.,* 398 U. S. 144, 170. See *Peterson* v. *City of Greenville,* 373 U. S. 244, 248. It is irrelevant whether the law is statutory, or an administrative regulation. *Robinson* v. *Florida,* 378 U. S. 153, 156. And it is irrelevant whether the discriminatory act was instigated by the regulation,

or was independent of it. *Peterson* v. *City of Greenville, supra.* The result, as I see it, is the same as though Pennsylvania had put into its liquor licenses a provision that the license may not be used to dispense liquor to blacks, browns, yellows—or atheists or agnostics. Regulation § 113.09 is thus an invidious form of state action.

Were this regulation the only infirmity in Pennsylvania's licensing scheme, I would perhaps agree with the majority that the appropriate relief would be a decree enjoining its enforcement. But there is another flaw in the scheme not so easily cured. Liquor licenses in Pennsylvania, unlike driver's licenses, or marriage licenses, are not freely available to those who meet racially neutral qualifications. There is a complex quota system, which the majority accurately describes. *Ante,* at 176. What the majority neglects to say is that the quota for Harrisburg, where Moose Lodge No. 107 is located, has been full for many years.[2] No more club licenses may be issued in that city.

This state-enforced scarcity of licenses restricts the ability of blacks to obtain liquor, for liquor is commercially available *only* at private clubs for a significant portion of each week.[3] Access by blacks to places that

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[2] Indeed, the quota is more than full, as a result of a grandfather clause in the law limiting licenses to one per 1,500 inhabitants. Act No. 702 of Dec. 17, 1959, § 2. There are presently 115 licenses in effect in Harrisburg, and based on 1970 census figures, the quota would be 45.

[3] Hotels and restaurants may serve liquor between 7 a. m. and 2 a. m. the next day, Monday through Saturday. On Sunday, such licenses are restricted to sales between 12 p. m. and 2 a. m., and between 1 p. m. and 10 p. m. Pennsylvania Liquor Code, § 406 (a). Thus, such licensees may serve a total of 123 hours per week. Club licensees, however, are permitted to sell liquor to members and guests from 7 a. m. to 3 a. m. the next day, seven days a week. *Ibid.* The total hours of sale permitted club licensees are 140, 17 more than are permitted hotels and restaurants. (There is an

serve liquor is further limited by the fact that the state quota is filled. A group desiring to form a nondiscriminatory club which would serve blacks must purchase a license held by an existing club, which can exact a monopoly price for the transfer. The availability of such a license is speculative at best, however, for, as Moose Lodge itself concedes, without a liquor license a fraternal organization would be hard pressed to survive.

Thus, the State of Pennsylvania is putting the weight of its liquor license, concededly a valued and important adjunct to a private club, behind racial discrimination.

As the first Justice Harlan, dissenting in the *Civil Rights Cases*, 109 U. S. 3, 59, said:

> "I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern. . . . What I affirm is that no State, nor the officers of any State, nor any corporation or individual wielding power under State authority for the public benefit or the public convenience, can, consistently . . . with the freedom established by the fundamental law . . . discriminate against freemen or citizens, in those rights, because of their race . . . ."

The regulation governing this liquor license has in it that precise infirmity.[4]

I would affirm the judgment below.

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additional restriction on election-day sales as to which only club licensees are exempt. *Ibid.*)

[4] The majority asserts that appellee Irvis had "standing" only to challenge Moose Lodge's guest-service practices, not its membership policies, on the theory that his "injury . . . stemmed, not from the lodge's membership requirements, but from its policies with

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

When Moose Lodge obtained its liquor license, the State of Pennsylvania became an active participant in the operation of the Lodge bar. Liquor licensing laws

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respect to the serving of guests of members." *Ante*, at 166. I submit that appellee's standing is not so confined.

A litigant has standing, for purposes of the Art. III "case" or "controversy" requirement, if he "alleges that the challenged action has caused him injury in fact, economic or otherwise." *Association of Data Processing Service Organizations* v. *Camp*, 397 U. S. 150, 152. When Moose Lodge refused service to appellee Irvis solely because of his race, it imposed upon him a special disability apart from that suffered by the population at large. If this discrimination is chargeable to the State, Irvis has standing, not only to challenge Moose Lodge's guest policies—the immediate cause of the harm—but also to challenge the state scheme which authorized these policies. For an individual "subjected by statute to special disabilities necessarily has . . . a substantial, immediate, and real interest in the validity of the statute which imposes the disability." *Evers* v. *Dwyer*, 358 U. S. 202, 204.

Moreover, once called into question, all discrimination authorized by the scheme is at issue. Just as a federal court may order an entire school desegregated upon the petition of a litigant representing only the fifth grade, so could the court below cure the invidious discrimination it found to exist in Pennsylvania's liquor licensing scheme upon the petition of a litigant injured only by one aspect of that discrimination. The root evil was that Irvis was discriminated against with the blessing of the State, not that he was discriminated against *qua* "guest" or "member."

In my view, moreover, a black Pennsylvanian suffers cognizable injury when the State supports and encourages the maintenance of a system of segregated fraternal organizations, whether or not he himself had sought membership in or had been refused service by such an organization, just as a black Pennsylvanian would suffer cognizable injury if the State were to enforce a segregated bus system, whether or not he had ever ridden or ever intended to ride on such a bus. Cf. *Evers* v. *Dwyer, supra.* American culture and history have been so plagued with racism and discrimination that it is clear beyond doubt that in such circumstances blacks suffer "injury in fact." It "is practically a brand upon them, affixed by the law,

are only incidentally revenue measures; they are primarily pervasive regulatory schemes under which the State dictates and continually supervises virtually every detail of the operation of the licensee's business. Very few, if any, other licensed businesses experience such complete state involvement. Yet the Court holds that such involvement does not constitute "state action" making the Lodge's refusal to serve a guest liquor solely because of his race a violation of the Fourteenth Amendment. The vital flaw in the Court's reasoning is its complete disregard of the fundamental value underlying the "state action" concept. That value is discussed in my separate opinion in *Adickes* v. *Kress & Co.,* 398 U. S. 144, 190–191 (1970):

> "The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. Accordingly, . . . the

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an assertion of their inferiority, and a stimulant to . . . race prejudice . . . ." *Strauder* v. *West Virginia,* 100 U. S. 303, 308. Their stake is analogous to the "spiritual stake" in First Amendment values which we have held may give standing to raise claims under the Establishment Clause and Free Exercise Clause. See *Flast* v. *Cohen,* 392 U. S. 83.

Thus, whether state action be found in Regulation § 113.09, in Pennsylvania's creation of a monopoly which operates to restrict access to places in which blacks may be served liquor, or both, appellee Irvis has standing to challenge all aspects of the discriminatory scheme.

> cases that have come before us [in which] this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken[,] . . . represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination."

Plainly, the State of Pennsylvania's liquor regulations intertwine the State with the operation of the Lodge bar in a "significant way [and] lend [the State's] authority to the sordid business of racial discrimination." The opinion of the late Circuit Judge Freedman, for the three-judge District Court, most persuasively demonstrates the "state action" present in this case:

> "We believe the decisive factor is the uniqueness and the all-pervasiveness of the regulation by the Commonwealth of Pennsylvania of the dispensing of liquor under licenses granted by the state. The regulation inherent in the grant of a state liquor license is so different in nature and extent from the ordinary licenses issued by the state that it is different in quality.
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> "It had always been held in Pennsylvania, even prior to the Eighteenth Amendment, that the exercise of the power to grant licenses for the sale of intoxicating liquor was an exercise of the highest governmental power, one in which the state had the fullest freedom inhering in the police power of the sovereign. With the Eighteenth Amendment which went into effect in 1919 the right to deal in intoxicating liquor was extinguished. The era of Prohibition ended with the adoption in 1933 of the Twenty-first Amendment, which has left to each state the absolute power to prohibit the sale,

possession or use of intoxicating liquor, and in general to deal otherwise with it as it sees fit.

"Pennsylvania has exercised this power with the fullest measure of state authority. Under the Pennsylvania plan the state monopolizes the sale of liquor through its so-called state stores, operated by the state. Resale of liquor is permitted by hotels, restaurants and private clubs, which must obtain licenses from the Liquor Control Board, authorizing them 'to purchase liquor from a Pennsylvania Liquor Store [at a discount] and keep on the premises such liquor and, subject to the provisions of this Act and the regulations made thereunder to sell the same and also malt or brewed beverages to guests, patrons or members for consumption on the hotel, restaurant or club premises.'

"The issuance or refusal of a license to a club is in the discretion of the Liquor Control Board. In order to secure one of the limited number of licenses which are available in each municipality an applicant must comply with extensive requirements, which in general are applicable to commercial and club licenses equally. The applicant must make such physical alterations in his premises as the Board may require and, if a club, must file a list of the names and addresses of its members and employees, together with such other information as the Board may require. He must conform his overall financial arrangements to the statute's exacting requirements and keep extensive records. He may not permit 'persons of ill repute' to frequent his premises nor allow thereon at any time any 'lewd, immoral or improper entertainment.' He must grant the Board and its agents the right to inspect the licensed premises at any time when patrons, guests or members are present. It is only on compliance

with these and numerous other requirements and if the Board is satisfied that the applicant is 'a person of good repute' and that the license will not be 'detrimental to the welfare, health, peace and morals of the inhabitants of the neighborhood,' that the license may issue.

"Once a license has been issued the licensee must comply with many detailed requirements or risk its suspension or revocation. He must in any event have it renewed periodically. Liquor licenses have been employed in Pennsylvania to regulate a wide variety of moral conduct, such as the presence and activities of homosexuals, performance by a topless dancer, lewd dancing, swearing, being noisy or disorderly. So broad is the state's power that the courts of Pennsylvania have upheld its restriction of freedom of expression of a licensee on the ground that in doing so it merely exercises its plenary power to attach conditions to the privilege of dispensing liquor which a licensee holds at the sufferance of the state.

"These are but some of the many reported illustrations of the use which the state has made of its unrestricted power to regulate and even to deny the right to sell, transport or possess intoxicating liquor. It would be difficult to find a more pervasive interaction of state authority with personal conduct. The holder of a liquor license from the Commonwealth of Pennsylvania therefore is not like other licensees who conduct their enterprises at arms-length from the state, even though they may have been required to comply with certain conditions, such as zoning or building requirements, in order to obtain or continue to enjoy the license which authorizes them to engage in their business. The state's concern in such cases is minimal and

once the conditions it has exacted are met the customary operations of the enterprise are free from further encroachment. Here by contrast beyond the act of licensing is the continuing and pervasive regulation of the licensees by the state to an unparalleled extent. The unique power which the state enjoys in this area, which has put it in the business of operating state liquor stores and in the role of licensing clubs, has been exercised in a manner which reaches intimately and deeply into the operation of the licensees.

"In addition to this, the regulations of the Liquor Control Board adopted pursuant to the statute affirmatively require that 'every club licensee shall adhere to all the provisions of its constitution and by-laws.' As applied to the present case this regulation requires the local Lodge to adhere to the constitution of the Supreme Lodge and thus to exclude non-Caucasians from membership in its licensed club. The state therefore has been far from neutral. It has declared that the local Lodge must adhere to the discriminatory provision under penalty of loss of its license. It would be difficult in any event to consider the state neutral in an area which is so permeated with state regulation and control, but any vestige of neutrality disappears when the state's regulation specifically exacts compliance by the licensee with an approved provision for discrimination, especially where the exaction holds the threat of loss of the license.

"However it may deal with its licensees in exercising its great and untrammeled power over liquor traffic, the state may not discriminate against others or disregard the operation of the Equal Protection Clause of the Fourteenth Amendment as it affects personal rights. Here the state has used its great

power to license the liquor traffic in a manner which has no relation to the traffic in liquor itself but instead permits it to be exploited in the pursuit of a discriminatory practice." 318 F. Supp. 1246, 1248–1250 (MD Pa. 1970).

This is thus a case requiring application of the principle that until today has governed our determinations of the existence of "state action": "Our prior decisions leave no doubt that the mere existence of efforts by the State, through legislation or otherwise, to authorize, encourage, or otherwise support racial discrimination in a particular facet of life constitutes illegal state involvement in those pertinent private acts of discrimination that subsequently occur." *Adickes* v. *Kress & Co.*, 398 U. S., at 202 (separate opinion of BRENNAN, J.). See, *e. g., Peterson* v. *City of Greenville,* 373 U. S. 244 (1963); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961); *Evans* v. *Newton,* 382 U. S. 296 (1966); *Hunter* v. *Erickson,* 393 U. S. 385 (1969); *Lombard* v. *Louisiana,* 373 U. S. 267 (1963); *Reitman* v. *Mulkey,* 387 U. S. 369 (1967); *Robinson* v. *Florida,* 378 U. S. 153 (1964); *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151 (1914).

I therefore dissent and would affirm the final decree entered by the District Court.

TAYLOR ET AL *v.* McKEITHEN, GOVERNOR OF LOUISIANA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–784. Decided June 12, 1972

The District Court in this litigation involving legislative reapportionment, after extensive hearings, approved a plan that departed from historical boundaries as necessary to avoid dilution of racial minority voting strength. The Court of Appeals, without opinion, reversed, adopting Louisiana's plan retaining those boundaries. *Held:* Absent an explication of the reasons for its summary reversal of the District Court, the Court of Appeals' judgment is vacated and the case remanded.

Certiorari granted; vacated and remanded.

PER CURIAM.

The 1970 self-reapportionment of the Louisiana Legislature was challenged in this lawsuit on the dual grounds that it offended both the one-man, one-vote principle and the prohibition against voting arrangements designed to dilute the voting strength of racial minorities. After the United States Attorney General interposed an objection to the election law change under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c, the District Court appointed a Special Master to prepare a court-imposed plan. The Master was verbally instructed to hold hearings and to devise a proposal to maintain the integrity of political subdivisions and to observe natural or historical boundaries "as nearly as possible." He was also instructed that "[n]o consideration whatsoever was to be given to the location of the residence of either incumbents in office or of announced or prospective candidates." Opinion of Judge West, Civil Action No. 71–234, Aug. 24, 1971.

The Special Master held four days of hearings, during

which over 100 persons were heard. Proposed plans were received by him. No one was denied a hearing. He then submitted his recommendation to the District Court and after a hearing it was adopted by the court.

This dispute involves only four state senate seats affected by the reapportionment. At the hearing held by the District Judge on the Master's proposal, the State Attorney General presented a counterplan which differed from the Master's only with respect to four senatorial districts in the New Orleans area. Although the judge found that both plans satisfied the one-man, one-vote requirement, he found that the two schemes differed in their racial composition of the four districts, as is set out in greater detail in the margin.[1] Under the State Attorney General's scheme, four "safe" white districts were proposed whereas the Master's design would have created two districts of slight majorities of black voters. Also, under the counterplan each incumbent would continue to reside in his "own" district, whereas under the Master's proposal the residences of the four incumbents would fall evenly between the two districts to be composed primarily of white voters, ensuring defeat for two of the four incumbents.

At the hearing the State Attorney General contended that the court's plan would make hash of the traditional ward-and-precinct lines. The District Court acknowledged that there would be some departure from the historical patterns but concluded that the " 'historical'

[1] According to the District Judge's opinion, the percentages of black registered voters in each of the four districts under each of the competing plans would be:

	Master's Plan	*Attorney General's Plan*
District 2	51%	37.6%
District 3	18%	25.7%
District 4	58%	44.3%
District 5	20%	24.0%

boundaries of voting districts in Louisiana reflect[ed] a history of racial discrimination. Adherence to the historical boundaries alluded to by objectors [had] been the prime reason why only two negroes [had] been allowed to sit in the Louisiana Legislature in the last 75 years." 333 F. Supp. 452, 462. The court found that the alternative proposal would "operate to diversify the negro voting population throughout the four districts and thus significantly dilute their vote" and would practically eliminate "the possibility of a negro being elected from any of the four districts," while the court-approved plan would at least give blacks "a fair chance in two out of the four districts. . . ." *Id.*, at 457. The court-approved plan sought "to protect the rights of the people while the primary purpose of the Senators' plan appear[ed] to be the protection of incumbent office holders." *Id.*, at 458. Accordingly, as mentioned, the District Court adopted the Master's recommendation.

Despite the District Court's findings, however, the Court of Appeals reversed without opinion and adopted the Attorney General's alternative division of New Orleans. The petitioners are the original plaintiffs and they now seek review of this summary reversal.

An examination of the record in this case suggests that the Court of Appeals may have believed that benign districting by federal judges is itself unconstitutional gerrymandering even where (a) it is employed to overcome the residual effects of past state dilution of Negro voting strength and (b) the only alternative is to leave intact the traditional "safe" white districts.[2] If that

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[2] It is possible, but unlikely, that the Court of Appeals believed that benign districting, although permissible, was achievable here with less violence to the parish's historical district lines. But had that been its view presumably the court would have remanded for the construction of a less drastic alternative rather than simply directing the adoption of the Attorney General's counterplan.

were in fact the reasoning of the lower court, then this petition would present an important federal question of the extent to which the broad equitable powers of a federal court, *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15, are limited by the colorblind concept of *Gomillion* v. *Lightfoot,* 364 U. S. 339, and *Wright* v. *Rockefeller,* 376 U. S. 52, 57, 67 (DOUGLAS, J., dissenting).[3] In reapportionment cases, as JUSTICE STEWART has observed, "the federal courts are often going to be faced with hard remedial problems" in minimizing friction between their remedies and legitimate state policies. *Sixty-Seventh Minnesota State Senate* v. *Beens,* 406 U. S. 187, 204 (dissenting opinion).

Because this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals, we grant the petition for writ of certiorari, vacate the judgment below, and remand the case to the Court of Appeals for proceedings in conformity with this opinion.[4]

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[3] Although similar in some respects, this case is not controlled by *Whitcomb* v. *Chavis,* 403 U. S. 124. To be sure, in both cases the District Courts were writing on clean slates in the sense that they were fashioning court-imposed reapportionment plans. And, in each case the equitable remedy of the court conflicted with a state policy. (There the state policy favored multi-member districts whereas here the policy favors maintenance of traditional boundaries.) The important difference, however, is that in *Whitcomb* it was conceded that the State's preference for multi-member districts was not rooted in racial discrimination, 403 U. S., at 149. Here, however, there has been no such concession and, indeed, the District Court found a long "history" of bias and franchise dilution in the State's traditional drawing of district lines. Cf. *id.,* at 155.

[4] We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances. See Rule 21, Court of Appeals for the Fifth Circuit. But here the lower court summarily reversed without any opinion on a point that had been considered at length by the District Judge. Under the special

MR. JUSTICE BLACKMUN concurs in the Court's judgment.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

The short recitation of specific facts in the Court's opinion makes clear that the issues in this case, as viewed by both petitioners and respondents, are well developed in the record. The federal questions adverted to by the Court in its opinion are undoubtedly important ones. They are either presented by the proceedings below on this record, or they are not; this Court, in exercising its certiorari jurisdiction, may wish to consider such problems as are presented in this case at this time, or it may not. While an opinion from the Court of Appeals fully explaining the reason for its reversal of the District Court would undoubtedly be of assistance to our exercise of certiorari jurisdiction here, it is by no means essential.[1] I do not believe that the Court's vacation of the judgment below with a virtually express directive to the Court of Appeals that it write an opinion is an appropriate exercise of this Court's authority.

The courts of appeals are statutory courts, having the power to prescribe rules for the conduct of their own business so long as those rules are consistent with applicable law and rules of practice and procedure prescribed by this Court, 28 U. S. C. § 2071. No existing statute or rule of procedure prohibits the Fifth Circuit from issuing a short opinion and order, as it has done here, or from deciding cases without any opinion at all. Cf. Rule 21, Court of Appeals for the Fifth Circuit. The courts of

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circumstances of this case, we are loath to impute to the Court of Appeals reasoning that would raise a substantial federal question when it is plausible that its actual ground of decision was of more limited importance.

[1] See, *e. g.*, *Lego* v. *Twomey*, 404 U. S. 477, 482 n. 6 (1972).

appeals, and particularly the Fifth Circuit, which has experienced the heaviest caseload of all the circuits, need the maximum possible latitude to deal with the "flood tide" of appeals that the "ever growing explosive increase" of federal judicial business has produced. See *Isbell Enterprises, Inc.* v. *Citizens Casualty Co.*, 431 F. 2d 409 (CA5 1970); *NLRB* v. *Amalgamated Clothing Workers*, 430 F. 2d 966 (CA5 1970).[2]

If there are important federal questions presented in this record, this Court should address itself to them. Instead of doing that, it calls upon the Fifth Circuit to write an *amicus curiae* opinion to aid us. I think decisions as to whether opinions should accompany judgments of the courts of appeals, and the desirable length and content of those opinions are matters best left to the judges of the courts of appeals. I therefore dissent from the order of vacation and remand.

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[2] In fiscal year 1971, 2,316 new matters were docketed in the Fifth Circuit, 380 more than in any of the other circuits. This represented a 120% increase in a 10-year period, although the number of circuit judges was increased by only 60%. Annual Report of the Director of the Administrative Office of the United States Courts 106 (1971). The increase in the business of the courts of appeals has been almost exponential. In 1961 the Fifth Circuit carried over only 278 cases that were undisposed of. By 1970 there were 1,181 cases put over to the succeeding year. *NLRB* v. *Amalgamated Clothing Workers*, 430 F. 2d 966, 968 n. 4 (CA5 1970).

FLOWER *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–1180. Decided June 12, 1972

Application of 18 U. S. C. § 1382, proscribing the re-entry onto a military post of a person who has been removed therefrom or ordered by an officer not to re-enter, held violative of First Amendment rights as applied when petitioner, a civilian who had previously been barred from the post was arrested after re-entry while quietly distributing leaflets on a public street extensively used by civilians as well as military personnel that runs through Fort Sam Houston, an open military post.

Certiorari granted; 452 F. 2d 80, reversed and remanded.

PER CURIAM.

Petitioner John Thomas Flower, a regional "Peace Education Secretary" of the American Friends Service Committee and a civilian, was arrested by military police while quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston, San Antonio, Texas. In an ensuing prosecution before the United States District Court for the Western District of Texas on charges of violating 18 U. S. C. § 1382 ("Whoever reenters or is found [within a military post] after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—Shall be fined not more than $500 or imprisoned not more than six months, or both"), it was established that petitioner had previously been barred from the post by order of the deputy commander because of alleged participation in an attempt to distribute "unauthorized" leaflets. The District Court found that § 1382 "is a valid law" and was validly applied. It sentenced petitioner to six months in prison. A divided

panel of the Court of Appeals for the Fifth Circuit affirmed. 452 F. 2d 80 (CA5 1972).

We reverse. Whatever power the authorities may have to restrict general access to a military facility, see *Cafeteria & Restaurant Workers* v. *McElroy,* 367 U. S. 886 (1961), here the fort commander chose not to exclude the public from the street where petitioner was arrested. As Judge Simpson, dissenting, noted below:

> "There is no sentry post or guard at either entrance or anywhere along the route. Traffic flows through the post on this and other streets 24 hours a day. A traffic count conducted on New Braunfels Avenue on January 22, 1968, by the Director of Transportation of the city of San Antonio, shows a daily (24-hour) vehicular count of 15,110 south of Grayson Street (the place where the street enters the post boundary) and 17,740 vehicles daily north of that point. The street is an important traffic artery used freely by buses, taxi cabs and other public transportation facilities as well as by private vehicles, and its sidewalks are used extensively at all hours of the day by civilians as well as by military personnel. Fort Sam Houston was an open post; the street, New Braunfels Avenue, was a completely open street." 452 F. 2d, at 90.

Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street. Cf. *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938), *Schneider* v. *State,* 308 U. S. 147 (1939). "[S]treets are natural and proper places for the dissemination of information and opinion," 308 U. S., at 163. "[O]ne who is rightfully on a street which the state has left open to the public

carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison* v. *Texas,* 318 U. S. 413, 416 (1943).

The First Amendment protects petitioner from the application of § 1382 under conditions like those of this case. Accordingly, without need to set the matter for further argument, we grant the petition for a writ of certiorari and reverse the conviction.

Reversed and remanded.

MR. JUSTICE BLACKMUN dissents, for he would grant the petition for certiorari and hear argument on the merits.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The result, if not the reasoning, of the Court's impressionistic summary reversal of the Court of Appeals in this case is clear: without benefit of briefs or oral argument the Court declares unconstitutional this application of 18 U. S. C. § 1382, a statute enacted to give commanders of military posts authority thought necessary by Congress to exclude civilians from the post area after proper notice.

Because the post commander of Fort Sam Houston may have permitted civilian vehicular and pedestrian traffic on New Braunfels Avenue within the limits of Fort Sam Houston,* the Court holds that he has "aban-

*From a record consisting largely of rejected offers of proof, the Court concludes that Fort Sam Houston was an "open" post. It also concludes that New Braunfels Avenue, a traffic artery within the post, was a "completely open" street, presumably more "open" than the post as a whole. While I have difficulty at this stage of the case in knowing how the Court reaches these factual conclusions, or indeed what exactly the varying degrees of "openness" are meant to connote, my disagreement with the Court's summary reversal is not limited to this aspect of the case.

doned" any claim of special interest in who walks, talks, or distributes leaflets on the avenue. Obviously the Court cannot be referring to the subjective intent of the base commander, since he gave petitioner due notice of his debarment from the base, and the bringing of this prosecution evinces a rather strong interest on the part of the commander in petitioner's "leafleting" activities. If the Court means to say that once any portion of a military base is opened up to unregulated vehicular traffic it automatically follows that such portion of the base acquires the status of a public square in a city or town, the mere statement of that proposition—which is all that is contained in the Court's opinion—is not self-demonstrating. Since the Court does not hold, and it does not appear on this record that it could hold, that petitioner Flower was treated differently from any other "leafleteers," the Court's holding does not deal with any possible denial of equal protection. The case thus concerns only the First Amendment claim of leafleteers to go anywhere on a military base to which civilian vehicles and pedestrians are granted free access.

Adderley v. *Florida,* 385 U. S. 39 (1966), suggests that civilian authorities may draw reasonable distinctions, based on the purpose for which public buildings and grounds are used, in according the right to exercise First Amendment freedoms in such buildings and on such grounds. Simply because some activities and individuals are allowed on government property does not require the abandonment of otherwise allowable restrictions on its use. Indeed, it is generally recognized that demonstrations on courthouse grounds can be prohibited in order to protect the proper exercise of the judicial function. See *Cox* v. *Louisiana,* 379 U. S. 559, 562 (1965). See also 63 Stat. 617, § 6, 40 U. S. C. § 13k (prohibiting any demonstrations on the grounds surrounding this Court). Similarly, the unique requirements of mili-

tary morale and security may well necessitate control over certain persons and activities on the base, even while normal traffic flow through the area can be tolerated.

The Court's opinion leaves the base commander with a Hobson's choice. He may close access to civilian traffic on New Braunfels Avenue and other traffic arteries traversing the post, thereby rendering the post once more subject to the authority that Congress intended him to have, but also causing substantial inconvenience to civilian residents of Bexar County who presently use these arteries. Or, he may continue to accommodate the convenience of the residents, but only at the cost of surrendering the authority Congress conferred upon him under 18 U. S. C. § 1382 to control access to the post he commands.

An additional problem, to which the Court's opinion devotes no attention whatever, is the question of whether this petitioner should be free to challenge the validity of the post commander's original debarment order in defending a criminal prosecution under 18 U. S. C. § 1382. The Solicitor General, in opposing the petition for a writ of certiorari, contends that petitioner would have been free to challenge the debarment order in a separate proceeding in the United States District Court, relying on *Kiiskila* v. *Nichols,* 433 F. 2d 745 (CA7 1970), and *Dash* v. *Commanding General,* 429 F. 2d 427 (CA4 1970). The Court, by determining *sub silentio* that exhaustion of such remedies is not required, substantially dilutes the effectiveness of the criminal sanction that Congress deliberately placed behind a post commander's order of debarment. It accomplishes this dilution in a way that may not be at all necessary to the vindication of petitioner's First Amendment rights. By requiring petitioner to proceed in an orderly manner to first litigate any alleged constitutional infirmity in the debarment order, the Court

could assure him a forum for the assertion of such claims while preserving to the post commander the availability of a relatively summary criminal sanction against one who violated a debarment order whose validity has not been contested.

While full argument in this case on the merits might persuade me that the Court's result was required by the Constitution, its present opinion certainly has not done so. I therefore dissent from the summary reversal.

IVAN V. *v.* CITY OF NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

No. 71–6425. Decided June 12, 1972

In re Winship, 397 U. S. 358, which held that proof beyond a reasonable doubt is essential to due process at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult, must be given fully retroactive effect.

Certiorari granted; 37 App. Div. 2d 822, 324 N. Y. S. 2d 934, reversed and remanded.

PER CURIAM.

The Court held in *In re Winship,* 397 U. S. 358, decided March 31, 1970, that proof beyond a reasonable doubt is among the essentials of due process and fair treatment that must be afforded at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult. In this case, on January 6, 1970, before *Winship* was decided, petitioner was adjudged a delinquent in the Family Court of Bronx County, New York, on a finding, based on the preponderance-of-evidence standard, that, at knifepoint, he forcibly took a bicycle from another boy, an act that, if done by an adult, would constitute the crime of robbery in the first degree. On direct appeal, the Appellate Division, First Department, reversed on the ground that *Winship* should be retroactively applied to all cases still in the appellate process, 35 App. Div. 2d 806, 316 N. Y. S. 2d 568 (1970). The New York Court of Appeals reversed the Appellate Division, holding that *Winship* was not to be applied retroactively, 29 N. Y. 2d 583,

272 N. E. 2d 895 (1971).* On remand, the Appellate Division thereupon affirmed the delinquency adjudication, 37 App. Div. 2d 822, 324 N. Y. S. 2d 934 (1971), and the Court of Appeals denied leave to appeal from that affirmance, 29 N. Y. 2d 489 (1972). We disagree with the holding of the Court of Appeals that *Winship* is not to be applied retroactively.

"Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Williams* v. *United States,* 401 U. S. 646, 653 (1971). See *Adams* v. *Illinois,* 405 U. S. 278, 280 (1972); *Roberts* v. *Russell,* 392 U. S. 293, 295 (1968).

Winship expressly held that the reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . . 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of

*The Court of Appeals followed *Matter of D.,* 27 N. Y. 2d 90, 261 N. E. 2d 627 (1970), where *Winship* was said not to be retroactive but that even if it were, appellant there had waived the claim when he entered a guilty plea to the charges. In that circumstance this Court dismissed an appeal and denied certiorari in that case. *D.* v. *County of Onandaga,* 403 U. S. 926 (1971).

his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' " 397 U. S., at 363–364.

Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Appellate Division of the Supreme Court of New York, First Judicial Department, is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

PENNSYLVANIA *v.* NEW YORK ET AL.

ON BILL OF COMPLAINT

No. 40, Orig. Argued March 29, 1972—Decided June 19, 1972

Pennsylvania brought this original action against New York to determine the authority of States to escheat, or take custody of, unclaimed funds paid to Western Union Telegraph Co. for purchase of money orders. The Special Master, following *Texas* v. *New Jersey*, 379 U. S. 674, recommended that any sum held by Western Union unclaimed for the time period prescribed by state statute may be escheated or taken into custody by the State in which the company's records placed the creditor's address, whether the creditor be the payee of an unpaid draft, the sender of a money order entitled to a refund, or an individual whose claim has been erroneously underpaid; and where the records show no address, or where the State in which the creditor's address falls has no applicable escheat law, the right to escheat or take custody shall be in the debtor's domiciliary State, here New York. The recommended decree is adopted and entered, and the cause is remanded to the Special Master for a proposed supplemental decree with respect to the distribution of the costs to the States of the inquiry as to available addresses. Pp. 208–216.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 216.

Herman Rosenberger II, Assistant Attorney General of Pennsylvania, argued on the exceptions to the Report of the Special Master for plaintiff. On the brief were *J. Shane Creamer,* Attorney General, and *Joseph H. Resnick,* Assistant Atorney General.

F. Michael Ahern, Assistant Attorney General, argued on the exceptions to the Report of the Special Master for intervenor-plaintiff the State of Connecticut. With him on the brief was *Robert K. Killian,* Attorney General. *Theodore L. Sendak,* Attorney General, and *Rob-*

ert A. Zaban, Deputy Attorney General, filed a brief on exceptions to the Report of the Special Master for intervenor-plaintiff the State of Indiana.

Winifred L. Wentworth, Assistant Attorney General, argued on the exceptions to the Report of the Special Master for defendant the State of Florida. With her on the brief was *Robert L. Shevin,* Attorney General. *Julius Greenfield,* Assistant Attorney General, argued in support of the Report of the Special Master for defendant the State of New York. With him on the brief were *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Gustave Harrow,* Assistant Attorney General. *Lee Johnson,* Attorney General, *John W. Osburn,* Solicitor General, and *Philip J. Engelgau,* Assistant Attorney General, filed a brief on exceptions to the Report of the Special Master for defendant the State of Oregon.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Pennsylvania and other States except to, and New York supports,[1] the Report of the Special Master filed in this original action brought by Pennsylvania against New York for a determination respecting the authority of the several States to escheat, or take custody of, unclaimed funds paid to the Western Union Telegraph Company for the purchase of money orders.[2] We over-

[1] Of the remaining States party to this case, Florida has filed exceptions as defendant, and Connecticut and Indiana as intervening plaintiffs. New Jersey has filed a brief *amicus curiae* in support of Pennsylvania's position.

[2] We granted leave to file the bill of complaint, 398 U. S. 956, permitted the State of Connecticut to intervene as a party plaintiff, and appointed Mr. John F. Davis as a Special Master to take evidence and make appropriate reports. 400 U. S. 811. Thereafter, California and Indiana were permitted to intervene as plaintiffs, and Arizona as a defendant. 400 U. S. 924, 1019; 401 U. S. 931.

rule the exceptions and enter the decree recommended by the Special Master, see *post,* p. 223.[3]

The nature of Western Union's money order business, and the source of the funds here in dispute, were described by the Court in *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U. S. 71 (1961):

> "Western Union is a corporation chartered under New York law with its principal place of business in that State. It also does business and has offices in all the other States except Alaska and Hawaii, [as well as] in the District of Columbia, and in foreign countries, and was from 1916 to 1934 subject to regulation by the I. C. C. and since then by the F. C. C. In addition to sending telegraphic messages throughout its world-wide system, it carries on a telegraphic money order business which commonly works like this. A sender goes to a Western Union office, fills out an application and gives it to the company clerk who waits on him together with the money to be sent and the charges for sending it. A receipt is given the sender and a telegraph message is transmitted to the company's office nearest to the payee directing that office to pay the money order to the payee. The payee is then notified and upon properly identifying himself is given a negotiable draft, which he can either endorse and cash at once or keep for use in the future. If the payee cannot be located for delivery of the notice, or fails to call for the draft within 72 hours, the office of destination notifies the sending office. This office then notifies the original sender of the failure to deliver and makes a refund, as it

[3] The exception of Indiana as to a typographical error in the recommended decree is sustained. The phrase "escheat of custodial taking" in paragraph 2, lines 4–5 of the decree should read "escheat or custodial taking."

makes payments to payees, by way of a negotiable draft which may be either cashed immediately or kept for use in the future.

"In the thousands of money order transactions carried on by the company, it sometimes happens that it can neither make payment to the payee nor make a refund to the sender. Similarly payees and senders who accept drafts as payment or refund sometimes fail to cash them. For this reason large sums of money due from Western Union for undelivered money orders and unpaid drafts accumulate over the years in the company's offices and bank accounts throughout the country." *Id.*, at 72–73.

In 1953 Pennsylvania began state proceedings under its escheat statute [4] to take custody of those unclaimed funds, held by Western Union, that arose from money order purchases in the company's Pennsylvania offices. The Supreme Court of Pennsylvania affirmed a judgment for the State of about $40,000, *Commonwealth* v. *Western Union,* 400 Pa. 337, 162 A. 2d 617 (1960), but this Court reversed, *Western Union Telegraph Co.* v. *Pennsylvania, supra,* holding that the state court judgment denied Western Union due process of law because it could not protect the company against rival claims of other States. We noted that controversies among different

[4] The Pennsylvania statute, Act of July 29, 1953, P. L. 986, § 1, (Pa. Stat. Ann., Tit. 27, § 333) provides in part:

"(b) Whensoever the . . . person entitled to any . . . personal property within or subject to the control of the Commonwealth or the whereabouts of such . . . person entitled has been or shall be and remain unknown for the period of seven successive years, such . . . personal property . . . shall escheat to the Commonwealth . . . .

"(c) Whensoever any . . . personal property within or subject to the control of this Commonwealth has been or shall be and remain unclaimed for the period of seven successive years, such . . . personal property . . . shall escheat to the Commonwealth . . . ."

States over their right to escheat intangibles could be settled only in a forum "where all the States that want to do so can present their claims for consideration and final, authoritative determination. Our Court has jurisdiction to do that." *Id.*, at 79.

Thereafter, in *Texas* v. *New Jersey*, 379 U. S. 674 (1965), the Court was asked to decide which of several States was entitled to escheat intangible property consisting of debts owed by the Sun Oil Co. and left unclaimed by creditors. Four different rules were proposed. Texas argued that the funds should go to the State having the most significant "contacts" with the debt, as measured by a number of factors; New Jersey, that they should go to the State of the debtor company's incorporation; Pennsylvania, to the State where the company had its principal place of business; and Florida, to the State of the creditor's last known address as shown by the debtor's books and records. We rejected Texas' and Pennsylvania's proposals as being too uncertain and difficult to administer, and rejected New Jersey's because "it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Id.*, at 680. Florida's proposal, on the other hand, was regarded not only as a "simple and easy" standard to follow, but also as one that tended "to distribute escheats among the States in the proportion of the commercial activities of their residents." *Id.*, at 681. We therefore held that the State of the creditor's last known address is entitled to escheat the property owed him, adding that if his address does not appear on the debtor's books or is in a State that does not provide for escheat of intangibles, then the State of the debtor's incorporation may take custody of the funds "until some other

State comes forward with proof that it has a superior right to escheat." *Id.*, at 682. The opinion concluded:

> "We realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic. It is fundamentally a question of ease of administration and of equity. We believe that the rule we adopt is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." *Id.*, at 683.

On March 13, 1970, Pennsylvania filed this original action to renew its efforts to escheat part of Western Union's unclaimed money order proceeds. The complaint alleged that Western Union had accumulated more than $1,500,000 in unclaimed funds "on account of money orders purchased from the company on or before December 31, 1962," and that about $100,000 of that amount, "held by Western Union on account of money orders purchased from it in Pennsylvania," was subject to escheat by that State. Pennsylvania asked for a judgment resolving the conflicting claims of it and the defendant States, and for a temporary injunction against payment of the funds by Western Union or a taking of them by the defendant States, pending disposition of the case.[5]

In their arguments before the Special Master, the parties suggested three different formulas to resolve their conflicting claims. Pennsylvania contended that Western Union's money order records do not identify anyone as a "creditor" of the company and in many instances do

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[5] The Court has taken no action on the plea for temporary injunction, and accepts the recommendation of the Special Master that it now "be denied as unnecessary." Report 3 n. 2.

not list an address for either the sender or payee; therefore, strict application of the *Texas* v. *New Jersey* rule to this type of intangible would result in the escheat of almost all the funds to the State of incorporation, here New York. To avoid this result, Pennsylvania proposed that the State where the money order was purchased be permitted to take the funds. It claimed that the State where the money orders are bought should be presumed to be the State of the sender's residence. Connecticut, California, and Indiana supported this proposal, as did New Jersey as *amicus curiae*.

Florida and Arizona also supported Pennsylvania, but argued that where the payee had received but not cashed the money order, his address, if known, should determine escheat, regardless of the sender's address.

New York argued that *Texas* v. *New Jersey* should be strictly applied, but that it was not retroactive. Thus, as to money orders purchased between 1930 and 1958 (seven years before the *Texas* decision)[6] New York asserted its right as the State of incorporation to all unclaimed funds, regardless of the creditor's address.[7] As for money orders drawn after 1958, New York would apply the *Texas* rule, and take the funds in all cases where the creditor's address did not appear or was located in a State not providing for escheat.

The Special Master has submitted a report recommending that the *Texas* rule "be applied to all the items involved in this case regardless of the date of the trans-

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[6] New York makes no claim with respect to money orders issued before 1930.

[7] Section 1309 of New York's Abandoned Property Law provides for the custodial taking, not escheat, of uncashed money orders, so that "the rights of a holder of a . . . money order to payment . . . shall be in no wise affected, impaired or enlarged by reason of the provisions of this section or by reason of the payment to the state comptroller of abandoned property hereunder."

actions out of which they arose." Report 21. The Report expresses some doubt about the constitutionality of the suggested alternatives, stating that both the place-of-purchase and place-of-destination rules might permit intangible property rights to be "cut off or adversely affected by state action in an *in rem* proceeding in a forum having no continuing relationship to any of the parties to the proceedings." *Id.*, at 19. These doubts, however, were not the sole basis for the Special Master's recommendation. He found that "[a]s in the case of the obligations in [*Texas* v. *New Jersey*], [the *Texas*] rule presents an easily administered standard preventing multiple claims and giving all parties a fixed rule on which they can rely." *Id.*, at 20. He concluded that:

> "Any sum now held by Western Union unclaimed for the period of time prescribed by the applicable State statutes may be escheated or taken into custody by the State in which the records of Western Union placed the address of the creditor, whether that creditor be the payee of an unpaid draft, the sender of a money order entitled to a refund, or an individual whose claim has been underpaid through error. . . . [I]f no address is contained in the records of Western Union, or if the State in which the address of the creditor falls has no applicable escheat law, then the right to escheat or take custody shall be in the domiciliary State of the debtor, in this case, New York." *Id.*, at 20–21.

The Report also states that New York would bear the burden of establishing "as to all escheatable items the absence from Western Union's records of an address for the creditor." *Id.*, at 16.

Pennsylvania's exceptions argue that where a transaction is of a type that "the obligor does not make entries upon its books and records showing the address of the

obligee," only "the State of origin of the transaction" should be permitted to escheat. Florida and Arizona have abandoned their state-of-destination test, and together with the other participating States save New York, have joined in Pennsylvania's exceptions. Tr. of Oral Arg. 20, 42.

Pennsylvania's proposal has some surface appeal. Because Western Union does not regularly record the addresses of its money order creditors, it is likely that the corporate domicile will receive a much larger share of the unclaimed funds here than in the case of other obligations, like bills for services rendered, where such records are kept as a matter of business practice. In a sense, there is some inconsistency between that result and our refusal in *Texas* to make the debtor's domicile the primary recipient of unclaimed intangibles. Furthermore, the parties say, the *Texas* rule is nothing more than a legal presumption that the creditor's residence is in the State of his last known address. A presumption based on the place of purchase is equally valid, they argue, and should be applied in order to prevent New York from gaining this windfall.

Assuming, without resolving the doubts expressed by the Special Master, that the Pennsylvania rule provides a constitutional basis for escheat, we do not regard the likelihood of a "windfall" for New York as a sufficient reason for carving out this exception to the *Texas* rule. *Texas* v. *New Jersey* was not grounded on the assumption that all creditors' addresses are known. Indeed, as to four of the eight classes of debt involved in that case, the Court expressly found that some of the creditors "had no last address indicated." 379 U. S., at 675–676, n. 4. Thus, the only arguable basis for distinguishing money orders is that they involve a higher percentage of unknown addresses. But we are not told what percentage

is high enough to justify an exception to the *Texas* rule, nor is it entirely clear that money orders constitute the only form of transaction where the percentage of unknown addresses may run high. In other words, to vary the application of the *Texas* rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided—that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." *Texas* v. *New Jersey,* 379 U. S., at 679.

Furthermore, a substantial number of creditors' addresses may in fact be available in this case. Although Western Union has not kept ledger records of addresses, the parties stipulated, and the Special Master found, that money order applications have been retained in the company's records "as far back as 1930 in some instances and are generally available since 1941." Report 9. To the extent that creditor addresses are available from those forms, the "windfall" to New York will, of course, be diminished.

We think that as a matter of fairness the claimant States, and not Western Union, should bear the cost of finding and recording the available addresses, and we shall remand to the Special Master for a hearing and recommendation as to the appropriate formula for distributing those costs. As for future money order transactions, nothing we say here prohibits the States from requiring Western Union to keep adequate address records. The decree recommended by the Special Master is adopted and entered,[8] and the cause is remanded to the

[8] Insofar as the invocation of any provision of the Revised Uniform Disposition of Unclaimed Property Act would be inconsistent with this decree, the decree prevails. See *Board of Education* v. *Swann,* 402 U. S. 43, 45–46 (1971).

Special Master for further proceedings and the filing of a proposed supplemental decree with respect to the distribution of costs of the inquiry as to available addresses.

It is so ordered.

[For decree adopted and entered by the Court, see *post,* p. 223.]

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

The majority opinion today purports to apply the rule laid down in *Texas* v. *New Jersey,* 379 U. S. 674 (1965), to a fact situation not contemplated when that case was decided. In applying that rule to these new facts, it seems to me that the Court exalts the rule but derogates the reasons supporting it.

I

Texas v. *New Jersey,* a case decided within the Court's original jurisdiction, is a unique precedent. Disposition of that case necessarily required a departure from the Court's usual mode of decisionmaking. Our role in this country's scheme of government is ordinarily a restricted one, limited in large measure to the resolution of conflicts calling for the interpretation and application either of statutory acts or of provisions of the Federal Constitution. In the performance of this function, an individual Justice's views as to what he might consider "fair" or "equitable" or "expeditious" are largely immaterial. Infrequently, however, we are called on to resolve disputes arising under the original jurisdiction of the Court (Art. III, § 2) in which our judgment is unaided by statutory or constitutional directives.

In approaching such cases, we may find, as did the

Court in *Texas* v. *New Jersey*, that fairness and expeditiousness provide the guideposts for our decision:

> "[T]he issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic. It is fundamentally a question of ease of administration and of equity." *Id.*, at 683.

The case before us today requires the application of similar principles, and I agree that Mr. Justice Black's opinion in *Texas* v. *New Jersey* points the way to the most desirable result. In my view, however, the majority's application of that precedent to the facts of this case offends both the "fairness" and "ease of administration" bases of that opinion.

The Court in *Texas* v. *New Jersey* was asked to decide which States could take title to escheatable intangible personal property in the form of debts owed by Sun Oil Co. to a large number of individual creditors. After rejecting several alternatives offered by the parties, the Court adopted the rule proposed by the State of Florida and approved by the Special Master. Under that rule the power to escheat the debts in question, in the first instance, was to be accorded "to the State of the creditor's last known address as shown by the debtor's books and records." *Id.*, at 680–681. In the "infrequent" case in which no record of last address was available or in which the appropriate State's laws did not provide for the escheat of abandoned intangibles, the property was to go to the State of the debtor's corporate domicile. *Id.*, at 682.

This disposition recommended itself to the Court for several reasons. The rule was generally consistent with the common-law maxim *"mobilia sequuntur personam"**

*See *Blodgett* v. *Silberman*, 277 U. S. 1, 9–10 (1928).

under which intangible personal property may be found to follow the domicile of its owner—here the creditor. *Id.*, at 680 n. 10. In looking to the residence of the creditor, the rule adopted by the Court recognized that the Company's unclaimed debts were assets of the individual creditors rather than assets of the debtor. *Id.*, at 681. Also, in distributing the property among the creditors' States, the rule had the advantage of dividing the property in a manner roughly proportionate to the commercial activities of each State's residents. In using the last-known address as the sole indicator of domicile, the rule would be easy to administer and apply. The Court recognized, of course, that this approach might lead to the escheat of property to a State from which the creditor had removed himself in the period since the debt arose. Yet it concluded that these instances would "tend to a large extent to cancel each other out," and would not disrupt the basic fairness and expeditiousness of the result. *Id.*, at 681.

Paradoxically, the mechanistic application of the *Texas* v. *New Jersey* rule to the present case leads ultimately to the defeat of each of the beneficial justifications for that rule. Unlike the records of the numerous debts owed by Sun Oil, Western Union's records may reflect the creditors' addresses for only a relatively small percentage of the transactions. As a consequence, the greater portion of the entire Western Union fund will go to the State of New York—the State of corporate domicile. Effectively then, the obligation of the debtor will be converted into an asset of the debtor's State of domicile to the exclusion of the creditors' States. The Court in *Texas* v. *New Jersey* specifically repudiated this result on the ground that it was inconsistent with "principles of fairness." *Id.*, at 680. It would have "exalt[ed] a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened

to incorporate itself." *Ibid.* The fact that the Court was willing to permit this result in the few cases in which no record of address was available or in which no law of escheat governed, does not diminish the clear view of the Court that this result would be impermissible as a basis for disposing of more than a small minority of the debts. Yet the decision today ignores the Court's unwillingness to "exalt" the largely coincidental domicile of the corporate debtor. It also disregards the Court's clearly expressed intent that the escheatable property be distributed in proportions roughly comparable to the volume of transactions conducted in each State.

Furthermore, the rule today is incompatible with the Court's view in *Texas* v. *New Jersey* that an easily and inexpensively discernible mode of allocation be utilized. The majority's rule will require the examination of every available money order application to determine whether the applicant filled out the address blank for his own address, or in the case of money order drafts received but not cashed, whether the holder's address had been preserved. Western Union estimated in the stipulated statement of facts that such an item-by-item examination could be undertaken at a cost of approximately $175,000. Report of the Special Master 16.

In sum, the invocation of the *Texas* v. *New Jersey* rule in the manner contemplated by the majority will lead to a result that is neither expeditious nor equitable.

II

The reasons underlying *Texas* v. *New Jersey* could best be effectuated by a relatively minor but logical deviation in the manner in which that rule is implemented in this case. Rather than embarking upon a potentially fruitless search for the creditor's last-known address as a rough indicator of domicile, reliance should be placed upon the State where the debtor-creditor relationship was

established. In most cases that State is likely also to be the site of the creditor's domicile. In other words, in the case of money orders sent and then returned to the initiating Western Union office because the sendee failed to claim the money, the State in which the money order was purchased may be presumed to be the State of the purchaser-creditor's domicile. And, where the draft has been received by either the initiating party or by the recipient but not negotiated, the State in which the draft was issued may be assumed to be the State of that creditor's domicile.

This modification is preferable, first, because it preserves the equitable foundation of the *Texas* v. *New Jersey* rule. The State of the corporate debtor's domicile is denied a "windfall"; the fund is divided in a proportion approximating the volume of transactions occurring in each State; and the integrity of the notion that these amounts represent assets of the individual purchasers or recipients of money orders is maintained. Secondly, the relevant information would be more easily obtainable. The place of purchase and the office of destination are reflected in Western Union's ledger books and it would, therefore, be unnecessary to examine the innumerable application forms themselves. Since the ledgers are more readily available, the allocation of the fund would be effected at less expense than would be required by the majority's resolution.

Despite these advantages, the Special Master rejected this alternative. He reasoned that an undetermined number of these transactions must have taken place outside the creditors' State of domicile. Specifically, he cited the cases in which a New Jersey or Connecticut resident might purchase a money order in New York, or cases in which a resident of Virginia or Maryland might make his purchase in the District of Columbia. Report of the Special Master 18. While such cases

certainly exist, they are merely exceptions to a generally reliable rule that money order purchases are likely to have occurred within the State of the purchaser's domicile. That perfection is not achieved is no reason to reject this alternative. The *Texas* v. *New Jersey* Court recognized that absolute fairness was not obtainable and that the most that could be expected was a rule providing a reasonable approximation. *Id.*, at 681 n. 11. Certainly this objection should not be allowed to frustrate the better alternative in favor of one that is less fair and more difficult to administer.

III

The majority opinion intimates, as I think it must, that the ultimate consequence of its decision today is inconsistent (*ante,* at 214) with the result in *Texas* v. *New Jersey.* While the opinion appears to recognize that New York will reap the very "windfall" that *Texas* v. *New Jersey* sought to avoid, its refusal to bend in the face of this consequence goes largely unexplained. Apparently, the basis for its decision is the conviction that the Court's prior precedent was designed to settle the question of escheat of intangible personal property "once and for all." *Id.*, at 678. The majority adheres to the existing rule because of some apprehension that flexibility in this case will deprive the Court of a satisfactory test for the resolution of future cases. The opinion anticipates that departure from *Texas* v. *New Jersey* will leave other cases to be decided on an *ad hoc* basis, depending in each case on the "adequacy of the debtor's records." *Ante,* at 215. Although the factual circumstances of future cases cannot be predicted, it is likely that most of such cases can be resolved within the principles of *Texas* v. *New Jersey.* The factual range is limited. The debtor either will or will not maintain creditors' addresses in the ordinary course of business.

In some categories of transactions, such as those involving money orders and traveler's checks, adequate address records may not be available. In the case of ordinary corporate debts, however, it is more likely that records will be available. Moreover, as the majority points out, any State is free to require corporations doing business in that State to maintain records of their creditors' addresses. *Ante,* at 215.

In short, the threat of frequent and complicated cases in this area seems remote. It provides little justification for the majority's Cinderella-like compulsion to accommodate this ill-fitting precedential "slipper." From a result that seems both inflexible and inequitable, I dissent.

PENNSYLVANIA *v.* NEW YORK ET AL.

No. 40, Orig. Decided June 19, 1972—
Decree entered June 19, 1972

Opinion reported: *Ante,* p. 206.

DECREE

It is now Ordered, Adjudged, and Decreed as follows:

1. Each item of property in question in this case as to which a last known address of the person entitled thereto is shown on the books and records of the defendant, Western Union Telegraph Co., is subject to escheat or custodial taking only by the State of that last known address, as shown on the books and records of defendant, Western Union Telegraph Co., to the extent of that State's power under its own laws, to escheat or take custodially.

2. Each item of property in question in this case as to which there is no address of the person entitled thereto shown on the books and records of defendant Western Union Telegraph Co. is subject to escheat or custodial taking only by New York, the State in which Western Union Telegraph Co. was incorporated, to the extent of New York's power under its own laws to escheat or take custodially, subject to the right of any other State to recover such property from New York upon proof that the last known address of the creditor was within that other State's borders.

3. Each item of property in question in this case as to which the last known address of the person entitled thereto as shown on the books and records of defendant Western Union Telegraph Co. is in a State the laws of which do not provide for the escheat of such property, is subject to escheat or custodial taking only by New York, the State in which Western Union Tele-

graph Co. was incorporated, to the extent of New York's power under its own laws to escheat or to take custodially, subject to the right of the State of the last known address to recover the property from New York if and when the law of the State of the last known address makes provisions for escheat or custodial taking of such property.

MITCHUM, DBA BOOK MART *v.* FOSTER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

No. 70–27. Argued December 13, 1971—Decided June 19, 1972

Title 42 U. S. C. § 1983, which authorizes a suit in equity to redress the deprivation under color of state law "of any rights, privileges, or immunities secured by the Constitution . . . ," is within that exception of the federal anti-injunction statute, 28 U. S. C. § 2283, that provides that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress." And in this § 1983 action, though the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding (cf. *Younger* v. *Harris,* 401 U. S. 37, and companion cases) are not questioned, the District Court is *held* to have erred in holding that the anti-injunction statute absolutely barred its enjoining a pending state court proceeding under any circumstances whatsoever. Pp. 228–243.

315 F. Supp. 1387, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which all members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case. BURGER, C. J., filed a concurring opinion, in which WHITE and BLACKMUN, JJ., joined, *post,* p. 243.

Robert Eugene Smith argued the cause for appellant. With him on the brief was *Paul Shimek, Jr.*

Raymond L. Marky, Assistant Attorney General of Florida, argued the cause for appellees. With him on the brief were *Robert L. Shevin,* Attorney General, and *George R. Georgieff,* Assistant Attorney General.

George F. Kugler, Jr., Attorney General of New Jersey, and *Michael R. Perle* and *John DeCicco,* Deputy Attorneys General, filed a brief for the State of New Jersey as *amicus curiae.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The federal anti-injunction statute provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[1] An Act of Congress, 42 U. S. C. § 1983, expressly authorizes a "suit in equity" to redress "the deprivation," under color of state law, "of any rights, privileges, or immunities secured by the Constitution . . . ."[2] The question before us is whether this "Act of Congress" comes within the "expressly authorized" exception of the anti-injunction statute so as to permit a federal court in a § 1983 suit to grant an injunction to stay a proceeding pending in a state court. This question, which has divided the federal courts,[3] has lurked in the background of many of our recent cases, but we have not until today explicitly decided it.[4]

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[1] 28 U. S. C. § 2283.

[2] The statute provides in full: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[3] Compare *Cooper* v. *Hutchinson,* 184 F. 2d 119 (CA3) (§ 1983 is an "expressly authorized" exception), with *Baines* v. *City of Danville,* 337 F. 2d 579 (CA4) (§ 1983 is not an "expressly authorized" exception).

[4] See *Dombrowski* v. *Pfister,* 380 U. S. 479, 484 n. 2; *Cameron* v. *Johnson,* 390 U. S. 611, 613 n. 3; *Younger* v. *Harris,* 401 U. S. 37, 54. See also *Lynch* v. *Household Finance Corp.,* 405 U. S. 538, 556; *Roudebush* v. *Hartke,* 405 U. S. 15.

In *Younger, supra,* MR. JUSTICE DOUGLAS was the only member of the Court who took a position on the question now before us. He expressed the view that § 1983 is included in the "expressly author-

I

The prosecuting attorney of Bay County, Florida, brought a proceeding in a Florida court to close down the appellant's bookstore as a public nuisance under the claimed authority of Florida law. The state court entered a preliminary order prohibiting continued operation of the bookstore. After further inconclusive proceedings in the state courts, the appellant filed a complaint in the United States District Court for the Northern District of Florida, alleging that the actions of the state judicial and law enforcement officials were depriving him of rights protected by the First and Fourteenth Amendments. Relying upon 42 U. S. C. § 1983,[5] he asked for injunctive and declaratory relief against the state court proceedings, on the ground that Florida laws were being unconstitutionally applied by the state court so as to cause him great and irreparable harm. A single federal district judge issued temporary restraining orders, and a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. After a hearing, the three-judge court dissolved the temporary restraining orders and refused to enjoin the state court proceeding, holding that the "injunctive relief sought here

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ized exception to § 2283 . . . ." 401 U. S., at 62. Cf. *id.*, at 54 (STEWART, J., joined by Harlan, J., concurring); *Perez* v. *Ledesma*, 401 U. S. 82, 120 n. 14 (separate opinion of BRENNAN, J., joined by WHITE and MARSHALL, JJ.).

[5] Federal jurisdiction was based upon 28 U. S. C. § 1343 (3). The statute states in relevant part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress, it is not necessary in the aid of this court's jurisdiction, and it is not sought in order to protect or effectuate any judgment of this court." 315 F. Supp. 1387, 1389. An appeal was brought directly here under 28 U. S. C. § 1253,[6] and we noted probable jurisdiction. 402 U. S. 941.

II

In denying injunctive relief, the District Court relied on this Court's decision in *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281. The *Atlantic Coast Line* case did not deal with the "expressly authorized" exception of the anti-injunction statute,[7] but the Court's opinion in that case does bring into sharp focus the critical importance of the question now before us. For in that case we expressly rejected the view that the anti-injunction statute merely states a flexible doctrine of comity,[8] and made clear that the statute imposes an absolute ban upon the issuance of a federal injunction against a pending

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[6] The statute provides: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

[7] At issue were the other two exceptions of the anti-injunction statute: "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281, 288.

[8] See *First National Bank & Trust Co.* v. *Village of Skokie,* 173 F. 2d 1; *Baines,* 337 F. 2d, at 593. See also Taylor & Willis, The Power of Federal Courts to Enjoin Proceedings in State Courts, 42 Yale L. J. 1169, 1194 (1933).

state court proceeding, in the absence of one of the recognized exceptions:

> "On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondents here have intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. . . . [We] hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. . . ." 398 U. S., at 286–287.

It follows, in the present context, that if 42 U. S. C. § 1983 is not within the "expressly authorized" exception of the anti-injunction statute, then a federal equity court is wholly without power to grant any relief in a § 1983 suit seeking to stay a state court proceeding. In short, if a § 1983 action is not an "expressly authorized" statutory exception, the anti-injunction law absolutely prohibits in such an action all federal equitable intervention in a pending state court proceeding, whether civil or criminal, and regardless of how extraordinary the particular circumstances may be.

Last Term, in *Younger* v. *Harris,* 401 U. S. 37, and its companion cases,[9] the Court dealt at length with the subject of federal judicial intervention in pending

[9] *Samuels* v. *Mackell,* 401 U. S. 66; *Boyle* v. *Landry,* 401 U. S. 77; *Perez* v. *Ledesma,* 401 U. S. 82; *Dyson* v. *Stein,* 401 U. S. 200; *Byrne* v. *Karalexis,* 401 U. S. 216.

state criminal prosecutions. In *Younger* a three-judge federal district court in a § 1983 action had enjoined a criminal prosecution pending in a California court. In asking us to reverse that judgment, the appellant argued that the injunction was in violation of the federal anti-injunction statute. 401 U. S., at 40. But the Court carefully eschewed any reliance on the statute in reversing the judgment, basing its decision instead upon what the Court called "Our Federalism"—upon "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U. S., at 41, 44.

In *Younger,* this Court emphatically reaffirmed "the fundamental policy against federal interference with state criminal prosecutions." 401 U. S., at 46. It made clear that even "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." 401 U. S., at 54. At the same time, however, the Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances—where irreparable injury is "both great and immediate," 401 U. S., at 46, where the state law is " 'flagrantly and patently violative of express constitutional prohibitions,' " 401 U. S., at 53, or where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." 401 U. S., at 54. In the companion case of *Perez* v. *Ledesma,* 401 U. S. 82, the Court said that "[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending

state prosecutions appropriate." 401 U. S., at 85. See also *Dyson* v. *Stein,* 401 U. S. 200, 203.

While the Court in *Younger* and its companion cases expressly disavowed deciding the question now before us—whether § 1983 comes within the "expressly authorized" exception of the anti-injunction statute, 401 U. S., at 54—it is evident that our decisions in those cases cannot be disregarded in deciding this question. In the first place, if § 1983 is not within the statutory exception, then the anti-injunction statute would have absolutely barred the injunction issued in *Younger,* as the appellant in that case argued, and there would have been no occasion whatever for the Court to decide that case upon the "policy" ground of "Our Federalism." Secondly, if § 1983 is not within the "expressly authorized" exception of the anti-injunction statute, then we must overrule *Younger* and its companion cases insofar as they recognized the permissibility of injunctive relief against pending criminal prosecutions in certain limited and exceptional circumstances. For, under the doctrine of *Atlantic Coast Line,* the anti-injunction statute would, in a § 1983 case, then be an "absolute prohibition" against federal equity intervention in a pending state criminal *or* civil proceeding—under any circumstances whatever.

The *Atlantic Coast Line* and *Younger* cases thus serve to delineate both the importance and the finality of the question now before us. And it is in the shadow of those cases that the question must be decided.

III

The anti-injunction statute goes back almost to the beginnings of our history as a Nation. In 1793, Congress enacted a law providing that no "writ of injunction be granted [by any federal court] to stay proceedings

in any court of a state. . . ." Act of March 2, 1793; 1 Stat. 335. The precise origins of the legislation are shrouded in obscurity,[10] but the consistent understand-

[10] "The history of this provision in the Judiciary Act of 1793 is not fully known. We know that on December 31, 1790, Attorney General Edmund Randolph reported to the House of Representatives on desirable changes in the Judiciary Act of 1789. Am. State Papers, Misc., vol. 1, No. 17, pp. 21–36. The most serious question raised by Randolph concerned the arduousness of the circuit duties imposed on the Supreme Court justices. But the Report also suggested a number of amendments dealing with procedural matters. A section of the proposed bill submitted by him provided that 'no injunction in equity shall be granted by a district court to a judgment at law of a State court.' *Id.*, p. 26. Randolph explained that this clause 'will debar the district court from interfering with the judgments at law in the State courts; for if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun. It is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common law side of the question into the State courts, and the equity side into the federal courts.' *Id.*, p. 34. The Report was considered by the House sitting as a Committee of the Whole, and then was referred to successive special committees for further consideration. No action was taken until after Chief Justice Jay and his associates wrote the President that their circuit-riding duties were too burdensome. American State Papers, Misc., vol. 1, No. 32, p. 51. In response to this complaint, which was transmitted to Congress, the Act of March 2, 1793, was passed, containing in § 5, *inter alia*, the prohibition against staying state court proceedings.

"Charles Warren in his article *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347, suggests that this provision was the direct consequence of Randolph's report. This seems doubtful, in view of the very narrow purpose of Randolph's proposal, namely, that federal courts of equity should not interfere with the enforcement of judgments at law rendered in the state courts. See Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1171, n. 14.

"There is no record of any debates over the statute. See 3 Annals of Congress (1791–93). It has been suggested that the provision reflected the then strong feeling against the unwarranted intrusion

ing has been that its basic purpose is to prevent "needless friction between state and federal courts." *Oklahoma Packing Co.* v. *Gas Co.*, 309 U. S. 4, 9. The law remained unchanged until 1874, when it was amended to permit a federal court to stay state court proceedings that interfered with the administration of a federal bankruptcy proceeding.[11] The present wording of the legislation was adopted with the enactment of Title 28 of the United States Code in 1948.

Despite the seemingly uncompromising language of the anti-injunction statute prior to 1948, the Court soon

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of federal courts upon state sovereignty. *Chisholm* v. *Georgia*, 2 Dall. 419, was decided on February 18, 1793, less than two weeks before the provision was enacted into law. The significance of this proximity is doubtful. Compare Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347–348, with *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 291–292. Much more probable is the suggestion that the provision reflected the prevailing prejudices against equity jurisdiction. The *Journal of William Maclay* (1927 ed.), chronicling the proceedings of the Senate while he was one of its members (1789–1791), contains abundant evidence of a widespread hostility to chancery practice. See especially, pp. 92–94, 101–06 (debate on the bill that became Judiciary Act of 1789). Moreover, Senator Ellsworth (soon to become Chief Justice of the United States), the principal draftsman of both the 1789 and 1793 Judiciary Acts, often indicated a dislike for equity jurisdiction. See Brown, *Life of Oliver Ellsworth* (1905 ed.) 194; *Journal of William Maclay* (1927 ed.) 103–04; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 96–100." *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 130–132.

See also Note, 38 U. Chi. L. Rev. 612 (1971); 1A J. Moore, Federal Practice 2302 (1965); H. Hart & H. Wechsler, The Federal Courts and the Federal System 1075–1078 (1953); Durfee & Sloss, Federal Injunction Against Proceedings in State Courts: The Life History of a Statute, 30 Mich. L. Rev. 1145 (1932).

[11] As so amended, the statute provided that state court proceedings could be enjoined "where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. Stat. § 720 (1874).

recognized that exceptions must be made to its blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope. So it was that, in addition to the bankruptcy law exception that Congress explicitly recognized in 1874, the Court through the years found that federal courts were empowered to enjoin state court proceedings, despite the anti-injunction statute, in carrying out the will of Congress under at least six other federal laws. These covered a broad spectrum of congressional action: (1) legislation providing for removal of litigation from state to federal courts,[12] (2) legislation limiting the liability of shipowners,[13] (3) legislation providing for federal interpleader actions,[14] (4) legislation conferring federal jurisdiction over farm mortgages,[15] (5) legisla-

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[12] See *French* v. *Hay*, 22 Wall. 250; *Kline* v. *Burke Construction Co.*, 260 U. S. 226. The federal removal provisions, both civil and criminal, 28 U. S. C. §§ 1441–1450, provide that once a copy of the removal petition is filed with the clerk of the state court, the "State court shall proceed no further unless and until the case is remanded." 28 U. S. C. § 1446 (e).

[13] See *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578. The Act of 1851, 9 Stat. 635, as amended, provides that once a shipowner has deposited with the court an amount equal to the value of his interest in the ship, "all claims and proceedings against the owner with respect to the matter in question shall cease." 46 U. S. C. § 185.

[14] See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66. The Interpleader Act of 1926, 44 Stat. 416, as currently written provides that in "any civil action of interpleader . . . a district court may . . . enter its order restraining [all claimants] . . . from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action." 28 U. S. C. § 2361.

[15] See *Kalb* v. *Feuerstein*, 308 U. S. 433. The Frazier-Lemke Farm-Mortgage Act, as amended in 1935, 49 Stat. 944, provides that in situations to which it is applicable a federal court shall "stay all

tion governing federal habeas corpus proceedings,[16] and (6) legislation providing for control of prices.[17]

In addition to the exceptions to the anti-injunction statute found to be embodied in these various Acts of Congress, the Court recognized other "implied" exceptions to the blanket prohibition of the anti-injunction statute. One was an *"in rem"* exception, allowing a federal court to enjoin a state court proceeding in order to protect its jurisdiction of a *res* over which it had first acquired jurisdiction.[18] Another was a "relitigation" exception, permitting a federal court to enjoin relitigation in a state court of issues already decided in federal litigation.[19] Still a third exception, more recently developed, permits a federal injunction of state

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judicial or official proceedings in any court." 11 U. S. C. § 203 (s) (2) (1940 ed.).

[16] See *Ex parte Royall,* 117 U. S. 241, 248–249. The Federal Habeas Corpus Act provides that a federal court before which a habeas corpus proceeding is pending may "stay any proceeding against the person detained in any State Court . . . for any matter involved in the habeas corpus proceeding." 28 U. S. C. § 2251.

[17] Section 205 (a) of the Emergency Price Control Act of 1942, 56 Stat. 33, provided that the Price Administrator could request a federal district court to enjoin acts that violated or threatened to violate the Act. In *Porter* v. *Dicken,* 328 U. S. 252, we held that this authority was broad enough to justify an injunction to restrain state court proceedings. *Id.,* at 255. The Emergency Price Control Act was thus considered a congressionally authorized exception to the anti-injunction statute. *Ibid.;* see also *Bowles* v. *Willingham,* 321 U. S. 503. Section 205 (a) expired in 1947. Act of July 25, 1946, 60 Stat. 664.

[18] See, *e. g., Toucey* v. *New York Life Ins. Co.,* 314 U. S., at 135–136; *Freeman* v. *Howe,* 24 How. 450; *Kline* v. *Burke Construction Co.,* 260 U. S. 226.

[19] See, *e. g., Toucey, supra,* at 137–141; *Dial* v. *Reynolds,* 96 U. S. 340; *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356. See generally 1A J. Moore, Federal Practice 2302–2311 (1965).

court proceedings when the plaintiff in the federal court is the United States itself, or a federal agency asserting "superior federal interests." [20]

In *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, the Court in 1941 issued an opinion casting considerable doubt upon the approach to the anti-injunction statute reflected in its previous decisions. The Court's opinion expressly disavowed the "relitigation" exception to the statute, and emphasized generally the importance of recognizing the statute's basic directive "of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court." 314 U. S., at 132. The congressional response to *Toucey* was the enactment in 1948 of the anti-injunction statute in its present form in 28 U. S. C. § 2283, which, as the Reviser's Note makes evident, served not only to overrule the specific holding of *Toucey*,[21] but to restore "the basic law as generally understood and interpreted prior to the Toucey decision." [22]

We proceed, then, upon the understanding that in determining whether § 1983 comes within the "expressly authorized" exception of the anti-injunction statute, the

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[20] *Leiter Minerals Inc.* v. *United States*, 352 U. S. 220; *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138.

[21] The Reviser's Note states in part: "The exceptions specifically include the words 'to protect or effectuate its judgments,' for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See Toucey v. New York Life Insurance Co., . . . 314 U. S. 118 . . . .) A vigorous dissenting opinion [314 U. S. 141] notes that at the time of the 1911 revision of the Judicial Code, the power of the courts . . . of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change." H. R. Rep. No. 308, 80th Cong., 1st Sess., A181–182 (1947).

[22] *Ibid.*

criteria to be applied are those reflected in the Court's decisions prior to *Toucey.*[23] A review of those decisions makes reasonably clear what the relevant criteria are. In the first place, it is evident that, in order to qualify under the "expressly authorized" exception of the anti-injunction statute, a federal law need not contain an express reference to that statute. As the Court has said, "no prescribed formula is required; an authorization need not expressly refer to § 2283." *Amalgamated Clothing Workers* v. *Richman Bros. Co.,* 348 U. S. 511, 516. Indeed, none of the previously recognized statutory exceptions contains any such reference.[24] Secondly, a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception. Three of the six previously recognized statutory exceptions contain no such authorization.[25] Thirdly, it is clear that, in order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not

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[23] Cf. *Amalgamated Clothing Workers* v. *Richman Bros. Co.,* 348 U. S. 511, 521 (dissenting opinion).

[24] See nn. 12, 13, 14, 15, 16, and 17, *supra.*

[25] See nn. 12, 13, and 17, *supra.* The federal courts have found that other Acts of Congress that do not refer to § 2283 or to injunctions against state court proceedings nonetheless come within the "expressly authorized" language of the anti-injunction statute. See, *e. g., Walling* v. *Black Diamond Coal Mining Co.,* 59 F. Supp. 348, 351 (WD Ky.) (the Fair Labor Standards Act); *Okin* v. *SEC,* 161 F. 2d 978, 980 (CA2) (the Public Utility Holding Company Act); *Dilworth* v. *Riner,* 343 F. 2d 226, 230 (CA5) (the 1964 Civil Rights Act); *Studebaker Corp.* v. *Gittlin,* 360 F. 2d 692 (CA2) (the Securities and Exchange Act).

to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute.[26] The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding. See *Toucey, supra,* at 132–134; *Kline* v. *Burke Construction Co.,* 260 U. S. 226; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578, 599; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 78; *Kalb* v. *Feuerstein,* 308 U. S. 433; *Bowles* v. *Willingham,* 321 U. S. 503.

With these criteria in view, we turn to consideration of 42 U. S. C. § 1983.

IV

Section 1983 was originally § 1 of the Civil Rights Act of 1871. 17 Stat. 13. It was "modeled" on § 2 of the Civil Rights Act of 1866, 14 Stat. 27,[27] and was enacted for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." 17 Stat. 13. The predecessor of § 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment.[28] As a result of the

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[26] Cf. *Baines* v. *City of Danville,* 337 F. 2d 579 (CA4).

[27] See remarks of Representative Shellabarger, chairman of the House Select Committee which drafted the Civil Rights Act of 1871, Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871), and *Lynch* v. *Household Finance Corp.,* 405 U. S. 538, 545 n. 9.

[28] In addition to proposing the Thirteenth, Fourteenth, and Fifteenth Amendments, Congress, from 1866 to 1875 enacted the following civil rights legislation: Act of April 9, 1866, 14 Stat. 27; Act of May 31, 1870, 16 Stat. 140; Act of April 20, 1871, 17 Stat. 13; and Act of March 1, 1875, 18 Stat. 335. In 1875, Congress also

new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. *Monroe* v. *Pape,* 365 U. S. 167; *McNeese* v. *Board of Education,* 373 U. S. 668; *Shelley* v. *Kraemer,* 334 U. S. 1; *Zwickler* v. *Koota,* 389 U. S. 241, 245–249; H. Flack, The Adoption of the Fourteenth Amendment (1908); J. tenBroek, The Anti-Slavery Origins of the Fourteenth Amendment (1951).[29] Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.[30]

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passed the general federal-question provision, giving federal courts the power to hear suits arising under Art. III, § 2, of the Constitution. Act of March 3, 1875, 18 Stat. 470. This is the predecessor of 28 U. S. C. § 1331.

[29] See generally Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323 (1952); Note, 75 Yale L. J. 1007 (1966); F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928). As one commentator has put it: "That statutory plan [of the Fourteenth Amendment and Acts of Congress to enforce it] did supply the means of vindicating those rights [of person and property] through the instrumentalities of the federal government. . . . It did constitute the federal government the protector of the civil rights . . . ." TenBroek, at 185. See also *United States* v. *Price,* 383 U. S. 787, 801 n. 9; K. Stampp, The Era of Reconstruction (1965).

[30] As Representative Shellabarger stated, the Civil Rights Act of 1871 "not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871). And as Representative Hoar stated: "The principal danger that menaces us to-day is from the effort within the States to deprive considerable numbers of persons of the civil

It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against State action, . . . whether that action be executive, legislative, or *judicial*." *Ex parte Virginia*, 100 U. S. 339, 346 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

As Representative Lowe stated, the "records of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights] . . . . What less than this [the Civil Rights Act of 1871] will afford an adequate remedy? The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to protect the rights, privileges and immunities of citizens . . . . The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42d Cong., 1st Sess., 374–376 (1871). This view was echoed by Senator Osborn: "If the State courts had proven themselves competent to suppress the local dis-

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and equal rights which the General Government is endeavoring to secure to them." Cong. Globe, 42d Cong., 1st Sess. 335.

Although, as originally drafted in 1871, § 1983's predecessor protected rights, privileges, or immunities secured by the Constitution, the provision included by the Congress in the Revised Statutes of 1874 was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well. Rev. Stat. § 1979.

orders, or to maintain law and order, we should not have been called upon to legislate . . . . We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves; *i. e.*, the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts." *Id.*, at 653. And Representative Perry concluded: "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices . . . . [A]ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice." *Id.*, at App. 78.[31]

Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights. The debate was not about whether the predecessor of § 1983 extended to actions of state

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[31] Representative Coburn stated: "The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . ." Cong. Globe, 42d Cong., 1st Sess., 460 (1871).

See also *id.*, at App. 85 (Rep. Bingham); 321 (Rep. Stoughton); 333–334 (Rep. Hoar); 389 (Rep. Elliot); 394 (Rep. Rainey); 429 (Rep. Beatty); App. 68–69 (Rep. Shellabarger); App. 78 (Rep. Perry); 345 (Sen. Sherman); 505 (Sen. Pratt); 577 (Sen. Carpenter); 651 (Sen. Sumner); 653 (Sen. Osborn); App. 255 (Sen. Wilson). Cf. *id.*, at 697 (Sen. Edmunds).

courts, but whether this innovation was necessary or desirable.[32]

This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

V

Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." *Ex parte Virginia,* 100 U. S., at 346. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. *Ex parte Young,* 209 U. S. 123; cf. *Truax* v. *Raich,* 239 U. S. 33; *Dombrowski* v. *Pfister,* 380 U. S. 479. For these reasons we conclude that, under the

[32] See, *e. g.,* Cong. Globe, 42d Cong., 1st Sess., 361 (Rep. Swann); 385 (Rep. Lewis); 416 (Rep. Biggs); 429 (Rep. McHenry); App. 179 (Rep. Voorhees); 599–600 (Sen. Saulsbury); App. 216 (Sen. Thurman).

criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law.

In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger* v. *Harris,* 401 U. S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past. *Fenner* v. *Boykin,* 271 U. S. 240; *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89; *Beal* v. *Missouri Pac. R. Co.,* 312 U. S. 45; *Watson* v. *Buck,* 313 U. S. 387; *Williams* v. *Miller,* 317 U. S. 599; *Douglas* v. *City of Jeannette,* 319 U. S. 157; *Stefanelli* v. *Minard,* 342 U. S. 117; *Cameron* v. *Johnson,* 390 U. S. 611. Today we decide only that the District Court in this case was in error in holding that, because of the anti-injunction statute, it was absolutely without power in this § 1983 action to enjoin a proceeding pending in a state court under any circumstances whatsoever.

The judgment is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN join, concurring.

I concur in the opinion of the Court and add a few words to emphasize what the Court is and is not deciding today as I read the opinion. The Court holds

only that 28 U. S. C. § 2283, which is an absolute bar to injunctions against state court proceedings in most suits, does not apply to a suit brought under 42 U. S. C. § 1983 seeking an injunction of state proceedings. But, as the Court's opinion has noted, it does nothing to "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Ante,* at 243. In the context of pending state *criminal* proceedings, we held in *Younger* v. *Harris,* 401 U. S. 37 (1971), that these principles allow a federal court properly to issue an injunction in only a narrow class of circumstances. We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state *civil* proceedings. Therefore, on remand in this case, it seems to me the District Court, before reaching a decision on the merits of appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in *Younger,* prevent the issuance of an injunction against the state "nuisance abatement" proceedings in the circumstances of this case.

Syllabus

McNEIL *v.* DIRECTOR, PATUXENT INSTITUTION

CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 71–5144. Argued April 20, 1972—Decided June 19, 1972

Petitioner, who was given a five-year sentence, was referred under an *ex parte* order to the Patuxent Institution for examination to determine whether he should be committed for an indefinite term as a defective delinquent. In this proceeding for post-conviction relief he challenges his confinement after expiration of that sentence as violative of due process. Respondent contends that petitioner's continued confinement is justified until petitioner cooperates with the examining psychiatrists and thus facilitates an assessment of his condition. The trial court denied relief, holding that a person confined under Maryland's Defective Delinquency Law may be detained until the statutory procedures for examination and report have been completed, regardless of whether or not the criminal sentence has expired. *Held:* In the circumstances of this case, it is a denial of due process to continue to hold petitioner on the basis of an *ex parte* order committing him to observation without the procedural safeguards commensurate with a long-term commitment, *Jackson* v. *Indiana,* 406 U. S. 715; and without affording him those safeguards his further detention cannot be justified as analogous to confinement for civil contempt or for any other reason. Pp. 247–252.

Reversed.

MARSHALL, J., delivered the opinion for a unanimous Court. DOUGLAS, J., filed a concurring opinion, *post,* p. 252.

E. Barrett Prettyman, Jr., by appointment of the Court, 404 U. S. 1057, argued the cause for petitioner. With him on the briefs were *Peter F. Rousselot* and *Richard B. Ruge.*

Henry R. Lord, Deputy Attorney General of Maryland, argued the cause for respondent. With him on the brief were *Francis B. Burch,* Attorney General, and *Edward F. Borgerding, Donald R. Stutman, Josef Rosen-*

blatt, and *Harry A. E. Taylor,* Assistant Attorneys General.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Edward McNeil was convicted of two assaults in 1966, and sentenced to five years' imprisonment. Instead of committing him to prison, the sentencing court referred him to the Patuxent Institution for examination, to determine whether he should be committed to that institution for an indeterminate term under Maryland's Defective Delinquency Law. Md. Ann. Code, Art. 31B (1971). No such determination has yet been made, his sentence has expired, and his confinement continues. The State contends that he has refused to cooperate with the examining psychiatrists, that they have been unable to make any valid assessment of his condition, and that consequently he may be confined indefinitely until he cooperates and the institution has succeeded in making its evaluation. He claims that when his sentence expired, the State lost its power to hold him, and that his continued detention violates his rights under the Fourteenth Amendment. We agree.

I

The Maryland Defective Delinquency Law provides that a person convicted of any felony, or certain misdemeanors, may be committed to the Patuxent Institution for an indeterminate period, if it is judicially determined that he is a "defective delinquent." A defective delinquent is defined as

> "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly

> demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." Md. Ann. Code, Art. 31B, § 5.

Defective-delinquency proceedings are ordinarily instituted immediately after conviction and sentencing; they may also be instituted after the defendant has served part of his prison term. §§ 6 (b), 6 (c).[1] In either event, the process begins with a court order committing the prisoner to Patuxent for a psychiatric examination. §§ 6 (b), 6 (d). The institution is required to submit its report to the court within a fixed period of time. § 7 (a).[2] If the report recommends commitment, then a hearing must be promptly held, with a jury trial if requested by the prisoner, to determine whether he should be committed as a defective delinquent. § 8. If he is so committed, then the commitment operates to suspend the prison sentence previously imposed. § 9 (b).

In *Murel* v. *Baltimore City Criminal Court*, *post*, p. 355, several prisoners who had been committed

[1] But not after he has served all of it. The statute has always provided that no examination may be ordered or held if the person has been released from custody; since 1971 it has also prohibited the examination if the person is within six months of the expiration of sentence, § 6 (c), as amended in 1971. The State asserts that about 98% of the referrals to Patuxent are made immediately after conviction. Tr. of Oral Arg. 27; see Respondent's Brief 82 n. 33.

[2] The statute originally required the report to be submitted within six months, or before expiration of sentence, whichever later occurs. Since 1971, it has required a report within six months, or three months before expiration of sentence, whichever *first* occurs. § 7 (a), as amended in 1971. The state courts have construed the statute to permit extension of the allowable time, however, in the case of a noncooperative defendant who resists examination. *State* v. *Musgrove*, 241 Md. 521, 217 A. 2d 247 (1966); *Mullen* v. *Director*, 6 Md. App. 120, 250 A. 2d 281 (1969).

as defective delinquents sought to challenge various aspects of the criteria and procedures that resulted in their commitment; we granted certiorari in that case together with this one, in order to consider together these challenges to the Maryland statutory scheme. For various reasons we decline today to reach those questions, see *Murel, supra.* But Edward McNeil presents a much more stark and simple claim. He has never been committed as a defective delinquent, and thus he has no cause to challenge the criteria and procedures that control a defective-delinquency hearing. His confinement rests wholly on the order committing him for examination, in preparation for such a commitment hearing. That order was made, not on the basis of an adversary hearing, but on the basis of an *ex parte* judicial determination that there was "reasonable cause to believe that the Defendant may be a Defective Delinquent." [3] Petitioner does not challenge in this Court the power of the sentencing court to issue such an order in the first instance, but he contends that the State's power to hold him on the basis of that order has expired. He filed a petition for state post-conviction relief on this ground, *inter alia,* pursuant to Md. Ann. Code, Art. 27, § 645A. The trial court denied relief, holding that "[a] person referred to Patuxent under Section 6, Article 31B for the purpose of determining whether or not he is a defective delinquent may be detained in Patuxent until the procedures for such determination have been completed regardless of whether or not the criminal sentence

[3] Brief for Petitioner 6 n. 5; see Art. 31B, § 6 (b): request for examination is made to court "on any knowledge or suspicion of the presence of defective delinquency in such person." It appears that in this case the trial court issued the order *sua sponte;* prior to sentencing, the court had ordered a psychiatric evaluation by its own medical officer, who in turn recommended referral to Patuxent for further evaluation and treatment.

has expired." App. 35–36. The Court of Appeals of Maryland denied leave to appeal. App. 37–38. We granted certiorari, 404 U. S. 999 (1971).

II

The State of Maryland asserts the power to confine petitioner indefinitely, without ever obtaining a judicial determination that such confinement is warranted. Respondent advances several distinct arguments in support of that claim.

A. First, respondent contends that petitioner has been committed merely for observation, and that a commitment for observation need not be surrounded by the procedural safeguards (such as an adversary hearing) that are appropriate for a final determination of defective delinquency. Were the commitment for observation limited in duration to a brief period, the argument might have some force. But petitioner has been committed "for observation" for six years, and on respondent's theory of his confinement there is no reason to believe it likely that he will ever be released. A confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation.

We recently rejected a similar argument in *Jackson* v. *Indiana,* 406 U. S. 715 (1972), when the State sought to confine indefinitely a defendant who was mentally incompetent to stand trial on his criminal charges. The State sought to characterize the commitment as temporary, and on that basis to justify reduced substantive and procedural safeguards. We held that because the commitment was permanent in its practical effect, it required safeguards commensurate with a long-term commitment. *Id.,* at 723–730. The other half of the *Jackson* argument is equally relevant here. If the commitment is properly regarded as a short-term confinement with a limited purpose, as the respondent suggests, then lesser safeguards

may be appropriate, but by the same token, the duration of the confinement must be strictly limited. "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.*, at 738. Just as that principle limits the permissible length of a commitment on account of incompetence to stand trial, so it also limits the permissible length of a commitment "for observation." We need not set a precise time limit here; it is noteworthy, however, that the Maryland statute itself limits the observation period to a maximum of six months. While the state courts have apparently construed the statute to permit extensions of time, see n. 2, *supra,* nevertheless the initial legislative judgment provides a useful benchmark. In this case it is sufficient to note that the petitioner has been confined for six years, and there is no basis for anticipating that he will ever be easier to examine than he is today. In these circumstances, it is a denial of due process to continue to hold him on the basis of an *ex parte* order committing him for observation.

B. A second argument advanced by the respondent relies on the claim that petitioner himself prevented the State from holding a hearing on his condition. Respondent contends that, by refusing to talk to the psychiatrists, petitioner has prevented them from evaluating him, and has made it impossible for the State to go forward with evidence at a hearing. Thus, it is argued, his continued confinement is analogous to civil contempt; he can terminate the confinement and bring about a hearing at any time by talking to the examining psychiatrists, and the State has the power to induce his cooperation by confining him.

Petitioner claims that he has a right under the Fifth Amendment to withhold cooperation, a claim we need not consider here. But putting that claim to one side, there

is nevertheless a fatal flaw in the respondent's argument. For if confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt. At such a hearing it could be ascertained whether petitioner's conduct is willful, or whether it is a manifestation of mental illness, for which he cannot fairly be held responsible. *Robinson* v. *California,* 370 U. S. 660 (1962). Civil contempt is coercive in nature, and consequently there is no justification for confining on a civil contempt theory a person who lacks the present ability to comply. *Maggio* v. *Zeitz,* 333 U. S. 56 (1948). Moreover, a hearing would provide the appropriate forum for resolution of petitioner's Fifth Amendment claim. Finally, if the petitioner's confinement were explicitly premised on a finding of contempt, then it would be appropriate to consider what limitations the Due Process Clause places on the contempt power. The precise contours of that power need not be traced here. It is enough to note that petitioner has been confined, potentially for life, although he has never been determined to be in contempt by a procedure that comports with due process. The contempt analogy cannot justify the State's failure to provide a hearing of any kind.

C. Finally, respondent suggests that petitioner is probably a defective delinquent, because most noncooperators are. Hence, it is argued, his confinement rests not only on the purposes of observation, and of penalizing contempt, but also on the underlying purposes of the Defective Delinquency Law. But that argument proves too much. For if the Patuxent staff members were prepared to conclude, on the basis of petitioner's silence and their observations of him over the years, that petitioner is a defective delinquent, then it is not true that he has prevented them from evaluating him. On that theory,

they have long been ready to make their report to the court, and the hearing on defective delinquency could have gone forward.

III

Petitioner is presently confined in Patuxent without any lawful authority to support that confinement. His sentence having expired, he is no longer within the class of persons eligible for commitment to the Institution as a defective delinquent. Accordingly, he is entitled to be released. The judgment below is reversed, and the mandate shall issue forthwith.

Reversed.

MR. JUSTICE DOUGLAS, concurring.

This is an action in the Maryland courts for post-conviction relief which was denied, with no court making a report of its decision. The case is here on a petition for writ of certiorari, which we granted. 404 U. S. 999. I concur in reversing the judgment below.

McNeil was tried and convicted in a Maryland court for assault on a public officer and for assault with intent to rape. He took the stand and denied he had committed the offenses. He had had no prior criminal record. The sentencing judge asked for a psychiatric evaluation of the accused, though neither side at the trial had raised or suggested any psychiatric issues. A medical officer examined him and recommended that he be considered for evaluation and treatment at Patuxent Institution, a state psychiatric agency.

The court sentenced McNeil to "not more than five years" to prison in Hagerstown [1] and, without modifying

[1] Under Maryland law that sentence was subject to statutory reductions for good behavior, industrial or agricultural work, and satisfactory progress in education and vocational courses. Md. Ann. Code, Art. 27, § 700 (1971).

McNeil would have been eligible for parole after one-fourth of the term or a little over one year.

or suspending that sentence, ordered him referred to Patuxent. Under Maryland law a defendant convicted of any felony or certain misdemeanors may be referred to Patuxent for determination whether he is a "defective delinquent." Md. Ann. Code, Art. 31B (1971). A "defective delinquent" is defined in Art. 31B, § 5, as "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."

Under Art. 31B, the staff—which includes a psychiatrist, a psychologist, and a physician—shall examine the person and "state their findings" as to defective delinquency in a written report to the court. Art. 31B, § 7 (a). And it is provided that once transferred to Patuxent, the person in question shall remain there "until such time as the procedures . . . for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired." [2] Art. 31B, § 6 (e) (Supp. 1971).

The examination normally entails psychiatric interviews and evaluation, psychological tests, sociological and

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[2] At the time of McNeil's referral, the Act required that the report be filed no later than six months from the date he was transferred to Patuxent or before expiration of his sentence, whichever last occurred. Md. Ann. Code, Art. 31B, § 7 (a) (1957 ed., Supp. 1966). An amendment effective July 1, 1971, required that the report be filed no later than six months from the date he was transferred to Patuxent or three months before expiration of his sentence, whichever occurs first. Art. 31B, § 7 (a) (Supp. 1971).

social work studies, and review of past history and records, including police, juvenile, penal, and hospital records. Personal interviews include a series of questions to elicit and to determine the past criminal record, and antisocial and criminal behavior of the individual.

If the report shows that he should not be classified as a defective delinquent, he is retained in custody under his original sentence with full credit given for the time confined at Patuxent. Art. 31B, § 7 (a) (Supp. 1971). If the report says that he should be classified as a defective delinquent, a hearing is held, at which the defendant is entitled to counsel and a trial by jury. Art. 31B, § 8.

McNeil, though confined at Patuxent beyond the term of five years for which he was sentenced, has never had such a hearing, for he has never been declared a "defective delinquent." [3] He has not been so declared and on the other hand has not been cleared, because he has refused on at least 15 separate occasions to submit to the psychiatric tests and questions. Nor has he received in the interim any rehabilitative treatment or training. The State, indeed, intends to keep him there indefinitely, as long as he refuses to submit to psychiatric or psychological examinations.[4]

McNeil's refusal to submit to that questioning is not quixotic; it is based on his Fifth Amendment right to be

[3] Detention beyond the expiration of court-imposed sentences occurs in Communist China where "public security organs [have] the authority to impose as well as administer punishment" and "the discretionary power to extend the duration of imprisonment beyond the original sentences." Shao-chuan Leng, Justice in Communist China 34 (1967).

[4] In the District Court proceedings in *Murel* v. *Baltimore City Criminal Court*, *post*, p. 355, Dr. Boslow, the Director of Patuxent, testified:

"[The Court] . . . Take the case of a person who is referred for diagnosis and he fails, let us say, 100 per cent, to cooperate;

silent. McNeil remains confined without any hearing whatsoever as to whether he has a propensity toward criminal activity and without any hope of having a hearing unless he surrenders his right against self-incrimination.[5]

The Fifth Amendment prohibition against compulsory self-incrimination is applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan,* 378 U. S. 1. The protection extends to refusal to answer questions

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he won't talk to anybody, he won't undergo any tests, he won't participate, though I don't think he gets group therapy.

"[Dr. Boslow] No, sir.

"[The Court] But he will do absolutely nothing and will take no advantage of whatever opportunity if any there may be.

"He, therefore, assuming that the law is valid, and assuming that the administration in that respect is supportable, could he remain there indefinitely unclassified? Is that correct?

"[Dr. Boslow] Under the present state of things, yes."

[5] As stated in a provocative and searching study in Virginia:

"Certainly, a prisoner is not entitled to all the constitutional rights enjoyed by free citizens, but the burden of showing what restrictions are necessary for the preservation of prison order should fall upon prison officials. Widespread, sweeping denials of freedom should not be tolerated. Ideally, the legislative and executive branches of government should decide the extent to which liberty must be denied. No organ of government is better suited than the legislature to consider the penological developments of the last few decades in order to determine the extent to which restrictive practices are warranted. But after legislative command or in its absence, the courts must decide whether the balance of competing interests effected by legislative compromise or executive fiat comports with specific constitutional guarantees and traditional notions of due process. In this context the 'hands-off doctrine' has no place. The judiciary functions as more than a final arbiter; it has a responsibility for educating the public and, where it fails to act, it functions to legitimize the status quo. The simple failure of the courts to review prison conditions blunts the success of important constitutional inquiries, impedes the flow of information and encourages abuse." Hirschkop & Millemann, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 835–837 (1969).

where the person "has reasonable cause to apprehend danger from a direct answer." *Hoffman* v. *United States,* 341 U. S. 479, 486; see *Spevack* v. *Klein,* 385 U. S. 511. The questioning of McNeil is in a setting and has a goal pregnant with both potential and immediate danger. To be labeled a "defective delinquent," McNeil must have demonstrated a "persistent aggravated antisocial or criminal behavior" and "a propensity toward criminal activity." Art. 31B, § 5.

McNeil was repeatedly interrogated not only about the crime for which he was convicted but for many other alleged antisocial incidents going back to his sophomore year in high school. One staff member after interviewing McNeil reported: "He adamantly and vehemently denies, despite the police reports, that he was involved in the offense"; "Further questioning revealed that he had stolen some shoes but he insisted that he did not know that they were stolen . . ."; "but in the tenth grade he was caught taking some milk and cookies from the cafeteria"; "He consistently denies his guilt in all these offenses"; "He insisted that he was not present at the purse snatching"; "He was adamant in insisting on this version of the offense despite the police report which was in the brief and which I had available and discussed with him"; "He continued his denial into a consideration of a juvenile offense . . ."; "He denies the use of all drugs and narcotics"; ". . . I explained to him that it might be of some help to him if we could understand why he did such a thing but this was to no avail." Brief for Petitioner 36 n. 43.

Some of the questioning of McNeil was at a time when his conviction was on direct appeal or when he was seeking post-conviction relief. Concessions or confessions obtained might be useful to the State on a retrial or might vitiate post-conviction relief. Moreover, the privilege extends to every "link in a chain of evidence

sufficient to connect" the person with a crime. *Malloy* v. *Hogan,* 378 U. S., at 13. Whether or not a grant of immunity would give the needed protection in this context is irrelevant, because we are advised that there is no such immunity under state laws.

Finally, the refusal to answer results in severe sanctions, contrary to the constitutional guarantee.

First. the staff refuses to diagnose him, no matter how much information they may have, unless he talks. The result is that he never receives a hearing and remains at Patuxent indefinitely.

Second, if there is no report on him, he remains on the receiving tier indefinitely and receives no treatment.

Third, if he talks and a report is made and he is committed as a "defective delinquent," he is no longer confined for any portion of the original sentence. Art. 31B, § 9 (b). If he does not talk, McNeil's sentence continues to run until it expires and yet he is kept at Patuxent indefinitely. We are indeed advised by the record in the *Murel* case that 20% of Patuxent inmates at that time were serving beyond their expired sentences and of those paroled between 1955 and 1965, 46% had served beyond their expired sentences.

Whatever the Patuxent procedures may be called—whether civil or criminal—the result under the Self-Incrimination Clause of the Fifth Amendment is the same. As we said in *In re Gault,* 387 U. S. 1, 49–50, there is the threat of self-incrimination whenever there is "a deprivation of liberty;" and there is such a deprivation whatever the name of the institution, if a person is held against his will.

It is elementary that there is a denial of due process when a person is committed or, as here, held without a hearing and opportunity to be heard. *Specht* v. *Patterson,* 386 U. S. 605; *Humphrey* v. *Cady,* 405 U. S. 504.

McNeil must be discharged forthwith.

FLOOD *v.* KUHN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71–32. Argued March 20, 1972—Decided June 19, 1972

Petitioner, a professional baseball player "traded" to another club without his previous knowledge or consent, brought this antitrust suit after being refused the right to make his own contract with another major league team, which is not permitted under the reserve system. The District Court rendered judgment in favor of respondents, and the Court of Appeals affirmed. *Held:* The long-standing exemption of professional baseball from the antitrust laws, *Federal Baseball Club* v. *National League,* 259 U. S. 200 (1922); *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356 (1953), is an established aberration, in the light of the Court's holding that other interstate professional sports are not similarly exempt, but one in which Congress has acquiesced, and that is entitled to the benefit of *stare decisis.* Removal of the resultant inconsistency at this late date is a matter for legislative, not judicial, resolution. Pp. 269–285.

443 F. 2d 264, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which STEWART and REHNQUIST, JJ., joined, and in all but Part I of which BURGER, C. J., and WHITE, J., joined. BURGER, C. J., filed a concurring opinion, *post,* p. 285. DOUGLAS, J., *post,* p. 286, and MARSHALL, J., *post,* p. 288, filed dissenting opinions, in which BRENNAN, J., joined. POWELL, J., took no part in the consideration or decision of the case.

Arthur J. Goldberg argued the cause for petitioner. With him on the briefs was *Jay H. Topkis.*

Paul A. Porter argued the cause for respondent Kuhn. *Louis F. Hoynes, Jr.,* argued the cause for respondents Feeney, President of National League of Professional Baseball Clubs, et al. With them on the brief were *Mark F. Hughes, Alexander H. Hadden, James P. Garner, Warren Daane,* and *Jerome I. Chapman.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.[1]

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[1] The reserve system, publicly introduced into baseball contracts in 1887, see *Metropolitan Exhibition Co.* v. *Ewing*, 42 F. 198, 202–204 (CC SDNY 1890), centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum. Thus

A. Rule 3 of the Major League Rules provides in part:

"(a) UNIFORM CONTRACT. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major League Executive Council. No club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, except with the written approval of the Commissioner. . . .

. . . . . .

"(g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract or acceptance of terms, unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement."

B. Rule 9 of the Major League Rules provides in part:

"(a) NOTICE. A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment, is by his contract bound to serve the assignee.

. . . . . .

"After the date of such assignment all rights and obligations of the

Collateral issues of state law and of federal labor policy are also advanced.

I

The Game

It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's

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assignor clubs thereunder shall become the rights and obligations of the assignee club . . . ."

C. Rules 3 and 9 of the Professional Baseball Rules contain provisions parallel to those just quoted.

D. The Uniform Player's Contract provides in part:

"4. (a) . . . The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contract."

"5. (a). The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post-season games under the conditions prescribed in the Major League Rules. . . ."

"6. (a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules."

"10. (a) On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the club shall fix in said notice; provided, however, that said amount, if fixed by

Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but the contest marked a significant date in baseball's beginnings. That early game led ultimately to the development of professional baseball and its tightly organized structure.

The Cincinnati Red Stockings came into existence in 1869 upon an outpouring of local pride. With only one Cincinnatian on the payroll, this professional team traveled over 11,000 miles that summer, winning 56 games and tying one. Shortly thereafter, on St. Patrick's Day in 1871, the National Association of Professional Baseball Players was founded and the professional league was born.

The ensuing colorful days are well known. The ardent follower and the student of baseball know of General Abner Doubleday; the formation of the National League in 1876; Chicago's supremacy in the first year's competition under the leadership of Al Spalding and with Cap Anson at third base; the formation of the American Association and then of the Union Association in the 1880's; the introduction of Sunday baseball; interleague warfare with cut-rate admission prices and player raiding; the development of the reserve "clause"; the emergence in 1885 of the Brotherhood of Professional Ball Players, and in 1890 of the Players League; the appearance of the American League, or "junior circuit," in 1901, rising from the minor Western Association; the first World

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a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year.

"(b) The Club's right to renew this contract, as provided in subparagraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof."

Series in 1903, disruption in 1904, and the Series' resumption in 1905; the short-lived Federal League on the majors' scene during World War I years; the troublesome and discouraging episode of the 1919 Series; the home run ball; the shifting of franchises; the expansion of the leagues; the installation in 1965 of the major league draft of potential new players; and the formation of the Major League Baseball Players Association in 1966.[2]

Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson, Henry Chadwick, Eddie Collins, Lou Gehrig, Grover Cleveland Alexander, Rogers Hornsby, Harry Hooper, Goose Goslin, Jackie Robinson, Honus Wagner, Joe McCarthy, John McGraw, Deacon Phillippe, Rube Marquard, Christy Mathewson, Tommy Leach, Big Ed Delahanty, Davy Jones, Germany Schaefer, King Kelly, Big Dan Brouthers, Wahoo Sam Crawford, Wee Willie Keeler, Big Ed Walsh, Jimmy Austin, Fred Snodgrass, Satchel Paige, Hugh Jennings, Fred Merkle, Iron Man McGinnity, Three-Finger Brown, Harry and Stan Coveleski, Connie Mack, Al Bridwell, Red Ruffing, Amos Rusie, Cy Young, Smokey Joe Wood, Chief Meyers, Chief Bender, Bill Klem, Hans Lobert, Johnny Evers, Joe Tinker, Roy Campanella, Miller Huggins, Rube Bressler, Dazzy Vance, Edd Roush, Bill Wambsganss, Clark Griffith, Branch Rickey, Frank Chance, Cap Anson,

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[2] See generally The Baseball Encyclopedia (1969); L. Ritter, The Glory of Their Times (1966); 1 & 2 H. Seymour, Baseball (1960, 1971); 1 & 2 D. Voigt, American Baseball (1966, 1970).

Nap Lajoie, Sad Sam Jones, Bob O'Farrell, Lefty O'Doul, Bobby Veach, Willie Kamm, Heinie Groh, Lloyd and Paul Waner, Stuffy McInnis, Charles Comiskey, Roger Bresnahan, Bill Dickey, Zack Wheat, George Sisler, Charlie Gehringer, Eppa Rixey, Harry Heilmann, Fred Clarke, Dizzy Dean, Hank Greenberg, Pie Traynor, Rube Waddell, Bill Terry, Carl Hubbell, Old Hoss Radbourne, Moe Berg, Rabbit Maranville, Jimmie Foxx, Lefty Grove.[3] The list seems endless.

And one recalls the appropriate reference to the "World Serious," attributed to Ring Lardner, Sr.; Ernest L. Thayer's "Casey at the Bat";[4] the ring of "Tinker to

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[3] These are names only from earlier years. By mentioning some, one risks unintended omission of others equally celebrated.

[4] Millions have known and enjoyed baseball. One writer knowledgeable in the field of sports almost assumed that everyone did until, one day, he discovered otherwise:

"I knew a cove who'd never heard of Washington and Lee,
Of Caesar and Napoleon from the ancient jamboree,
But, bli'me, there are queerer things than anything like that,
For here's a cove who never heard of 'Casey at the Bat'!

. . . . .

"Ten million never heard of Keats, or Shelley, Burns or Poe;
But they know 'the air was shattered by the force of Casey's blow';
They never heard of Shakespeare, nor of Dickens, like as not,
But they know the somber drama from old Mudville's haunted lot.

"He never heard of Casey! Am I dreaming? Is it true?
Is fame but windblown ashes when the summer day is through?
Does greatness fade so quickly and is grandeur doomed to die
That bloomed in early morning, ere the dusk rides down the sky?"

"He Never Heard of Casey" Grantland Rice, The Sportlight, New York Herald Tribune, June 1, 1926, p. 23.

Evers to Chance"; [5] and all the other happenings, habits, and superstitions about and around baseball that made it the "national pastime" or, depending upon the point of view, "the great American tragedy." [6]

II

The Petitioner

The petitioner, Curtis Charles Flood, born in 1938, began his major league career in 1956 when he signed a contract with the Cincinnati Reds for a salary of $4,000 for the season. He had no attorney or agent to advise him on that occasion. He was traded to the St. Louis Cardinals before the 1958 season. Flood rose to fame as a center fielder with the Cardinals during the years 1958–1969. In those 12 seasons he compiled a batting average of .293. His best offensive season was 1967 when he achieved .335. He was .301 or better in six of the 12 St. Louis years. He participated in the 1964, 1967, and 1968 World Series. He played errorless ball in the field in 1966, and once enjoyed 223 consecutive errorless games. Flood has received seven Golden Glove Awards. He was co-captain of his team from 1965–1969. He ranks among the 10 major league outfielders possessing the highest lifetime fielding averages.

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[5] "These are the saddest of possible words,
'Tinker to Evers to Chance.'
Trio of bear cubs, and fleeter than birds,
'Tinker to Evers to Chance.'
Ruthlessly pricking our gonfalon bubble,
Making a Giant hit into a double—
Words that are weighty with nothing but trouble:
'Tinker to Evers to Chance.' "
Franklin Pierce Adams, Baseball's Sad Lexicon.

[6] George Bernard Shaw, The Sporting News, May 27, 1943, p. 15, col. 4.

Flood's St. Louis compensation for the years shown was:

1961	$13,500 (including a bonus for signing)
1962	$16,000
1963	$17,500
1964	$23,000
1965	$35,000
1966	$45,000
1967	$50,000
1968	$72,500
1969	$90,000

These figures do not include any so-called fringe benefits or World Series shares.

But at the age of 31, in October 1969, Flood was traded to the Philadelphia Phillies of the National League in a multi-player transaction. He was not consulted about the trade. He was informed by telephone and received formal notice only after the deal had been consummated. In December he complained to the Commissioner of Baseball and asked that he be made a free agent and be placed at liberty to strike his own bargain with any other major league team. His request was denied.

Flood then instituted this antitrust suit [7] in January 1970 in federal court for the Southern District of New York. The defendants (although not all were named in each cause of action) were the Commissioner of Baseball, the presidents of the two major leagues, and the 24 major league clubs. In general, the complaint charged violations of the federal antitrust laws and civil rights statutes, violation of state statutes and the common law, and the imposition of a form of peonage and involuntary

[7] Concededly supported by the Major League Baseball Players Association, the players' collective-bargaining representative. Tr. of Oral Arg. 12.

servitude contrary to the Thirteenth Amendment and 42 U. S. C. § 1994, 18 U. S. C. § 1581, and 29 U. S. C. §§ 102 and 103. Petitioner sought declaratory and injunctive relief and treble damages.

Flood declined to play for Philadelphia in 1970, despite a $100,000 salary offer, and he sat out the year. After the season was concluded, Philadelphia sold its rights to Flood to the Washington Senators. Washington and the petitioner were able to come to terms for 1971 at a salary of $110,000.[8] Flood started the season but, apparently because he was dissatisfied with his performance, he left the Washington club on April 27, early in the campaign. He has not played baseball since then.

III

The Present Litigation

Judge Cooper, in a detailed opinion, first denied a preliminary injunction, 309 F. Supp. 793 (SDNY 1970), observing on the way:

> "Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young.
>
> "Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to

[8] The parties agreed that Flood's participating in baseball in 1971 would be without prejudice to his case.

> most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there." 309 F. Supp., at 797.

Flood's application for an early trial was granted. The court next deferred until trial its decision on the defendants' motions to dismiss the primary causes of action, but granted a defense motion for summary judgment on an additional cause of action. 312 F. Supp. 404 (SDNY 1970).

Trial to the court took place in May and June 1970. An extensive record was developed. In an ensuing opinion, 316 F. Supp. 271 (SDNY 1970), Judge Cooper first noted that:

> "Plaintiff's witnesses in the main concede that some form of reserve on players is a necessary element of the organization of baseball as a league sport, but contend that the present all-embracing system is needlessly restrictive and offer various alternatives which in their view might loosen the bonds without sacrifice to the game. . . .
>
> . . . . . .
>
> "Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of plaintiff himself, it shows that even plaintiff's witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious. . . ." 316 F. Supp., at 275–276.

He then held that *Federal Baseball Club* v. *National League,* 259 U. S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356 (1953), were controlling; that it was not necessary to reach the issue whether exemption from the antitrust laws would result because aspects of

baseball now are a subject of collective bargaining; that the plaintiff's state-law claims, those based on common law as well as on statute, were to be denied because baseball was not "a matter which admits of diversity of treatment," 316 F. Supp., at 280; that the involuntary servitude claim failed because of the absence of "the essential element of this cause of action, a showing of compulsory service," 316 F. Supp., at 281–282; and that judgment was to be entered for the defendants. Judge Cooper included a statement of personal conviction to the effect that "negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned" and that "the reserve clause can be fashioned so as to find acceptance by player and club." 316 F. Supp., at 282 and 284.

On appeal, the Second Circuit felt "compelled to affirm." 443 F. 2d 264, 265 (1971). It regarded the issue of state law as one of first impression, but concluded that the Commerce Clause precluded its application. Judge Moore added a concurring opinion in which he predicted, with respect to the suggested overruling of *Federal Baseball* and *Toolson,* that "there is no likelihood that such an event will occur." [9] 443 F. 2d, at 268, 272.

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[9] "And properly so. Baseball's welfare and future should not be for politically insulated interpreters of technical antitrust statutes but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record." 443 F. 2d, at 272.

Cf. Judge Friendly's comments in *Salerno* v. *American League,* 429 F. 2d 1003, 1005 (CA2 1970), cert. denied, *sub nom. Salerno* v. *Kuhn,* 400 U. S. 1001 (1971):

"We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's

We granted certiorari in order to look once again at this troublesome and unusual situation. 404 U. S. 880 (1971).

IV

The Legal Background

A. *Federal Baseball Club* v. *National League,* 259 U. S. 200 (1922), was a suit for treble damages instituted by a member of the Federal League (Baltimore) against the National and American Leagues and others. The plaintiff obtained a verdict in the trial court, but the Court of Appeals reversed. The main brief filed by the plaintiff with this Court discloses that it was strenuously argued, among other things, that the business in which the defendants were engaged was interstate commerce; that the interstate relationship among the several clubs, located as they were in different States, was predominant; that organized baseball represented an investment of colossal wealth; that it was an engagement in moneymaking; that gate receipts were divided by agreement between the home club and the visiting club; and that the business of baseball was to be distinguished from the mere playing of the game as a sport for physical exercise and diversion. See also 259 U. S., at 201–206.

Mr. Justice Holmes, in speaking succinctly for a unanimous Court, said:

> "The business is giving exhibitions of base ball, which are purely state affairs. . . . But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and

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own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.'. . . While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch."

must arrange and pay for their doing so is not enough to change the character of the business. . . . [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

"If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." 259 U. S., at 208–209.[10]

[10] "What really saved baseball, legally at least, for the next half century was the protective canopy spread over it by the United States Supreme Court's decision in the Baltimore Federal League anti-trust suit against Organized Baseball in 1922. In it Justice Holmes, speaking for a unanimous court, ruled that the business of giving baseball exhibitions for profit was not 'trade or commerce in the commonly-accepted use of those words' because 'personal effort, not related to production, is not a subject of commerce'; nor was it interstate, because the movement of ball clubs across state lines was merely 'incidental' to the business. It should be noted that, contrary to what many believe, Holmes did call baseball a business; time and again those who have not troubled to read the text of the decision have claimed incorrectly that the court said baseball was a sport and not a business." 2 H. Seymour, Baseball 420 (1971).

The Court thus chose not to be persuaded by opposing examples proffered by the plaintiff, among them (a) Judge Learned Hand's decision on a demurrer to a Sherman Act complaint with respect to vaudeville entertainers traveling a theater circuit covering several States, *H. B. Marienelli, Ltd.* v. *United Booking Offices,* 227 F. 165 (SDNY 1914); (b) the first Mr. Justice Harlan's opinion in *International Textbook Co.* v. *Pigg,* 217 U. S. 91 (1910), to the effect that correspondence courses pursued through the mail constituted commerce among the States; and (c) Mr. Justice Holmes' own opinion, for another unanimous Court, on demurrer in a Sherman Act case, relating to cattle shipment, the interstate movement of which was interrupted for the finding of purchasers at the stockyards, *Swift & Co.* v. *United States,* 196 U. S. 375 (1905). The only earlier case the parties were able to locate where the question was raised whether organized baseball was within the Sherman Act was *American League Baseball Club* v. *Chase,* 86 Misc. 441, 149 N. Y. S. 6 (1914). That court had answered the question in the negative.

B. *Federal Baseball* was cited a year later, and without disfavor, in another opinion by Mr. Justice Holmes for a unanimous Court. The complaint charged antitrust violations with respect to vaudeville bookings. It was held, however, that the claim was not frivolous and that the bill should not have been dismissed. *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271 (1923).[11]

It has also been cited, not unfavorably, with respect to the practice of law, *United States* v. *South-Eastern*

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[11] On remand of the *Hart* case the trial court dismissed the complaint at the close of the evidence. The Second Circuit affirmed on the ground that the plaintiff's evidence failed to establish that the interstate transportation was more than incidental. 12 F. 2d 341 (1926). This Court denied certiorari, 273 U. S. 703 (1926).

Underwriters Assn., 322 U. S. 533, 573 (1944) (Stone, C. J., dissenting); with respect to out-of-state contractors, *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 196–197 (1954) (Minton, J., dissenting); and upon a general comparison reference, *North American Co.* v. *SEC*, 327 U. S. 686, 694 (1946).

In the years that followed, baseball continued to be subject to intermittent antitrust attack. The courts, however, rejected these challenges on the authority of *Federal Baseball*. In some cases stress was laid, although unsuccessfully, on new factors such as the development of radio and television with their substantial additional revenues to baseball.[12] For the most part, however, the Holmes opinion was generally and necessarily accepted as controlling authority.[13] And in the 1952 Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H. R. Rep. No. 2002, 82d Cong., 2d Sess., 229, it was said, in conclusion:

> "On the other hand the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause. Baseball's history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even com-

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[12] *Toolson* v. *New York Yankees, Inc.*, 101 F. Supp. 93 (SD Cal. 1951), aff'd, 200 F. 2d 198 (CA9 1952); *Kowalski* v. *Chandler*, 202 F. 2d 413 (CA6 1953). See *Salerno* v. *American League*, 429 F. 2d 1003 (CA2 1970), cert. denied, *sub nom. Salerno* v. *Kuhn*, 400 U. S. 1001 (1971). But cf. *Gardella* v. *Chandler*, 172 F. 2d 402 (CA2 1949) (this case, we are advised, was subsequently settled); *Martin* v. *National League Baseball Club*, 174 F. 2d 917 (CA2 1949).

[13] *Corbett* v. *Chandler*, 202 F. 2d 428 (CA6 1953); *Portland Baseball Club, Inc.* v. *Baltimore Baseball Club, Inc.*, 282 F. 2d 680 (CA9 1960); *Niemiec* v. *Seattle Rainier Baseball Club, Inc.*, 67 F. Supp. 705 (WD Wash. 1946). See *State* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N. W. 2d 1, cert. denied, 385 U. S. 990 (1966).

petitive struggle. The evidence adduced at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause."

C. The Court granted certiorari, 345 U. S. 963 (1953), in the *Toolson, Kowalski,* and *Corbett* cases, cited in nn. 12 and 13, *supra,* and, by a short *per curiam* (Warren, C. J., and Black, Frankfurter, DOUGLAS, Jackson, Clark, and Minton, JJ.), affirmed the judgments of the respective courts of appeals in those three cases. *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356 (1953). *Federal Baseball* was cited as holding "that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws," 346 U. S., at 357, and:

> "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Ibid.*

This quotation reveals four reasons for the Court's affirmance of *Toolson* and its companion cases: (a) Congressional awareness for three decades of the Court's ruling in *Federal Baseball,* coupled with congressional

inaction. (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws. (c) A reluctance to overrule *Federal Baseball* with consequent retroactive effect. (d) A professed desire that any needed remedy be provided by legislation rather than by court decree. The emphasis in *Toolson* was on the determination, attributed even to *Federal Baseball,* that Congress had no intention to include baseball within the reach of the federal antitrust laws. Two Justices (Burton and Reed, JJ.) dissented, stressing the factual aspects, revenue sources, and the absence of an express exemption of organized baseball from the Sherman Act. 346 U. S., at 357. The 1952 congressional study was mentioned. *Id.,* at 358, 359, 361.

It is of interest to note that in *Toolson* the petitioner had argued flatly that *Federal Baseball* "is wrong and must be overruled," Brief for Petitioner, No. 18, O. T. 1953, p. 19, and that Thomas Reed Powell, a constitutional scholar of no small stature, urged, as counsel for an *amicus,* that "baseball is a unique enterprise," Brief for Boston American League Base Ball Co. as Amicus Curiae 2, and that "unbridled competition as applied to baseball would not be in the public interest." *Id.,* at 14.

D. *United States* v. *Shubert,* 348 U. S. 222 (1955), was a civil antitrust action against defendants engaged in the production of legitimate theatrical attractions throughout the United States and in operating theaters for the presentation of such attractions. The District Court had dismissed the complaint on the authority of *Federal Baseball* and *Toolson.* 120 F. Supp. 15 (SDNY 1953). This Court reversed. Mr. Chief Justice Warren noted the Court's broad conception of "trade or commerce" in the antitrust statutes and the types of enterprises already held to be within the reach of that phrase.

He stated that *Federal Baseball* and *Toolson* afforded no basis for a conclusion that businesses built around the performance of local exhibitions are exempt from the antitrust laws. 348 U. S., at 227. He then went on to elucidate the holding in *Toolson* by meticulously spelling out the factors mentioned above:

> "In *Federal Baseball,* the Court, speaking through Mr. Justice Holmes, was dealing with the business of baseball and nothing else. . . . The travel, the Court concluded, was 'a mere incident, not the essential thing.' . . .
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> . . . . .
>
> "In *Toolson,* where the issue was the same as in *Federal Baseball,* the Court was confronted with a unique combination of circumstances. For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause.' During this period, in reliance on the *Federal Baseball* precedent, the baseball business had grown and developed. . . . And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation. Against this background, the Court in *Toolson* was asked to overrule *Federal Baseball* on the ground that it was out of step with subsequent decisions reflecting present-day concepts of interstate commerce. The Court, in view of the circumstances of the case, declined to do so. But neither did the Court necessarily reaffirm all that was said in *Federal Baseball.* Instead, '[w]ithout re-examination of the underlying issues,' the Court adhered to *Federal Baseball* 'so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' 346

U. S., at 357. In short, *Toolson* was a narrow application of the rule of *stare decisis.*

". . . If the *Toolson* holding is to be expanded—or contracted—the appropriate remedy lies with Congress." 348 U. S., at 228–230.

E. *United States* v. *International Boxing Club,* 348 U. S. 236 (1955), was a companion to *Shubert* and was decided the same day. This was a civil antitrust action against defendants engaged in the business of promoting professional championship boxing contests. Here again the District Court had dismissed the complaint in reliance upon *Federal Baseball* and *Toolson.* The Chief Justice observed that "if it were not for *Federal Baseball* and *Toolson,* we think that it would be too clear for dispute that the Government's allegations bring the defendants within the scope of the Act." 348 U. S., at 240–241. He pointed out that the defendants relied on the two baseball cases but also would have been content with a more restrictive interpretation of them than the *Shubert* defendants, for the boxing defendants argued that the cases immunized only businesses that involve exhibitions of an athletic nature. The Court accepted neither argument. It again noted, 348 U. S., at 242, that "*Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball.*" It stated:

"The controlling consideration in *Federal Baseball* and *Hart* was, instead, a very practical one—the degree of interstate activity involved in the particular business under review. It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue,

but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court." 348 U. S., at 243.

The Court noted the presence then in Congress of various bills forbidding the application of the antitrust laws to "organized professional sports enterprises"; the holding of extensive hearings on some of these; subcommittee opposition; a postponement recommendation as to baseball; and the fact that "Congress thus left intact the then-existing coverage of the antitrust laws." 348 U. S., at 243–244.

Mr. Justice Frankfurter, joined by Mr. Justice Minton, dissented. "It would baffle the subtlest ingenuity," he said, "to find a single differentiating factor between other sporting exhibitions . . . and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a 'trade or commerce.' " 348 U. S., at 248. He went on:

> "The Court decided as it did in the *Toolson* case as an application of the doctrine of *stare decisis.* That doctrine is not, to be sure, an imprisonment of reason. But neither is it a whimsy. It can hardly be that this Court gave a preferred position to baseball because it is the great American sport. . . . If *stare decisis* be one aspect of law, as it is, to disregard it in identic situations is mere caprice.
>
> "Congress, on the other hand, may yield to sentiment and be capricious, subject only to due process. . . .
>
> "Between them, this case and *Shubert* illustrate that nice but rational distinctions are inevitable in adjudication. I agree with the Court's opinion in *Shubert* for precisely the reason that constrains me to dissent in this case." 348 U. S., at 249–250.

Mr. Justice Minton also separately dissented on the ground that boxing is not trade or commerce. He added the comment that "Congress has not attempted" to control baseball and boxing. 348 U. S., at 251, 253. The two dissenting Justices, thus, did not call for the overruling of *Federal Baseball* and *Toolson;* they merely felt that boxing should be under the same umbrella of freedom as was baseball and, as Mr. Justice Frankfurter said, 348 U. S., at 250, they could not exempt baseball "to the exclusion of every other sport different not one legal jot or tittle from it." [14]

F. The parade marched on. *Radovich* v. *National Football League,* 352 U. S. 445 (1957), was a civil Clayton Act case testing the application of the antitrust laws to professional football. The District Court dismissed. The Ninth Circuit affirmed in part on the basis of *Federal Baseball* and *Toolson.* The court did not hesitate to "confess that the strength of the pull" of the baseball cases and of *International Boxing* "is about equal," but then observed that "[f]ootball is a team sport" and boxing an individual one. 231 F. 2d 620, 622.

This Court reversed with an opinion by Mr. Justice Clark. He said that the Court made its ruling in *Toolson* "because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity." 352 U. S., at 450. He noted that Congress had not acted. He then said:

> "All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that

[14] The case's final chapter is *International Boxing Club* v. *United States,* 358 U. S. 242 (1959).

it should sustain the unequivocal line of authority reaching over many years.

"[S]ince *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i. e.*, the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those cases. . . .

"If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action." 352 U. S., at 450–452 (footnote omitted).

Mr. Justice Frankfurter dissented essentially for the reasons stated in his dissent in *International Boxing,*

352 U. S., at 455. Mr. Justice Harlan, joined by Mr. Justice Brennan, also dissented because he, too, was "unable to distinguish football from baseball." 352 U. S., at 456. Here again the dissenting Justices did not call for the overruling of the baseball decisions. They merely could not distinguish the two sports and, out of respect for *stare decisis*, voted to affirm.

G. Finally, in *Haywood* v. *National Basketball Assn.*, 401 U. S. 1204 (1971), Mr. Justice Douglas, in his capacity as Circuit Justice, reinstated a District Court's injunction *pendente lite* in favor of a professional basketball player and said, "Basketball . . . does not enjoy exemption from the antitrust laws." 401 U. S., at 1205.[15]

H. This series of decisions understandably spawned extensive commentary,[16] some of it mildly critical and

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[15] See also *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049, 1060 (CD Cal. 1971); *Washington Professional Basketball Corp.* v. *National Basketball Assn.*, 147 F. Supp. 154 (SDNY 1956).

[16] Neville, Baseball and the Antitrust Laws, 16 Fordham L. Rev. 208 (1947); Eckler, Baseball—Sport or Commerce?, 17 U. Chi. L. Rev. 56 (1949); Comment, Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws, 62 Yale L. J. 576 (1953); P. Gregory, The Baseball Player, An Economic Study, c. 19 (1956); Note, The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws, 81 Harv. L. Rev. 418 (1967); The Supreme Court, 1953 Term, 68 Harv. L. Rev. 105, 136–138 (1954); The Supreme Court, 1956 Term, 71 Harv. L. Rev. 94, 170–173 (1957); Note, 32 Va. L. Rev. 1164 (1946); Note, 24 Notre Dame Law. 372 (1949); Note, 53 Col. L. Rev. 242 (1953); Note, 22 U. Kan. City L. Rev. 173 (1954); Note, 25 Miss. L. J. 270 (1954); Note, 29 N. Y. U. L. Rev. 213 (1954); Note, 105 U. Pa. L. Rev. 110 (1956); Note, 32 Texas L. Rev. 890 (1954); Note, 35 B. U. L. Rev. 447 (1955); Note, 57 Col. L. Rev. 725 (1957); Note, 23 Geo. Wash. L. Rev. 606 (1955); Note, 1 How. L. J. 281 (1955); Note, 26 Miss. L. J. 271 (1955); Note, 9 Sw. L. J. 369 (1955); Note, 29 Temple L. Q. 103 (1955); Note, 29 Tul. L. Rev. 793 (1955); Note, 62 Dick.

much of it not; nearly all of it looked to Congress for any remedy that might be deemed essential.

I. Legislative proposals have been numerous and persistent. Since *Toolson* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball.[17] A few of these passed one house or the other. Those that did would have expanded, not restricted, the reserve system's exemption to other professional league sports. And the Act of Sept. 30, 1961, Pub. L. 87–331, 75 Stat. 732, and the merger addition thereto effected by the Act of Nov. 8, 1966, Pub. L. 89–800, § 6 (b),

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L. Rev. 96 (1957); Note, 11 Sw. L. J. 516 (1957); Note, 36 N. C. L. Rev. 315 (1958); Note, 35 Fordham L. Rev. 350 (1966); Note, 8 B. C. Ind. & Com. L. Rev. 341 (1967); Note, 13 Wayne L. Rev. 417 (1967); Note, 2 Rutgers-Camden L. J. 302 (1970); Note, 8 San Diego L. Rev. 92 (1970); Note, 12 B. C. Ind. & Com. L. Rev. 737 (1971); Note, 12 Wm. & Mary L. Rev. 859 (1971).

[17] Hearings on H. R. 5307 et al. before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess. (1957); Hearings on H. R. 10378 and S. 4070 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958); Hearings on H. R. 2370 et al. before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess. (1959) (not printed); Hearings on S. 616 and S. 886 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1959); Hearings on S. 3483 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960); Hearings on S. 2391 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (1964); S. Rep. No. 1303, 88th Cong., 2d Sess. (1964); Hearings on S. 950 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965); S. Rep. No. 462, 89th Cong., 1st Sess. (1965). Bills introduced in the 92d Cong., 1st Sess., and bearing on the subject are S. 2599, S. 2616, H. R. 2305, H. R. 11033, and H. R. 10825.

80 Stat. 1515, 15 U. S. C. §§ 1291–1295, were also expansive rather than restrictive as to antitrust exemption.[18]

V

In view of all this, it seems appropriate now to say that:

1. Professional baseball is a business and it is engaged in interstate commerce.

2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

3. Even though others might regard this as "unrealistic, inconsistent, or illogical," see *Radovich,* 352 U. S., at 452, the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson,* but in *Shubert, International Boxing,* and *Radovich,* as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis,* and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

4. Other professional sports operating interstate—foot-

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[18] Title 15 U. S. C. § 1294 reads:

"Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the *applicability* or *nonapplicability* of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply." (Emphasis supplied.)

ball, boxing, basketball, and, presumably, hockey [19] and golf [20]—are not so exempt.

5. The advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson.*

6. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity. Cf. *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U. S. 235, 241–242 (1970).

7. The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball.* It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.

8. The Court noted in *Radovich,* 352 U. S., at 452, that the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century.

This emphasis and this concern are still with us. We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson,* to overturn those cases judicially when Congress, by its positive inaction,

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[19] *Peto* v. *Madison Square Garden Corp.,* 1958 Trade Cases, ¶ 69,106 (SDNY 1958).

[20] *Deesen* v. *Professional Golfers' Assn.,* 358 F. 2d 165 (CA9), cert. denied, 385 U. S. 846 (1966).

has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich* and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in *Toolson* and from the concerns as to retrospectivity therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.

The petitioner's argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because state antitrust regulation would conflict with federal policy and because national "uniformity [is required] in any regulation of baseball and its reserve system." 316 F. Supp., at 280. The Court of Appeals, in affirming, stated, "[A]s the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." 443 F. 2d, at 268. As applied to organized baseball, and in the light of this Court's observations and holdings in *Federal Baseball,* in *Toolson,* in *Shubert,* in *International Boxing,* and in *Radovich,* and despite baseball's allegedly inconsistent position taken in the past with respect to the application of state law,[21]

[21] See Brief for Respondent in *Federal Baseball,* No. 204, O. T. 1921, p. 67, and in *Toolson,* No. 18, O. T. 1953, p. 30. See also *State* v. *Milwaukee Braves, Inc.,* 31 Wis. 2d 699, 144 N. W. 2d 1, cert. denied, 385 U. S. 990 (1966).

these statements adequately dispose of the state law claims.

The conclusion we have reached makes it unnecessary for us to consider the respondents' additional argument that the reserve system is a mandatory subject of collective bargaining and that federal labor policy therefore exempts the reserve system from the operation of federal antitrust laws.[22]

We repeat for this case what was said in *Toolson:*

> "Without re-examination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U. S., at 357.

And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE WHITE joins in the judgment of the Court, and in all but Part I of the Court's opinion.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring.

I concur in all but Part I of the Court's opinion but, like MR. JUSTICE DOUGLAS, I have grave reservations

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[22] See Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1 (1971), suggesting present-day irrelevancy of the antitrust issue.

as to the correctness of *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953); as he notes in his dissent, he joined that holding but has "lived to regret it." The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled. I agree with MR. JUSTICE DOUGLAS that congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

This Court's decision in *Federal Baseball Club* v. *National League*, 259 U. S. 200, made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view [1] of a rather dismal business account over the last 50 years would keep that derelict in midstream.

In 1922 the Court had a narrow, parochial view of commerce. With the demise of the old landmarks of that era, particularly *United States* v. *Knight Co.*, 156 U. S. 1, *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Paul* v. *Virginia*, 8 Wall. 168, the whole concept of commerce has changed.

Under the modern decisions such as *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219; *United States* v. *Darby*, 312 U. S. 100; *Wickard* v. *Filburn*, 317 U. S. 111; *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, the power of Congress was recognized as broad enough to reach all phases of the vast operations of our national industrial system.

[1] While I joined the Court's opinion in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356, I have lived to regret it; and I would now correct what I believe to be its fundamental error.

An industry so dependent on radio and television as is baseball and gleaning vast interstate revenues (see H. R. Rep. No. 2002, 82d Cong., 2d Sess., 4, 5 (1952)) would be hard put today to say with the Court in the *Federal Baseball Club* case that baseball was only a local exhibition, not trade or commerce.

Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. The beneficiaries of the *Federal Baseball Club* decision are not the Babe Ruths, Ty Cobbs, and Lou Gehrigs.

The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. I use the word "victims" in the Sherman Act sense, since a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade.[2] *Gardella* v. *Chandler,* 172 F. 2d 402 (CA2). And see *Haywood* v. *National Basketball Assn.,* 401 U. S. 1204 (DOUGLAS, J., in chambers).

If congressional inaction is our guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation.[3] H. R. Rep. No. 2002, 82d Cong., 2d Sess.

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[2] Had this same group boycott occurred in another industry, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207; *United States* v. *Shubert,* 348 U. S. 222; or even in another sport, *Haywood* v. *National Basketball Assn.,* 401 U. S. 1204 (DOUGLAS, J., in chambers); *Radovich* v. *National Football League,* 352 U. S. 445; *United States* v. *International Boxing Club,* 348 U. S. 236; we would have no difficulty in sustaining petitioner's claim.

[3] The Court's reliance upon congressional inaction disregards the wisdom of *Helvering* v. *Hallock,* 309 U. S. 106, 119–121, where we said:

"Nor does want of specific Congressional repudiations . . . serve as an implied instruction by Congress to us not to reconsider, in the light of new experience . . . those decisions . . . . It would require very persuasive circumstances enveloping Congressional silence to

(1952). The only statutory exemption granted by Congress to professional sports concerns broadcasting rights. 15 U. S. C. §§ 1291–1295. I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly.

There can be no doubt "that were we considering the question of baseball for the first time upon a clean slate" [4] we would hold it to be subject to federal antitrust regulation. *Radovich* v. *National Football League,* 352 U. S. 445, 452. The unbroken silence of Congress should not prevent us from correcting our own mistakes.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Petitioner was a major league baseball player from 1956, when he signed a contract with the Cincinnati Reds, until 1969, when his 12-year career with the St. Louis Cardinals, which had obtained him from the Reds, ended and he was traded to the Philadelphia Phillies. He had no notice that the Cardinals were contemplating a trade, no opportunity to indicate the teams with which he would prefer playing, and no desire to go to Philadelphia. After receiving formal notification of the trade, petitioner wrote to the Commissioner of Baseball protesting that he was not

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debar this Court from re-examining its own doctrines. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

And see *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, 556–561.

[4] This case gives us for the first time a full record showing the reserve clause in actual operation.

"a piece of property to be bought and sold irrespective of my wishes," [1] and urging that he had the right to consider offers from other teams than the Phillies. He requested that the Commissioner inform all of the major league teams that he was available for the 1970 season. His request was denied, and petitioner was informed that he had no choice but to play for Philadelphia or not to play at all.

To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know that it was not servitude that bound petitioner to the club owners; it was the reserve system. The essence of that system is that a player is bound to the club with which he first signs a contract for the rest of his playing days.[2] He cannot escape from the club except by retiring, and he cannot prevent the club from assigning his contract to any other club.

Petitioner brought this action in the United States District Court for the Southern District of New York. He alleged, among other things, that the reserve system was an unreasonable restraint of trade in violation of

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[1] Letter from Curt Flood to Bowie K. Kuhn, Dec. 24, 1969, App. 37.

[2] As MR. JUSTICE BLACKMUN points out, the reserve system is not novel. It has been employed since 1887. See *Metropolitan Exhibition Co.* v. *Ewing*, 42 F. 198, 202–204 (CC SDNY 1890). The club owners assert that it is necessary to preserve effective competition and to retain fan interest. The players do not agree and argue that the reserve system is overly restrictive. Before this lawsuit was instituted, the players refused to agree that the reserve system should be a part of the collective-bargaining contract. Instead, the owners and players agreed that the reserve system would temporarily remain in effect while they jointly investigated possible changes. Their activity along these lines has halted pending the outcome of this suit.

federal antitrust laws.[3] The District Court thought itself bound by prior decisions of this Court and found for the respondents after a full trial. 309 F. Supp. 793 (1970). The United States Court of Appeals for the Second Circuit affirmed. 443 F. 2d 264 (1971). We granted certiorari on October 19, 1971, 404 U. S. 880, in order to take a further look at the precedents relied upon by the lower courts.

This is a difficult case because we are torn between the principle of *stare decisis* and the knowledge that the decisions in *Federal Baseball Club* v. *National League,* 259 U. S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356 (1953), are totally at odds with more recent and better reasoned cases.

In *Federal Baseball Club,* a team in the Federal League brought an antitrust action against the National and American Leagues and others. In his opinion for a unanimous Court, Mr. Justice Holmes wrote that the business being considered was "giving exhibitions of base ball, which are purely state affairs." 259 U. S., at 208. Hence, the Court held that baseball was not within the purview of the antitrust laws. Thirty-one years later, the Court reaffirmed this decision, without reexamining it, in *Toolson,* a one-paragraph *per curiam* opinion. Like this case, *Toolson* involved an attack on the reserve system. The Court said:

> "The business has . . . been left for thirty years to develop, on the understanding that it was not

[3] Petitioner also alleged a violation of state antitrust laws, state civil rights laws, and of the common law, and claimed that he was forced into peonage and involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution. Because I believe that federal antitrust laws govern baseball, I find that state law has been pre-empted in this area. Like the lower courts, I do not believe that there has been a violation of the Thirteenth Amendment.

> subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.*, at 357.

Much more time has passed since *Toolson* and Congress has not acted. We must now decide whether to adhere to the reasoning of *Toolson*—*i. e.*, to refuse to re-examine the underlying basis of *Federal Baseball Club*—or to proceed with a re-examination and let the chips fall where they may.

In his answer to petitioner's complaint, the Commissioner of Baseball "admits that under present concepts of interstate commerce defendants are engaged therein." App. 40. There can be no doubt that the admission is warranted by today's reality. Since baseball is interstate commerce, if we re-examine baseball's antitrust exemption, the Court's decisions in *United States* v. *Shubert,* 348 U. S. 222 (1955), *United States* v. *International Boxing Club,* 348 U. S. 236 (1955), and *Radovich* v. *National Football League,* 352 U. S. 445 (1957), require that we bring baseball within the coverage of the antitrust laws. See also, *Haywood* v. *National Basketball Assn.,* 401 U. S. 1204 (DOUGLAS, J., in chambers).

We have only recently had occasion to comment that:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. . . . Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy

> because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as they are to football players, lawyers, doctors, or members of any other class of workers. Baseball players cannot be denied the benefits of competition merely because club owners view other economic interests as being more important, unless Congress says so.

Has Congress acquiesced in our decisions in *Federal Baseball Club* and *Toolson?* I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the Court was inconsistent, and baseball was isolated and distinguished from all other sports. In *Toolson* the Court refused to act because Congress had been silent. But the Court may have read too much into this legislative inaction.

Americans love baseball as they love all sports. Perhaps we become so enamored of athletics that we assume that they are foremost in the minds of legislators as well as fans. We must not forget, however, that there are only some 600 major league baseball players. Whatever muscle they might have been able to muster by combining forces with other athletes has been greatly impaired by the manner in which this Court has isolated them. It is this Court that has made them impotent, and this Court should correct its error.

We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the

antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here. See, *e. g., Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313 (1971); *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U. S. 235, 241 (1970).[4]

To the extent that there is concern over any reliance interests that club owners may assert, they can be satisfied by making our decision prospective only. Baseball should be covered by the antitrust laws beginning with this case and henceforth, unless Congress decides otherwise.[5]

Accordingly, I would overrule *Federal Baseball Club* and *Toolson* and reverse the decision of the Court of Appeals.[6]

This does not mean that petitioner would necessarily prevail, however. Lurking in the background is a hurdle of recent vintage that petitioner still must overcome.

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[4] In the past this Court has not hesitated to change its view as to what constitutes interstate commerce. Compare *United States* v. *Knight Co.,* 156 U. S. 1 (1895), with *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219 (1948), and *United States* v. *Darby,* 312 U. S. 100 (1941).

"The jurist concerned with 'public confidence in, and acceptance of the judicial system' might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself." Szanton, Stare Decisis; A Dissenting View, 10 Hastings L. J. 394, 397 (1959).

[5] We said recently that "[i]n rare cases, decisions construing federal statutes might be denied full retroactive effect, as for instance where this Court overrules its own construction of a statute . . . ." *United States* v. *Estate of Donnelly,* 397 U. S. 286, 295 (1970). Cf. *Simpson* v. *Union Oil Co. of California,* 377 U. S. 13, 25 (1964).

[6] The lower courts did not reach the question of whether, assuming the antitrust laws apply, they have been violated. This should be considered on remand.

In 1966, the Major League Players Association was formed. It is the collective-bargaining representative for all major league baseball players. Respondents argue that the reserve system is now part and parcel of the collective-bargaining agreement and that because it is a mandatory subject of bargaining, the federal labor statutes are applicable, not the federal antitrust laws.[7] The lower courts did not rule on this argument, having decided the case solely on the basis of the antitrust exemption.

This Court has faced the interrelationship between the antitrust laws and the labor laws before. The decisions make several things clear. First, "benefits to organized labor cannot be utilized as a cat's-paw to pull employer's chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U. S. 460, 464 (1949). See also *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797 (1945). Second, the very nature of a collective-bargaining agreement mandates that the parties be able to "restrain" trade to a greater degree than management could do unilaterally. *United States* v. *Hutcheson,* 312 U. S. 219 (1941); *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965); *Amalgamated Meat Cutters* v. *Jewel Tea,* 381 U. S. 676 (1965); cf., *Teamsters Union* v. *Oliver,* 358 U. S. 283 (1959). Finally, it is clear that some cases can be resolved only by examining the purposes and the competing interests of the labor and antitrust statutes and by striking a balance.

It is apparent that none of the prior cases is precisely in point. They involve union-management agreements that work to the detriment of management's competitors. In this case, petitioner urges that the reserve system works to the detriment of labor.

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[7] Cf. *United States* v. *Hutcheson,* 312 U. S. 219 (1941).

While there was evidence at trial concerning the collective-bargaining relationship of the parties, the issues surrounding that relationship have not been fully explored. As one commentary has suggested, this case "has been litigated with the implications for the institution of collective bargaining only dimly perceived. The labor law issues have been in the corners of the case—the courts below, for example, did not reach them—moving in and out of the shadows like an uninvited guest at a party whom one can't decide either to embrace or expel." [8]

It is true that in *Radovich* v. *National Football League, supra,* the Court rejected a claim that federal labor statutes governed the relationship between a professional athlete and the professional sport. But, an examination of the briefs and record in that case indicates that the issue was not squarely faced. The issue is once again before this Court without being clearly focused. It should, therefore, be the subject of further inquiry in the District Court.

There is a surface appeal to respondents' argument that petitioner's sole remedy lies in filing a claim with the National Labor Relations Board, but this argument is premised on the notion that management and labor have agreed to accept the reserve clause. This notion is contradicted, in part, by the record in this case. Petitioner suggests that the reserve system was thrust upon the players by the owners and that the recently formed players' union has not had time to modify or eradicate it. If this is true, the question arises as to whether there would then be any exemption from the antitrust laws in this case. Petitioner also suggests that there are limits

[8] Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1, 22 (1971).

to the antitrust violations to which labor and management can agree. These limits should also be explored.

In light of these considerations, I would remand this case to the District Court for consideration of whether petitioner can state a claim under the antitrust laws despite the collective-bargaining agreement, and, if so, for a determination of whether there has been an antitrust violation in this case.

Syllabus

UNITED STATES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL. (PLAMONDON ET AL., REAL PARTIES IN INTEREST)

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 70–153. Argued February 24, 1972—Decided June 19, 1972

The United States charged three defendants with conspiring to destroy, and one of them with destroying, Government property. In response to the defendants' pretrial motion for disclosure of electronic surveillance information, the Government filed an affidavit of the Attorney General stating that he had approved the wiretaps for the purpose of "gather[ing] intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." On the basis of the affidavit and surveillance logs (filed in a sealed exhibit), the Government claimed that the surveillances, though warrantless, were lawful as a reasonable exercise of presidential power to protect the national security. The District Court, holding the surveillances violative of the Fourth Amendment, issued an order for disclosure of the overheard conversations, which the Court of Appeals upheld. Title III of the Omnibus Crime Control and Safe Streets Act, which authorizes court-approved electronic surveillance for specified crimes, contains a provision in 18 U. S. C. § 2511 (3) that nothing in that law limits the President's constitutional power to protect against the overthrow of the Government or against "any other clear and present danger to the structure or existence of the Government." The Government relies on § 2511 (3) in support of its contention that "in excepting national security surveillances from the Act's warrant requirement, Congress recognized the President's authority to conduct such surveillances without prior judicial approval." *Held:*

1. Section 2511 (3) is merely a disclaimer of congressional intent to define presidential powers in matters affecting national security, and is not a grant of authority to conduct warrantless national security surveillances. Pp. 301–308.

2. The Fourth Amendment (which shields private speech from unreasonable surveillance) requires prior judicial approval for the type of domestic security surveillance involved in this case. Pp. 314–321; 323–324.

(a) The Government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy and free expression. Pp. 314–315.

(b) The freedoms of the Fourth Amendment cannot properly be guaranteed if domestic security surveillances are conducted solely within the discretion of the Executive Branch without the detached judgment of a neutral magistrate. Pp. 316–318.

(c) Resort to appropriate warrant procedure would not frustrate the legitimate purposes of domestic security searches. Pp. 318–321.

444 F. 2d 651, affirmed.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, STEWART, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post,* p. 324. BURGER, C. J., concurred in the result. WHITE, J., filed an opinion concurring in the judgment, *post,* p. 335. REHNQUIST, J., took no part in the consideration or decision of the case.

Assistant Attorney General Mardian argued the cause for the United States. With him on the briefs were *Solicitor General Griswold* and *Robert L. Keuch.*

William T. Gossett argued the cause for respondents the United States District Court for the Eastern District of Michigan et al. With him on the brief was *Abraham D. Sofaer. Arthur Kinoy* argued the cause for respondents Sinclair et al. With him on the brief were *William J. Bender* and *William Kunstler.*

Briefs of *amici curiae* urging affirmance were filed by *Stephen I. Schlossberg* for the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), and by *Benjamin Dreyfus* for the Black Panther Party et al.

Briefs of *amici curiae* were filed by *Herman Schwartz, Melvin L. Wulf,* and *Erwin B. Ellmann* for the American Civil Liberties Union et al.; by *John Ligtenberg* for the American Federation of Teachers; and by the American Friends Service Committee.

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees,[1] without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.

This case arises from a criminal proceeding in the United States District Court for the Eastern District of Michigan, in which the United States charged three defendants with conspiracy to destroy Government property in violation of 18 U. S. C. § 371. One of the defendants, Plamondon, was charged with the dynamite bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan.

During pretrial proceedings, the defendants moved to compel the United States to disclose certain electronic

[1] See n. 10, *infra.*

surveillance information and to conduct a hearing to determine whether this information "tainted" the evidence on which the indictment was based or which the Government intended to offer at trial. In response, the Government filed an affidavit of the Attorney General, acknowledging that its agents had overheard conversations in which Plamondon had participated. The affidavit also stated that the Attorney General approved the wiretaps "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." [2] The logs of the surveillance

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[2] The Attorney General's affidavit reads as follows:

"JOHN N. MITCHELL being duly sworn deposes and says:

"1. I am the Attorney General of the United States.

"2. This affidavit is submitted in connection with the Government's opposition to the disclosure to the defendant Plamondon of information concerning the overhearing of his conversations which occurred during the course of electronic surveillances which the Government contends were legal.

"3. The defendant Plamondon has participated in conversations which were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government. The records of the Department of Justice reflect the installation of these wiretaps had been expressly approved by the Attorney General.

"4. Submitted with this affidavit is a sealed exhibit containing the records of the intercepted conversations, a description of the premises that were the subjects of surveillances, and copies of the memoranda reflecting the Attorney General's express approval of the installation of the surveillances.

"5. I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court *in camera*. Accordingly, the sealed exhibit referred to herein is being submitted solely for the court's *in camera* inspection and a copy of the sealed exhibit is not being furnished to the defendants. I would request the court, at the conclusion of its

were filed in a sealed exhibit for *in camera* inspection by the District Court.

On the basis of the Attorney General's affidavit and the sealed exhibit, the Government asserted that the surveillance was lawful, though conducted without prior judicial approval, as a reasonable exercise of the President's power (exercised through the Attorney General) to protect the national security. The District Court held that the surveillance violated the Fourth Amendment, and ordered the Government to make full disclosure to Plamondon of his overheard conversations. 321 F. Supp. 1074 (ED Mich. 1971).

The Government then filed in the Court of Appeals for the Sixth Circuit a petition for a writ of mandamus to set aside the District Court order, which was stayed pending final disposition of the case. After concluding that it had jurisdiction,[3] that court held that the surveillance was unlawful and that the District Court had properly required disclosure of the overheard conversations, 444 F. 2d 651 (1971). We granted certiorari, 403 U. S. 930.

I

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U. S. C. §§ 2510–2520, authorizes the use of electronic surveillance for classes of crimes care-

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hearing on this matter, to place the sealed exhibit in a sealed envelope and return it to the Department of Justice where it will be retained under seal so that it may be submitted to any appellate court that may review this matter."

[3] Jurisdiction was challenged before the Court of Appeals on the ground that the District Court's order was interlocutory and not appealable under 28 U. S. C. § 1291. On this issue, the court correctly held that it did have jurisdiction, relying upon the All Writs Act, 28 U. S. C. § 1651, and cases cited in its opinion, 444 F. 2d, at 655–656. No attack was made in this Court as to the appropriateness of the writ of mandamus procedure.

fully specified in 18 U. S. C. § 2516. Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in *Berger* v. *New York*, 388 U. S. 41 (1967), and *Katz* v. *United States*, 389 U. S. 347 (1967).

Together with the elaborate surveillance requirements in Title III, there is the following proviso, 18 U. S. C. § 2511 (3):

> "Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. *Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.* The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing,

> or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." (Emphasis supplied.)

The Government relies on § 2511 (3). It argues that "in excepting national security surveillances from the Act's warrant requirement Congress recognized the President's authority to conduct such surveillances without prior judicial approval." Brief for United States 7, 28. The section thus is viewed as a recognition or affirmance of a constitutional authority in the President to conduct warrantless domestic security surveillance such as that involved in this case.

We think the language of § 2511 (3), as well as the legislative history of the statute, refutes this interpretation. The relevant language is that:

> "Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect . . ."

against the dangers specified. At most, this is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this, as the section refers—among other things—to protection "against actual or potential attack or other hostile acts of a foreign power." But so far as the use of the President's electronic surveillance power is concerned, the language is essentially neutral.

Section 2511 (3) certainly confers no power, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them. This view is reinforced by the general context of Title III. Section 2511 (1) broadly prohibits the use of electronic

surveillance "[e]xcept as otherwise specifically provided in this chapter." Subsection (2) thereof contains four specific exceptions. In each of the specified exceptions, the statutory language is as follows:

> "It shall not be unlawful . . . to intercept" the particular type of communication described.[4]

The language of subsection (3), here involved, is to be contrasted with the language of the exceptions set forth in the preceding subsection. Rather than stating that warrantless presidential uses of electronic surveillance "shall not be unlawful" and thus employing the standard language of exception, subsection (3) merely disclaims any intention to "limit the constitutional power of the President."

The express grant of authority to conduct surveillances is found in § 2516, which authorizes the Attorney General to make application to a federal judge when surveillance may provide evidence of certain offenses. These offenses are described with meticulous care and specificity.

Where the Act authorizes surveillance, the procedure to be followed is specified in § 2518. Subsection (1) thereof requires application to a judge of competent jurisdiction for a prior order of approval, and states in detail the information required in such application.[5]

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[4] These exceptions relate to certain activities of communication common carriers and the Federal Communications Commission, and to specified situations where a party to the communication has consented to the interception.

[5] Title 18 U. S. C. § 2518, subsection (1), reads as follows:

"§ 2518. Procedure for interception of wire or oral communications

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction

Subsection (3) prescribes the necessary elements of probable cause which the judge must find before issuing an order authorizing an interception. Subsection (4) sets forth the required contents of such an order.

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and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

Subsection (5) sets strict time limits on an order. Provision is made in subsection (7) for "an emergency situation" found to exist by the Attorney General (or by the principal prosecuting attorney of a State) "with respect to conspiratorial activities threatening the national security interest." In such a situation, emergency surveillance may be conducted "if an application for an order approving the interception is made . . . within forty-eight hours." If such an order is not obtained, or the application therefor is denied, the interception is deemed to be a violation of the Act.

In view of these and other interrelated provisions delineating permissible interceptions of particular criminal activity upon carefully specified conditions, it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances.[6]

The legislative history of § 2511 (3) supports this interpretation. Most relevant is the colloquy between Senators Hart, Holland, and McClellan on the Senate floor:

> "Mr. HOLLAND. . . . The section [2511(3)] from which the Senator [Hart] has read does not affirma-

[6] The final sentence of § 2511 (3) states that the contents of an interception "by authority of the President in the exercise of the foregoing powers may be received in evidence . . . only where such interception was reasonable . . . ." This sentence seems intended to assure that when the President conducts lawful surveillance—pursuant to whatever power he may possess—the evidence is admissible.

tively give any power. . . . *We are not affirmatively conferring any power upon the President.* We are simply saying that nothing herein shall limit such power as the President has under the Constitution. . . . We certainly do not grant him a thing.

"There is nothing affirmative in this statement.

"Mr. McCLELLAN. Mr. President, *we make it understood that we are not trying to take anything away from him.*

"Mr. HOLLAND. The Senator is correct.

"Mr. HART. Mr. President, there is no intention here to expand by this language a constitutional power. Clearly we could not do so.

"Mr. McCLELLAN. Even though intended, we could not do so.

"Mr. HART. . . . However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now.

"In addition, Mr. President, *as I think our exchange makes clear, nothing in section 2511 (3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague . . . . Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III.*" [7] (Emphasis supplied.)

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[7] 114 Cong. Rec. 14751. Senator McClellan was the sponsor of the bill. The above exchange constitutes the only time that § 2511 (3) was expressly debated on the Senate or House floor. The Report of the Senate Judiciary Committee is not so explicit as the exchange on the floor, but it appears to recognize that under § 2511 (3) the national security power of the President—whatever it may be—"is not to be deemed disturbed." S. Rep. No. 1097, 90th Cong., 2d Sess., 94 (1968). See also The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility, where the author concludes that in § 2511 (3) "Congress took what amounted to a position of

One could hardly expect a clearer expression of congressional neutrality. The debate above explicitly indicates that nothing in § 2511 (3) was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security. If we could accept the Government's characterization of § 2511 (3) as a congressionally prescribed exception to the general requirement of a warrant, it would be necessary to consider the question of whether the surveillance in this case came within the exception and, if so, whether the statutory exception was itself constitutionally valid. But viewing § 2511 (3) as a congressional disclaimer and expression of neutrality, we hold that the statute is not the measure of the executive authority asserted in this case. Rather, we must look to the constitutional powers of the President.

II

It is important at the outset to emphasize the limited nature of the question before the Court. This case raises no constitutional challenge to electronic surveillance as specifically authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Nor is there any question or doubt as to the necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest. *Katz* v. *United States,* 389 U. S. 347 (1967); *Berger* v. *New York,* 388 U. S. 41 (1967). Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General's affidavit in this case states that the surveillances were

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neutral noninterference on the question of the constitutionality of warrantless national security wiretaps authorized by the President." 45 S. Cal. L. Rev. 888, 889 (1972).

"deemed necessary to protect the nation from attempts of *domestic organizations* to attack and subvert the existing structure of Government" (emphasis supplied). There is no evidence of any involvement, directly or indirectly, of a foreign power.[8]

Our present inquiry, though important, is therefore a narrow one. It addresses a question left open by *Katz, supra,* at 358 n. 23:

> "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security . . . ."

The determination of this question requires the essential Fourth Amendment inquiry into the "reasonableness" of the search and seizure in question, and the way in which that "reasonableness" derives content and mean-

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[8] Section 2511 (3) refers to "the constitutional power of the President" in two types of situations: (i) where necessary to protect against attack, other hostile acts or intelligence activities of a "foreign power"; or (ii) where necessary to protect against the overthrow of the Government or other clear and present danger to the structure or existence of the Government. Although both of the specified situations are sometimes referred to as "national security" threats, the term "national security" is used only in the first sentence of § 2511 (3) with respect to the activities of foreign powers. This case involves only the second sentence of § 2511 (3), with the threat emanating—according to the Attorney General's affidavit—from "domestic organizations." Although we attempt no precise definition, we use the term "domestic organization" in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies. No doubt there are cases where it will be difficult to distinguish between "domestic" and "foreign" unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.

ing through reference to the warrant clause. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 473–484 (1971).

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to "preserve, protect and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government.[9] The use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946.[10]

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[9] Enactment of Title III reflects congressional recognition of the importance of such surveillance in combatting various types of crime. Frank S. Hogan, District Attorney for New York County for over 25 years, described telephonic interception, pursuant to court order, as "the single most valuable weapon in law enforcement's fight against organized crime." 117 Cong. Rec. 14051. The "Crime Commission" appointed by President Johnson noted that "[t]he great majority of law enforcement officials believe that the evidence necessary to bring criminal sanctions to bear consistently on the higher echelons of organized crime will not be obtained without the aid of electronic surveillance techniques. They maintain these techniques are indispensable to develop adequate strategic intelligence concerning organized crime, to set up specific investigations, to develop witnesses, to corroborate their testimony, and to serve as substitutes for them—each a necessary step in the evidence-gathering process in organized crime investigations and prosecutions." Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 201 (1967).

[10] In that month Attorney General Tom Clark advised President Truman of the necessity of using wiretaps "in cases vitally affecting the domestic security." In May 1940 President Roosevelt had au-

Herbert Brownell, Attorney General under President Eisenhower, urged the use of electronic surveillance both in internal and international security matters on the grounds that those acting against the Government

> "turn to the telephone to carry on their intrigue. The success of their plans frequently rests upon piecing together shreds of information received from many sources and many nests. The participants in the conspiracy are often dispersed and stationed in various strategic positions in government and industry throughout the country." [11]

Though the Government and respondents debate their seriousness and magnitude, threats and acts of sabotage against the Government exist in sufficent number to justify investigative powers with respect to them.[12] The covertness and complexity of potential unlawful con-

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thorized Attorney General Jackson to utilize wiretapping in matters "involving the defense of the nation," but it is questionable whether this language was meant to apply to solely domestic subversion. The nature and extent of wiretapping apparently varied under different administrations and Attorneys General, but, except for the sharp curtailment under Attorney General Ramsey Clark in the latter years of the Johnson administration, electronic surveillance has been used both against organized crime and in domestic security cases at least since the 1946 memorandum from Clark to Truman. Brief for United States 16–18; Brief for Respondents 51–56; 117 Cong. Rec. 14056.

[11] Brownell, The Public Security and Wire Tapping, 39 Cornell L. Q. 195, 202 (1954). See also Rogers, The Case For Wire Tapping, 63 Yale L. J. 792 (1954).

[12] The Government asserts that there were 1,562 bombing incidents in the United States from January 1, 1971, to July 1, 1971, most of which involved Government related facilities. Respondents dispute these statistics as incorporating many frivolous incidents as well as bombings against nongovernmental facilities. The precise level of this activity, however, is not relevant to the disposition of this case. Brief for United States 18; Brief for Respondents 26–29; Reply Brief for United States 13.

duct against the Government and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument in certain circumstances. The marked acceleration in technological developments and sophistication in their use have resulted in new techniques for the planning, commission, and concealment of criminal activities. It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens.

It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." *Miranda* v. *Arizona,* 384 U. S. 436, 539 (1966) (WHITE, J., dissenting). And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered. As Chief Justice Hughes reminded us in *Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1941):

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens.[13] We

[13] Professor Alan Westin has written on the likely course of future conflict between the value of privacy and the "new technology" of law enforcement. Much of the book details techniques

look to the Bill of Rights to safeguard this privacy. Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance. *Katz* v. *United States, supra; Berger* v. *New York, supra; Silverman* v. *United States,* 365 U. S. 505 (1961). Our decision in *Katz* refused to lock the Fourth Amendment into instances of actual physical trespass. Rather, the Amendment governs "not only the seizure of tangible items, but extends as well to the recording of oral statements . . . without any 'technical trespass under . . . local property law.'" *Katz, supra,* at 353. That decision implicitly recognized that the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails [14] necessitate the application of Fourth Amendment safeguards.

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure

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of physical and electronic surveillance and such possible threats to personal privacy as psychological and personality testing and electronic information storage and retrieval. Not all of the contemporary threats to privacy emanate directly from the pressures of crime control. Privacy and Freedom (1967).

[14] Though the total number of intercepts authorized by state and federal judges pursuant to Tit. III of the 1968 Omnibus Crime Control and Safe Streets Act was 597 in 1970, each surveillance may involve interception of hundreds of different conversations. The average intercept in 1970 involved 44 people and 655 conversations, of which 295 or 45% were incriminating. 117 Cong. Rec. 14052.

power," *Marcus* v. *Search Warrant,* 367 U. S. 717, 724 (1961). History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. Senator Hart addressed this dilemma in the floor debate on § 2511 (3):

> "As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government." [15]

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

III

As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government

[15] 114 Cong. Rec. 14750. The subsequent assurances, quoted in part I of the opinion, that § 2511 (3) implied no statutory grant, contraction, or definition of presidential power eased the Senator's misgivings.

to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures," the definition of "reasonableness" turns, at least in part, on the more specific commands of the warrant clause. Some have argued that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable," *United States* v. *Rabinowitz,* 339 U. S. 56, 66 (1950).[16] This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language. Rather, it has been

> "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should

[16] This view has not been accepted. In *Chimel* v. *California,* 395 U. S. 752 (1969), the Court considered the Government's contention that the search be judged on a general "reasonableness" standard without reference to the warrant clause. The Court concluded that argument was "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point." *Id.,* at 764–765.

> be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." *Coolidge* v. *New Hampshire,* 403 U. S., at 481.

See also *United States* v. *Rabinowitz, supra,* at 68 (Frankfurter, J., dissenting); *Davis* v. *United States,* 328 U. S. 582, 604 (1946) (Frankfurter, J., dissenting).

Over two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals who the *officer* might conclude were guilty of seditious libel. "It is not fit," said Mansfield, "that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." *Leach* v. *Three of the King's Messengers,* 19 How. St. Tr. 1001, 1027 (1765).

Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive: that, where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a "neutral and detached magistrate." *Coolidge* v. *New Hampshire, supra,* at 453; *Katz* v. *United States, supra,* at 356. The further requirement of "probable cause" instructs the magistrate that baseless searches shall not proceed.

These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Execu-

tive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. *Katz* v. *United States, supra,* at 359–360 (DOUGLAS, J., concurring). But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.[17]

It may well be that, in the instant case, the Government's surveillance of Plamondon's conversations was a reasonable one which readily would have gained prior judicial approval. But this Court "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." *Katz, supra,* at 356–357. The Fourth Amendment contemplates a prior judicial judgment,[18] not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A. B. A. J. 943–944 (1963). The independent check upon executive discretion is not

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[17] N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 79–105 (1937).

[18] We use the word "judicial" to connote the traditional Fourth Amendment requirement of a neutral and detached magistrate.

satisfied, as the Government argues, by "extremely limited" post-surveillance judicial review.[19] Indeed, post-surveillance review would never reach the surveillances which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. *Beck* v. *Ohio,* 379 U. S. 89, 96 (1964).

It is true that there have been some exceptions to the warrant requirement. *Chimel* v. *California,* 395 U. S. 752 (1969); *Terry* v. *Ohio,* 392 U. S. 1 (1968); *McDonald* v. *United States,* 335 U. S. 451 (1948); *Carroll* v. *United States,* 267 U. S. 132 (1925). But those exceptions are few in number and carefully delineated, *Katz, supra,* at 357; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," *Terry* v. *Ohio, supra,* at 20; *Chimel* v. *California, supra,* at 762.

The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security. We are told further that these surveillances are directed primarily to the collecting and maintaining of intelligence with

[19] The Government argues that domestic security wiretaps should be upheld by courts in post-surveillance review "[u]nless it appears that the Attorney General's determination that the proposed surveillance relates to a national security matter is arbitrary and capricious, *i. e.,* that it constitutes a clear abuse of the broad discretion that the Attorney General has to obtain all information that will be helpful to the President in protecting the Government . . ." against the various unlawful acts in § 2511(3). Brief for United States 22.

respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions. It is said that this type of surveillance should not be subject to traditional warrant requirements which were established to govern investigation of criminal activity, not ongoing intelligence gathering. Brief for United States 15–16, 23–24; Reply Brief for United States 2–3.

The Government further insists that courts "as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security." These security problems, the Government contends, involve "a large number of complex and subtle factors" beyond the competence of courts to evaluate. Reply Brief for United States 4.

As a final reason for exemption from a warrant requirement, the Government believes that disclosure to a magistrate of all or even a significant portion of the information involved in domestic security surveillances "would create serious potential dangers to the national security and to the lives of informants and agents. . . . Secrecy is the essential ingredient in intelligence gathering; requiring prior judicial authorization would create a greater 'danger of leaks . . . , because in addition to the judge, you have the clerk, the stenographer and some other officer like a law assistant or bailiff who may be apprised of the nature' of the surveillance." Brief for United States 24–25.

These contentions in behalf of a complete exemption from the warrant requirement, when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration. We certainly do not reject them lightly, especially at a time of worldwide ferment and when civil disorders in this country are more prevalent than in the less turbulent

periods of our history. There is, no doubt, pragmatic force to the Government's position.

But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny. Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent. We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure.

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of "ordinary crime." If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. The investigation of criminal activity has long

involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases. Title III of the Omnibus Crime Control and Safe Streets Act already has imposed this responsibility on the judiciary in connection with such crimes as espionage, sabotage, and treason, §§ 2516 (1)(a) and (c), each of which may involve domestic as well as foreign security threats. Moreover, a warrant application involves no public or adversary proceedings: it is an *ex parte* request before a magistrate or judge. Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Government itself to provide the necessary clerical assistance.

Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values. Nor do we think the Government's domestic surveillance powers will be impaired to any significant degree. A prior warrant establishes presumptive validity of the surveillance and will minimize the burden of justification in post-surveillance judicial review. By no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.

IV

We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed, and express no opinion

as to, the issues which may be involved with respect to activities of foreign powers or their agents.[20] Nor does our decision rest on the language of § 2511 (3) or any other section of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. That Act does not attempt to define or delineate the powers of the President to meet domestic threats to the national security.

Moreover, we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amend-

[20] See n. 8, *supra*. For the view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved, see *United States* v. *Smith*, 321 F. Supp. 424, 425–426 (CD Cal. 1971); and American Bar Association Project on Standards for Criminal Justice, Electronic Surveillance 120, 121 (Approved Draft 1971, and Feb. 1971 Supp. 11). See also *United States* v. *Clay*, 430 F. 2d 165 (CA5 1970).

ment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection. As the Court said in *Camara* v. *Municipal Court,* 387 U. S. 523, 534–535 (1967):

> "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . . In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement."

It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases; that the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court (*e. g.,* the District Court for the District of Columbia or the Court of Appeals for the District of Columbia Circuit); and that the time and reporting requirements need not be so strict as those in § 2518.

The above paragraph does not, of course, attempt to guide the congressional judgment but rather to delineate the present scope of our own opinion. We do not attempt to detail the precise standards for domestic security warrants any more than our decision in *Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III. We do

hold, however, that prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe.

V

As the surveillance of Plamondon's conversations was unlawful, because conducted without prior judicial approval, the courts below correctly held that *Alderman* v. *United States*, 394 U. S. 165 (1969), is controlling and that it requires disclosure to the accused of his own impermissibly intercepted conversations. As stated in *Alderman*, "the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect." 394 U. S., at 185.[21]

The judgment of the Court of Appeals is hereby

Affirmed.

THE CHIEF JUSTICE concurs in the result.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

While I join in the opinion of the Court, I add these words in support of it.

This is an important phase in the campaign of the police and intelligence agencies to obtain exemptions from the Warrant Clause of the Fourth Amendment. For, due to the clandestine nature of electronic eavesdropping, the need is acute for placing on the Govern-

[21] We think it unnecessary at this time and on the facts of this case to consider the arguments advanced by the Government for a re-examination of the basis and scope of the Court's decision in *Alderman*.

ment the heavy burden to show that "exigencies of the situation [make its] course imperative." [1] Other abuses, such as the search incident to arrest, have been partly deterred by the threat of damage actions against offending officers,[2] the risk of adverse publicity, or the possibility of reform through the political process. These latter safeguards, however, are ineffective against lawless wiretapping and "bugging" of which their victims are totally unaware. Moreover, even the risk of exclusion of tainted evidence would here appear to be of negligible deterrent value inasmuch as the United States frankly concedes that the primary purpose of these searches is to fortify its intelligence collage rather than to accumulate evidence to support indictments and convictions. If the Warrant Clause were held inapplicable here, then the federal intelligence machine would literally enjoy unchecked discretion.

Here, federal agents wish to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines, simply to seize those few utterances which may add to their sense of the pulse of a domestic underground.

We are told that one national security wiretap lasted for 14 months and monitored over 900 conversations. Senator Edward Kennedy found recently that "warrantless devices accounted for an average of 78 to 209 days of listening per device, as compared with a 13-day per device average for those devices installed under court order." [3] He concluded that the Government's

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[1] *Coolidge* v. *New Hampshire,* 403 U. S. 443, 455; *McDonald* v. *United States,* 335 U. S. 451, 456; *Chimel* v. *California,* 395 U. S. 752; *United States* v. *Jeffers,* 342 U. S. 48, 51.

[2] See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U. S. 388.

[3] Letter from Senator Edward Kennedy to Members of the Subcommittee on Administrative Procedure and Practice of the Senate Judiciary Committee, Dec. 17, 1971, p. 2. Senator Kennedy included

revelations posed "the frightening possibility that the conversations of untold thousands of citizens of this country are being monitored on secret devices which no judge has authorized and which may remain in operation for months and perhaps years at a time." [4] Even the most innocent and random caller who uses or telephones into a tapped line can become a flagged number in the Government's data bank. See *Laird* v. *Tatum,* 1971 Term, No. 71–288.

Such gross invasions of privacy epitomize the very evil to which the Warrant Clause was directed. This Court has been the unfortunate witness to the hazards of police intrusions which did not receive prior sanction by independent magistrates. For example, in *Weeks* v. *United States,* 232 U. S. 383; *Mapp* v. *Ohio,* 367 U. S. 643; and *Chimel* v. *California,* 395 U. S. 752, entire homes were ransacked pursuant to warrantless searches. Indeed, in *Kremen* v. *United States,* 353 U. S. 346, the *entire contents* of a cabin, totaling more than 800 items (such as "1 Dish Rag") [5] were seized incident to an arrest of its occupant and were taken to San Francisco for study by FBI agents. In a similar case, *Von Cleef* v. *New*

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in his letter a chart comparing court-ordered and department-ordered wiretapping and bugging by federal agencies. This chart is reproduced in the Appendix to this opinion. For a statistical breakdown by duration, location, and implementing agency of the 1,042 wiretap orders issued in 1971 by state and federal judges, see Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for 1971; The Washington Post, May 14, 1972, p. A30, col. 1 (final ed.).

[4] Kennedy, *supra,* n. 3, at 2. See also H. Schwartz, A Report on the Costs and Benefits of Electronic Surveillance (American Civil Liberties Union 1971); Schwartz, The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich. L. Rev. 455 (1969).

[5] For a complete itemization of the objects seized, see the Appendix to *Kremen* v. *United States,* 353 U. S. 346, 349.

Jersey, 395 U. S. 814, police, without a warrant, searched an arrestee's house for three hours, eventually seizing "several thousand articles, including books, magazines, catalogues, mailing lists, private correspondence (both open and unopened), photographs, drawings, and film." *Id.,* at 815. In *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, federal agents "without a shadow of authority" raided the offices of one of the petitioners (the proprietors of which had earlier been jailed) and "made a clean sweep of all the books, papers and documents found there." Justice Holmes, for the Court, termed this tactic an "outrage." *Id.,* at 390, 391. In *Stanford* v. *Texas,* 379 U. S. 476, state police seized more than 2,000 items of literature, including the writings of Mr. Justice Black, pursuant to a general search warrant issued to inspect an alleged subversive's home.

That "domestic security" is said to be involved here does not draw this case outside the mainstream of Fourth Amendment law. Rather, the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of that prohibition. For it was such excesses as the use of general warrants and the writs of assistance that led to the ratification of the Fourth Amendment. In *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807, decided in 1765, one finds a striking parallel to the executive warrants utilized here. The Secretary of State had issued general executive warrants to his messengers authorizing them to roam about and to seize libelous material and libellants of the sovereign. Entick, a critic of the Crown, was the victim of one such general search during which his seditious publications were impounded. He brought a successful damage action for trespass against the messengers. The verdict was sustained on appeal. Lord Camden wrote that if such sweeping tactics were validated, then "the secret cabinets and bureaus of every

subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." *Id.*, at 1063. In a related and similar proceeding, *Huckle* v. *Money*, 2 Wils. K. B. 206, 207, 95 Eng. Rep. 768, 769 (1763), the same judge who presided over Entick's appeal held for another victim of the same despotic practice, saying "[t]o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition . . . ." See also *Wilkes* v. *Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (1763). As early as *Boyd* v. *United States*, 116 U. S. 616, 626, and as recently as *Stanford* v. *Texas*, *supra*, at 485–486; *Berger* v. *New York*, 388 U. S. 41, 49–50; and *Coolidge* v. *New Hampshire*, *supra*, at 455 n. 9, the tyrannical invasions described and assailed in *Entick*, *Huckle*, and *Wilkes*, practices which also were endured by the colonists,[6] have been rec-

[6] "On this side of the Atlantic, the argument concerning the validity of general search warrants centered around the writs of assistance which were used by customs officers for the detection of smuggled goods." N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51 (1937). In February 1761, all writs expired six months after the death of George II and Boston merchants petitioned the Superior Court in opposition to the granting of any new writs. The merchants were represented by James Otis, Jr., who later became a leader in the movement for independence.

"Otis completely electrified the large audience in the court room with his denunciation of England's whole policy toward the Colonies and with his argument against general warrants. John Adams, then a young man less than twenty-six years of age and not yet admitted to the bar, was a spectator, and many years later described the scene in these oft-quoted words: 'I do say in the most solemn manner, that Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life.' He 'was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the

ognized as the primary abuses which ensured the Warrant Clause a prominent place in our Bill of Rights. See J. Landynski, Search and Seizure and the Supreme Court 28–48 (1966). N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 43–78 (1937); Note, Warrantless Searches In Light of *Chimel:* A Return To The Original Understanding, 11 Ariz. L. Rev. 457, 460–476 (1969).

As illustrated by a flood of cases before us this Term, *e. g., Laird* v. *Tatum,* No. 71–288; *Gelbard* v. *United States,* No. 71–110; *United States* v. *Egan,* No. 71–263; *United States* v. *Caldwell,* No. 70–57; *United States* v. *Gravel,* No. 71–1026; *Kleindienst* v. *Mandel,* No. 71–16; we are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries,[7] by the FBI,[8] or even by the military.[9] Their associates are in-

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first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.'" *Id.,* at 58–59.

[7] See Donner & Cerruti, The Grand Jury Network: How the Nixon Administration Has Secretly Perverted A Traditional Safeguard Of Individual Rights, 214 The Nation 5 (1972). See also *United States* v. *Caldwell,* O. T. 1971, No. 70–57; *United States* v. *Gravel,* O. T. 1971, No. 71–1026; *Gelbard* v. *United States* and *United States* v. *Egan,* O. T. 1971, Nos. 71–110 and 71–263. And see N. Y. Times, July 15, 1971, p. 6, col. 1 (grand jury investigation of N. Y. Times staff which published the Pentagon Papers).

[8] *E. g.,* N. Y. Times, April 12, 1970, p. 1, col. 2 ("U. S. To Tighten Surveillance of Radicals"); N. Y. Times, Dec. 14, 1969, p. 1, col. 1 ("F. B. I.'s Informants and Bugs Collect Data On Black Panthers"); the Washington Post, May 12, 1972, p. D21, col. 5 ("When the FBI Calls, Everybody Talks"); the Washington Post,

[*Footnote 9 is on p. 330*]

terrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers.[10] Their patriotism and loyalty are ques-

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May 16, 1972, p. B15, col. 5 ("Black Activists Are FBI Targets"); the Washington Post, May 17, 1972, p. B13, col. 5 ("Bedroom Peeking Sharpens FBI Files"). And, concerning an FBI investigation of Daniel Schorr, a television correspondent critical of the Government, see N. Y. Times, Nov. 11, 1971, p. 95, col. 4; and N. Y. Times, Nov. 12, 1971, p. 13, col. 1. For the wiretapping and bugging of Dr. Martin Luther King by the FBI, see V. Navasky, Kennedy Justice 135–155 (1971). For the wiretapping of Mrs. Eleanor Roosevelt and John L. Lewis by the FBI see Theoharis & Meyer, The "National Security" Justification For Electronic Eavesdropping: An Elusive Exception, 14 Wayne L. Rev. 749, 760–761 (1968).

[9] See *Laird* v. *Tatum*, O. T. 1971, No. 71–288; see also Federal Data Banks, Computers and the Bill of Rights, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971); N. Y. Times, Feb. 29, 1972, p. 1, col. 3.

[10] "Informers have been used for national security reasons throughout the twentieth century. They were deployed to combat what was perceived to be an internal threat from radicals during the early 1920's. When fears began to focus on Communism, groups thought to have some connection with the Communist Party were heavily infiltrated. Infiltration of the Party itself was so intense that one former FBI agent estimated a ratio of one informant for every 5.7 members in 1962. More recently, attention has shifted to militant antiwar and civil rights groups. In part because of support for such groups among university students throughout the country, informers seem to have become ubiquitous on campus. Some insight into the scope of the current use of informers was provided by the Media Papers, FBI documents stolen in early 1971 from a Bureau office in Media, Pennsylvania. The papers disclose FBI attempts to infiltrate a conference of war resisters at Haverford College in August 1969, and a convention of the National Association of Black Students in June 1970. They also reveal FBI endeavors 'to recruit informers, ranging from bill collectors to apartment janitors, in an effort to develop constant surveillance in black communities and New Left organizations' [N. Y. Times, April 8, 1971, p. 22, col. 1]. In Philadelphia's black community, for instance, a whole range of buildings 'including offices of the Congress

tioned.[11] Senator Sam Ervin, who has chaired hearings on military surveillance of civilian dissidents, warns that "it is not an exaggeration to talk in terms of hundreds of thousands of . . . dossiers."[12] Senator Kennedy, as mentioned *supra*, found "the frightening possibility that the conversations of untold thousands are being monitored on secret devices." More than our privacy is implicated. Also at stake is the reach of the Government's power to intimidate its critics.

When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedi-

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of Racial Equality, the Southern Christian Leadership Conference [and] the Black Coalition' [*ibid.*] was singled out for surveillance by building employees and other similar informers working for the FBI." Note, Developments In The Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1272–1273 (1972). For accounts of the impersonation of journalists by police, FBI agents and soldiers in order to gain the confidences of dissidents, see Press Freedoms Under Pressure, Report of the Twentieth Century Fund Task Force on the Government and the Press 29–34, 86–97 (1972). For the revelation of Army infiltration of political organizations and spying on Senators, Governors and Congressmen, see Federal Data Banks, Computers and the Bill of Rights, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971) (discussed in my dissent from the denial of certiorari in *Williamson* v. *United States*, 405 U. S. 1026). Among the Media Papers was the suggestion by the FBI that investigation of dissidents be stepped up in order to " 'enhance the paranoia endemic in these circles and [to] further serve to get the point across there is an FBI agent behind every mailbox.' " N. Y. Times, March 25, 1971, p. 33, col. 1.

[11] *E. g.*, N. Y. Times, Feb. 8, 1972, p. 1, col. 8 (Senate peace advocates said, by presidential adviser, to be aiding and abetting the enemy).

[12] *Amicus curiae* brief submitted by Senator Sam Ervin in *Laird* v. *Tatum*, No. 71–288, O. T. 1971, p. 8.

ents.[13] As Justice Brandeis said, concurring in *Whitney* v. *California,* 274 U. S. 357, 377: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." Chief Justice Warren put it this way in *United States* v. *Robel,* 389 U. S. 258, 264: "[T]his concept of 'national defense' cannot be deemed an end in itself, justifying any . . . power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which [make] the defense of the Nation worthwhile."

The Warrant Clause has stood as a barrier against intrusions by officialdom into the privacies of life. But if that barrier were lowered now to permit suspected subversives' most intimate conversations to be pillaged then why could not their abodes or mail be secretly searched by the same authority? To defeat so terrifying a claim of inherent power we need only stand by the enduring values served by the Fourth Amendment. As we stated last Term in *Coolidge* v. *New Hampshire,* 403 U. S. 443, 455: "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law

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[13] *E. g., New York Times Co.* v. *United States,* 403 U. S. 713; *Powell* v. *McCormack,* 395 U. S. 486; *United States* v. *Robel,* 389 U. S. 258, 264; *Aptheker* v. *Secretary of State,* 378 U. S. 500; *Baggett* v. *Bullitt,* 377 U. S. 360; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579; *Duncan* v. *Kahanamoku,* 327 U. S. 304; *White* v. *Steer,* 327 U. S. 304; *De Jonge* v. *Oregon,* 299 U. S. 353, 365; *Ex parte Milligan,* 4 Wall. 2; *Mitchell* v. *Harmony,* 13 How. 115. Note, The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility, 45 S. Cal. L. Rev. 888, 907–912 (1972).

and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won . . . a right of personal security against arbitrary intrusions . . . . If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." We have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our form of governing.[14]

[14] I continue in my belief that it would be extremely difficult to write a search warrant specifically naming the particular conversations to be seized and therefore any such attempt would amount to a general warrant, the very abuse condemned by the Fourth Amendment. As I said, dissenting in *Osborn* v. *United States*, 385 U. S. 323, 353: "Such devices lay down a dragnet which indiscriminately sweeps in all conversations within its scope, without regard to the nature of the conversations, or the participants. A warrant authorizing such devices is no different from the general warrants the Fourth Amendment was intended to prohibit."

APPENDIX TO OPINION OF DOUGLAS, J., CONCURRING

FEDERAL WIRETAPPING AND BUGGING 1969–1970

	Court Ordered Devices		Executive Ordered Devices		
				Days in Use	
Year	Number	Days in Use	Number	Minimum (Rounded)	Maximum (Rounded)
1969	30	462	94	8,100	20,800
1970	180	2,363	113	8,100	22,600

	Ratio of Days Used Executive Ordered: Court Ordered		Average Days in Use Per Device		
			Court Ordered	Executive Ordered Devices	
Year	Minimum	Maximum	Devices	Minimum	Maximum
1969	17.5*	45.0*	15.4	86.2	221.3
1970	3.4	9.6	13.1	71.7	200.0

*Ratios for 1969 are less meaningful than those for 1970, since court-ordered surveillance program was in its initial stage in 1969.

Source:

(1) Letter from Assistant Attorney General Robert Mardian to Senator Edward M. Kennedy, March 1, 1971. Source figures withheld at request of Justice Department.

(2) Reports of Administrative Office of U. S. Courts for 1969 and 1970.

MR. JUSTICE WHITE, concurring in the judgment.

This case arises out of a two-count indictment charging conspiracy to injure and injury to Government property. Count I charged Robert Plamondon and two codefendants with conspiring with a fourth person to injure Government property with dynamite. Count II charged Plamondon alone with dynamiting and injuring Government property in Ann Arbor, Michigan. The defendants moved to compel the United States to disclose, among other things, any logs and records of electronic surveillance directed at them, at unindicted coconspirators, or at any premises of the defendants or coconspirators. They also moved for a hearing to determine whether any electronic surveillance disclosed had tainted the evidence on which the grand jury indictment was based and which the Government intended to use at trial. They asked for dismissal of the indictment if such taint were determined to exist. Opposing the motion, the United States submitted an affidavit of the Attorney General of the United States disclosing that "[t]he defendant Plamondon has participated in conversations which were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government," the wiretaps having been expressly approved by the Attorney General. The records of the intercepted conversations and copies of the memorandum reflecting the Attorney General's approval were submitted under seal and solely for the Court's *in camera* inspection.[1]

[1] The Attorney General's affidavit concluded:

"I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court *in camera*. Accordingly, the sealed exhibit referred to herein is being submitted solely for the court's *in camera* inspection and a

As characterized by the District Court, the position of the United States was that the electronic monitoring of Plamondon's conversations without judicial warrant was a lawful exercise of the power of the President to safeguard the national security. The District Court granted the motion of defendants, holding that the President had no constitutional power to employ electronic surveillance without warrant to gather information about domestic organizations. Absent probable cause and judicial authorization, the challenged wiretap infringed Plamondon's Fourth Amendment rights. The court ordered the Government to disclose to defendants the records of the monitored conversations and directed that a hearing be held to determine the existence of taint either in the indictment or in the evidence to be introduced at trial.

The Government's petition for mandamus to require the District Court to vacate its order was denied by the Court of Appeals. 444 F. 2d 651 (CA6 1971). That court held that the Fourth Amendment barred warrantless electronic surveillance of domestic organizations even if at the direction of the President. It agreed with the District Court that because the wiretaps involved were therefore constitutionally infirm, the United States must turn over to defendants the records of overheard conversations for the purpose of determining whether the Government's evidence was tainted.

I would affirm the Court of Appeals but on the statutory ground urged by defendant-respondents (Brief 115) without reaching or intimating any views with respect

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copy of the sealed exhibit is not being furnished to the defendants. I would request the court, at the conclusion of its hearing on this matter, to place the sealed exhibit in a sealed envelope and return it to the Department of Justice where it will be retained under seal so that it may be submitted to any appellate court that may review this matter." App. 20–21.

to the constitutional issue decided by both the District Court and the Court of Appeals.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520, forbids, under pain of criminal penalties and civil actions for damages, any wiretapping or eavesdropping not undertaken in accordance with specified procedures for obtaining judicial warrants authorizing the surveillance. Section 2511 (1) establishes a general prohibition against electronic eavesdropping "[e]xcept as otherwise specifically provided" in the statute. Later sections provide detailed procedures for judicial authorization of official interceptions of oral communications; when these procedures are followed the interception is not subject to the prohibitions of § 2511 (1). Section 2511 (2), however, specifies other situations in which the general prohibitions of § 2511 (1) do not apply. In addition, § 2511 (3) provides that:

> "Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The con-

> tents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

It is this subsection that lies at the heart of this case.

The interception here was without judicial warrant, it was not covered by the provisions of § 2511 (2) and it is too clear for argument that it is illegal under § 2511 (1) unless it is saved by § 2511 (3). The majority asserts that § 2511 (3) is a "disclaimer" but not an "exception." But however it is labeled, it is apparent from the face of the section and its legislative history that if this interception is one of those described in § 2511 (3), it is not reached by the statutory ban on unwarranted electronic eavesdropping.[2]

The defendants in the District Court moved for the production of the logs of any electronic surveillance to which they might have been subjected. The Govern-

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[2] I cannot agree with the majority's analysis of the import of § 2511 (3). Surely, Congress meant at least that if a court determined that in the specified circumstances the President could constitutionally intercept communications without a warrant, the general ban of § 2511 (1) would not apply. But the limitation on the applicability of § 2511 (1) was not open-ended; it was confined to those situations that § 2511 (3) specifically described. Thus, even assuming the constitutionality of a warrantless surveillance authorized by the President to uncover private or official graft forbidden by federal statute, the interception would be illegal under § 2511 (1) because it is not the type of presidential action saved by the Act by the provision of § 2511 (3). As stated in the text and n. 3, *infra*, the United States does not claim that Congress is powerless to require warrants for surveillances that the President otherwise would not be barred by the Fourth Amendment from undertaking without a warrant.

ment responded that conversations of Plamondon had been intercepted but took the position that turnover of surveillance records was not necessary because the interception complied with the law. Clearly, for the Government to prevail it was necessary to demonstrate, first, that the interception involved was not subject to the statutory requirement of judicial approval for wiretapping because the surveillance was within the scope of § 2511 (3); and, secondly, if the Act did not forbid the warrantless wiretap, that the surveillance was consistent with the Fourth Amendment.

The United States has made no claim in this case that the statute may not constitutionally be applied to the surveillance at issue here.[3] Nor has it denied that to

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[3] See Tr. of Oral Arg. 13–14:

"Q. . . . I take it from your answer that Congress could forbid the President from doing what you suggest he has the power to do in this case?

"Mr. Mardian [Assistant Attorney General]: That issue is not before this Court——

"Q. Well, I would—my next question will suggest that it is. Would you say, though, that Congress could forbid the President?

"Mr. Mardian: I think under the rule announced by this court in *Colony Catering* that within certain limits the Congress could severely restrict the power of the President in this area.

"Q. Well, let's assume Congress says, then, that the Attorney General, or the President may authorize the Attorney General in specific situations to carry out electronic surveillance if the Attorney General certifies that there is a clear and present danger to the security of the United States?

"Mr. Mardian: I think that Congress has already provided that, and——

"Q. Well, would you say that Congress would have the power to limit surveillances to situations where those conditions were satisfied?

"Mr. Mardian: Yes, I would—I would concur in that, Your Honor."

A colloquy appearing in the debates on the bill, appearing at 114 Cong. Rec. 14750–14751, indicates that some Senators considered § 2511 (3) as merely stating an intention not to interfere with the constitutional powers that the President might otherwise have to

comply with the Act the surveillance must either be supported by a warrant or fall within the bounds of the exceptions provided by § 2511 (3). Nevertheless, as I read the opinions of the District Court and the Court of Appeals, neither court stopped to inquire whether the challenged interception was illegal under the statute but proceeded directly to the constitutional issue without adverting to the time-honored rule that courts should abjure constitutional issues except where necessary to decision of the case before them. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346–348 (1936) (concurring opinion). Because I conclude that on the record before us the surveillance undertaken by the Government in this case was illegal under the statute itself, I find it unnecessary, and therefore improper, to consider or decide the constitutional questions which the courts below improvidently reached.

The threshold statutory question is simply put: Was the electronic surveillance undertaken by the Government in this case a measure deemed necessary by the President to implement either the first or second branch of the exception carved out by § 2511 (3) to the general requirement of a warrant?

The answer, it seems to me, must turn on the affidavit of the Attorney General offered by the United States in opposition to defendants' motion to disclose surveillance records. It is apparent that there is nothing whatsoever in this affidavit suggesting that the surveillance was

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engage in warrantless electronic surveillance. But the Department of Justice, it was said, participated in the drafting of § 2511 (3) and there is no indication in the legislative history that there was any claim or thought that the supposed powers of the President reached beyond those described in the section. In any case, it seems clear that the congressional policy of noninterference was limited to the terms of § 2511 (3).

undertaken within the first branch of the § 2511 (3) exception, that is, to protect against foreign attack, to gather foreign intelligence or to protect national security information. The sole assertion was that the monitoring at issue was employed to gather intelligence information "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." App. 20.

Neither can I conclude from this characterization that the wiretap employed here fell within the exception recognized by the second sentence of § 2511 (3); for it utterly fails to assume responsibility for the judgment that Congress demanded: that the surveillance was necessary to prevent overthrow by force or other unlawful means or that there was any other clear and present danger to the structure or existence of the Government. The affidavit speaks only of attempts to attack or subvert; it makes no reference to force or unlawfulness; it articulates no conclusion that the attempts involved any clear and present danger to the existence or structure of the Government.

The shortcomings of the affidavit when measured against § 2511 (3) are patent. Indeed, the United States in oral argument conceded no less. The specific inquiry put to Government counsel was: "Do you think the affidavit, standing alone, satisfies the Safe Streets Act?" The Assistant Attorney General answered "No, sir. We do not rely upon the affidavit itself . . . ." Tr. of Oral Arg. 15.[4]

Government counsel, however, seek to save their case by reference to the *in camera* exhibit submitted to the

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[4] See also Tr. of Oral Arg. 17:

"Q. . . . If all the *in camera* document contained was what this affidavit contained, it would not comply with the Safe Streets Act?

"Mr. Mardian: I would concur in that, Your Honor."

District Court to supplement the Attorney General's affidavit.[5] It is said that the exhibit includes the request for wiretap approval submitted to the Attorney General, that the request asserted the need to avert a clear and present danger to the structure and existence of the Government, and that the Attorney General endorsed his approval on the request.[6] But I am unconvinced that the mere endorsement of the Attorney General on the request for approval submitted to him must be taken as the Attorney General's own opinion that the wiretap was necessary to avert a clear and present danger to the existence or structure of the Government

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[5] The Government appears to have shifted ground in this respect. In its initial brief to this Court, the Government quoted the Attorney General's affidavit and then said, without qualification, "These were the grounds upon which the Attorney General authorized the surveillance in the present case." Brief for United States 21. Moreover, counsel for the Government stated at oral argument "that the *in camera* submission was not intended as a justification for the authorization, but simply [as] a proof of the fact that the authorization had been granted by the Attorney General of the United States, over his own signature." Tr. of Oral Arg. 6–7.

Later at oral argument, however, the Government said: "[T]he affidavit was never intended as the basis for justifying the surveillance in question. . . . The justification, and again I suggest that it is only a partial justification, is contained in the *in camera* exhibit which was submitted to Judge Keith. . . . We do not rely upon the affidavit itself but the *in camera* exhibit." Tr. of Oral Arg. 14–15. And in its reply brief, the Government says flatly: "Those [*in camera*] documents, and not the affidavit, are the proper basis for determining the ground upon which the Attorney General acted." Reply Brief for United States 9.

[6] Procedures in practice at the time of the request here in issue apparently resulted in the Attorney General's merely countersigning a request which asserted a need for a wiretap. We are told that under present procedures the Attorney General makes an express written finding of clear and present danger to the structure and existence of the Government before he authorizes a tap. Tr. of Oral Arg. 17–18.

when, in an affidavit later filed in court specifically characterizing the purposes of the interception and at least impliedly the grounds for his prior approval, the Attorney General said only that the tap was undertaken to secure intelligence thought necessary to protect against attempts to attack and subvert the structure of Government. If the Attorney General's approval of the interception is to be given a judicially cognizable meaning different from the meaning he seems to have ascribed to it in his affidavit filed in court, there obviously must be further proceedings in the District Court.

Moreover, I am reluctant to proceed in the first instance to examine the *in camera* material and either sustain or reject the surveillance as a necessary measure to avert the dangers referred to in § 2511 (3). What Congress excepted from the warrant requirement was a surveillance which *the President* would assume responsibility for deeming an essential measure to protect against clear and present danger. No judge can satisfy this congressional requirement.

Without the necessary threshold determination, the interception is, in my opinion, contrary to the terms of the statute and subject therefore to the prohibition contained in § 2515 against the use of the fruits of the warrantless electronic surveillance as evidence at any trial.[7]

There remain two additional interrelated reasons for not reaching the constitutional issue. First, even if it were determined that the Attorney General purported to

[7] "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." 18 U. S. C. § 2515.

authorize an electronic surveillance for purposes exempt from the general provisions of the Act, there would remain the issue whether his discretion was properly authorized. The United States concedes that the act of the Attorney General authorizing a warrantless wiretap is subject to judicial review to some extent, Brief for United States 21–23, and it seems improvident to proceed to constitutional questions until it is determined that the Act itself does not bar the interception here in question.

Second, and again on the assumption that the surveillance here involved fell within the exception provided by § 2511 (3), no constitutional issue need be reached in this case if the fruits of the wiretap were inadmissible on statutory grounds in the criminal proceedings pending against respondent Plamondon. Section 2511 (3) itself states that "[t]he contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding *only* where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." (Emphasis added.) There has been no determination by the District Court that it would be reasonable to use the fruits of the wiretap against Plamondon or that it would be necessary to do so to implement the purposes for which the tap was authorized.

My own conclusion, again, is that, as long as nonconstitutional, statutory grounds for excluding the evidence or its fruits have not been disposed of, it is improvident to reach the constitutional issue.

I would thus affirm the judgment of the Court of Appeals unless the Court is prepared to reconsider the necessity for an adversary, rather than an *in camera,* hearing with respect to taint. If *in camera* proceedings are sufficient and no taint is discerned by the judge, this case is over, whatever the legality of the tap.

SHADWICK *v.* CITY OF TAMPA

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 71–5445. Argued April 10, 1972—Decided June 19, 1972

City charter provision authorizing municipal court clerks to issue arrest warrants for breach of municipal ordinances *held* to comport with requirements of the Fourth Amendment that warrants be issued by a neutral and detached magistrate who must be capable of determining whether probable cause exists for issuance of the warrant. The clerks, though laymen, worked within the judicial branch under supervision of municipal court judges and were qualified to make the determination whether there is probable cause to believe that a municipal code violation has occurred. Pp. 347–354.

250 So. 2d 4, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Daniel A. Rezneck argued the cause for appellant. With him on the briefs was *Malory B. Frier.*

Gerald H. Bee, Jr., argued the cause for appellee. With him on the brief was *William Reece Smith, Jr.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The charter of Tampa, Florida, authorizes the issuance of certain arrest warrants by clerks of the Tampa Municipal Court.[1] The sole question in this case is whether

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[1] The relevant Florida statute and Tampa charter provisions are set forth below.

1. Section 168.04 of Fla. Stat. (1965) reads as follows:

"The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, ad-

these clerks qualify as neutral and detached magistrates for purposes of the Fourth Amendment. We hold that they do.

Appellant was arrested for impaired driving on a warrant issued by a clerk of the municipal court. He moved the court to quash the warrant on the ground that it was issued by a nonjudicial officer in violation of the Fourth and Fourteenth Amendments. When the motion was denied, he initiated proceedings in the Florida courts by means of that State's writ of common-law certiorari. The state proceedings culminated in the holding of the Florida Supreme Court that "[t]he clerk and deputy clerks of the municipal court of the City of Tampa are neutral and detached 'magistrates' . . . for the purpose of issuing arrest warrants within the requirements of

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minister oaths to affidavits of complaints and issue warrants for the arrest of persons complained against."

2. Section 495 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 17, Chapter 5363, Laws of Florida 1903, reads as follows:

"The Chief of Police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person."

3. Section 160 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 1, Chapter 61–2915, Laws of Florida 1961, reads as follows:

"The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court."

the United States Constitution . . . ." 250 So. 2d 4, 5 (1971). We noted probable jurisdiction, 404 U. S. 1014 (1972).

I

A clerk of the municipal court is appointed by the city clerk from a classified list of civil servants and assigned to work in the municipal court. The statute does not specify the qualifications necessary for this job, but no law degree or special legal training is required. The clerk's duties are to receive traffic fines, prepare the court's dockets and records, fill out commitment papers and perform other routine clerical tasks. Apparently he may issue subpoenas. He may not, however, sit as a judge, and he may not issue a search warrant or even a felony or misdemeanor arrest warrant for violations of state laws. The only warrants he may issue are for the arrest of those charged with having breached municipal ordinances of the city of Tampa.[2]

Appellant, contending that the Fourth Amendment requires that warrants be issued by "judicial officers," argues that even this limited warrant authority is constitutionally invalid. He reasons that warrant applications of whatever nature cannot be assured the discerning, independent review compelled by the Fourth Amendment when the review is performed by less than a judicial officer.[3] It is less than clear, however, as to who would qualify as a "judicial officer" under appellant's theory. There is some suggestion in appellant's brief that a judicial officer must be a lawyer or the municipal court judge himself.[4] A more complete portrayal of appellant's position would be that the Tampa clerks are disqualified as judicial officers not merely because they are not lawyers

[2] Tr. of Oral Arg. 6, 7, 20, 21.

[3] Brief for Appellant 6; Tr. of Oral Arg. 10.

[4] Brief for Appellant 12–13; Reply Brief for Appellant 8.

or judges, but because they lack the institutional independence associated with the judiciary in that they are members of the civil service, appointed by the city clerk, "an executive official," and enjoy no statutorily specified tenure in office.[5]

II

Past decisions of the Court have mentioned review by a "judicial officer" prior to issuance of a warrant, *Whiteley* v. *Warden,* 401 U. S. 560, 564 (1971); *Katz* v. *United States,* 389 U. S. 347, 356 (1967); *Wong Sun* v. *United States,* 371 U. S. 471, 481–482 (1963); *Jones* v. *United States,* 362 U. S. 257, 270 (1960); *Johnson* v. *United States,* 333 U. S. 10, 14 (1948). In some cases the term "judicial officer" appears to have been used interchangeably with that of "magistrate." *Katz* v. *United States, supra,* and *Johnson* v. *United States, supra.* In others, it was intended simply to underscore the now accepted fact that someone independent of the police and prosecution must determine probable cause. *Jones* v. *United States, supra; Wong Sun* v. *United States, supra.* The very term "judicial officer" implies, of course, some connection with the judicial branch. But it has never been held that only a lawyer or judge could grant a warrant, regardless of the court system or the type of warrant involved. In *Jones, supra,* at 270–271, the Court implied that United States Commissioners, many of whom were *not* lawyers or judges, were nonetheless "independent judicial officers." [6]

The Court frequently has employed the term "magistrate" to denote those who may issue warrants. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 449–453 (1971); *Whiteley* v. *Warden, supra,* at 566; *Katz* v. *United States, supra,* at 356–357; *United States* v. *Ventresca,* 380 U. S. 102, 108

[5] Reply Brief for Appellant 8; Tr. of Oral Arg. 10–12.

[6] The United States Commissioner system has, of course, been replaced by the Federal Magistrates Act of 1968, 82 Stat. 1107.

(1965); *Giordenello* v. *United States,* 357 U. S. 480, 486 (1958); *Johnson* v. *United States, supra,* at 13–14; *United States* v. *Lefkowitz,* 285 U. S. 452, 464 (1932). Historically, a magistrate has been defined broadly as "a public civil officer, possessing such power, legislative, executive or judicial, as the government appointing him may ordain," *Compton* v. *Alabama,* 214 U. S. 1, 7 (1909), or, in a narrower sense "an inferior judicial officer, such as a justice of the peace." *Ibid.* More recent definitions have not much changed.[7]

An examination of the Court's decisions reveals that the terms "magistrate" and "judicial officer" have been used interchangeably. Little attempt was made to define either term, to distinguish the one from the other, or to advance one as the definitive Fourth Amendment requirement. We find no commandment in either term, however, that all warrant authority must reside exclusively in a lawyer or judge. Such a requirement would have been incongruous when even within the federal system warrants were until recently widely issued by nonlawyers.[8]

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[7] In *Compton,* a notary public was deemed a "magistrate," but the Court has nowhere indicated that the term denotes solely a lawyer or judge.

Webster's Dictionary (2d ed. 1957), defines magistrate as "[a] person clothed with power as a public civil officer; a public civil officer invested with executive or judicial powers . . ." or, more narrowly, "[a] magistrate of a class having summary, often criminal, jurisdiction, as a justice of the peace, or one of certain officials having a similar jurisdiction . . . ." Random House Dictionary (1966) defines magistrate as (1) "a civil officer charged with the administration of the law" and (2) "a minor judicial officer, as a justice of the peace or a police justice, having jurisdiction to try minor criminal cases and to conduct preliminary examinations of persons charged with serious crimes."

[8] United States Commissioners were not required to be lawyers until passage of the Federal Magistrates Act of 1968. Even under this Act, a limited exception to lawyer's status is afforded part-time magistrates. 28 U. S. C. § 631 (b)(1).

To attempt to extract further significance from the above terminology would be both unnecessary and futile. The substance of the Constitution's warrant requirements does not turn on the labeling of the issuing party. The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States, supra,* at 14; *Giordenello* v. *United States, supra,* at 486. In *Coolidge* v. *New Hampshire, supra,* the Court last Term voided a search warrant issued by the state attorney general "who was actively in charge of the investigation and later was to be chief prosecutor at the trial." *Id.,* at 450. If, on the other hand, detachment and capacity do conjoin, the magistrate has satisfied the Fourth Amendment's purpose.

III

The requisite detachment is present in the case at hand. Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality, or affiliation of these clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment

the Fourth Amendment requires. Appellant himself expressly refused to allege anything to that effect.[9] The municipal court clerk is assigned not to the police or prosecutor but to the municipal court judge for whom he does much of his work. In this sense, he may well be termed a "judicial officer." While a statutorily specified term of office and appointment by someone other than "an executive authority" might be desirable, the absence of such features is hardly disqualifying. Judges themselves take office under differing circumstances. Some are appointed, but many are elected by legislative bodies or by the people. Many enjoy but limited terms and are subject to re-appointment or re-election. Most depend for their salary level upon the legislative branch. We will not elevate requirements for the independence of a municipal clerk to a level higher than that prevailing with respect to many judges. The clerk's neutrality has not been impeached: he is removed from prosecutor or police and works within the judicial branch subject to the supervision of the municipal court judge.

Appellant likewise has failed to demonstrate that these clerks lack capacity to determine probable cause. The clerk's authority extends only to the issuance of arrest warrants for breach of municipal ordinances. We presume from the nature of the clerk's position that he would be able to deduce from the facts on an affidavit before him whether there was probable cause to believe a citizen guilty of impaired driving, breach of peace, drunkenness, trespass, or the multiple other common offenses covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish. Our legal system has long entrusted non-

[9] Tr. of Oral Arg. 10.

lawyers to evaluate more complex and significant factual data than that in the case at hand. Grand juries daily determine probable cause prior to rendering indictments, and trial juries assess whether guilt is proved beyond a reasonable doubt. The significance and responsibility of these lay judgments betray any belief that the Tampa clerks could not determine probable cause for arrest.

We decide today only that clerks of the municipal court may constitutionally issue the warrants in question. We have not considered whether the actual issuance was based upon an adequate showing of probable cause. *Aguilar* v. *Texas,* 378 U. S. 108 (1964). Appellant did not submit this question to the courts below, 237 So. 2d 231 (1970), 250 So. 2d 4 (1971), and we will not decide it here initially. The single question is whether power has been lawfully vested, not whether it has been constitutionally exercised.

Nor need we determine whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch. Many persons may not qualify as the kind of "public civil officers" we have come to associate with the term "magistrate." Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations. Here, however, the clerk is an employee of the judicial branch of the city of Tampa, disassociated from the role of law enforcement. On the record in this case, the independent status of the clerk cannot be questioned.

What we do reject today is any *per se* invalidation of a state or local warrant system on the ground that the issuing magistrate is not a lawyer or judge. Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judges or lawyers.[10] Many municipal courts face

[10] Some communities, such as those in rural or sparsely settled

stiff and unrelenting caseloads.[11] A judge pressured with the docket before him may give warrant applications more brisk and summary treatment than would a clerk. All this is not to imply that a judge or lawyer would not normally provide the most desirable review of warrant requests. But our federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities [12] one

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areas, may have a shortage of available lawyers and judges and must entrust responsibility for issuing warrants to other qualified persons. The Federal Magistrates Act, for example, explicitly makes provision for nonlawyers to be appointed in those communities where members of the bar are not available. 28 U. S. C. § 631 (b)(1).

[11] See generally Mass Production Justice and the Constitutional Ideal (C. Whitebread ed., 1970).

[12] States differ significantly as to whom they entrust the authority to grant a warrant. See *Burke* v. *Superior Court,* 3 Ariz. App. 576, 579, 416 P. 2d 997, 1000 (1966); *Parks* v. *Superior Court,* 236 P. 2d 874, 882 (Ct. App. Cal. 1951); *Kennedy* v. *Walker,* 135 Conn. 262, 272, 63 A. 2d 589, 594 (1948); *Grano* v. *State,* — Del. —, —, 257 A. 2d 768, 773–774 (1969); *Shadwick* v. *City of Tampa,* 250 So. 2d 4 (Fla. 1971); *State* v. *Swafford,* 250 Ind. 541, 546, 237 N. E. 2d 580, 584 (1968); *State ex rel. French* v. *Hendricks Superior Court,* 252 Ind. 213, 247 N. E. 2d 519 (1969); *Bailey* v. *Hudspeth,* 164 Kan. 600, 606, 191 P. 2d 894, 898 (1948); *State* v. *Guidry,* 247 La. 631, 635–636, 173 So. 2d 192, 194 (1965); *Wampler* v. *Warden of Maryland Penitentiary,* 231 Md. 639, 648, 191 A. 2d 594, 600 (1963); *LaChapelle* v. *United Shoe Machinery Corp.,* 318 Mass. 166, 168–170, 61 N. E. 2d 8, 10 (1945); *State* v. *Paulick,* 277 Minn. 140, 151 N. W. 2d 591 (1967); *People* v. *Richter,* 206 Misc. 304, 306–307, 133 N. Y. S. 2d 685, 688 (1954); *State* v. *Furmage,* 250 N. C. 616, 625–626, 109 S. E. 2d 563, 570 (1959); *Moseley* v. *Welch,* 218 S. C. 242, 250, 62 S. E. 2d 313, 317 (1950); *State* v. *Jefferson,* 79 Wash. 2d 345, 348–349, 485 P. 2d 77, 79 (1971); *State ex rel. Sahley* v. *Thompson,* 151 W. Va. 336, 342–343, 151 S. E. 2d 870, 873 (1966); *State ex rel. White* v. *Simpson,* 28 Wis. 2d 590, 137 N. W. 2d 391 (1965); *State* v. *Van Brocklin,* 194 Wis. 441, 217 N. W. 277 (1927).

key to national innovation and vitality.[13] States are entitled to some flexibility and leeway in their designation of magistrates, so long as all are neutral and detached and capable of the probable-cause determination required of them.

We affirm the judgment of the Florida Supreme Court.

Affirmed.

[13] Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A. B. A. J. 943, 944 (1963).

Syllabus

MUREL ET AL. *v.* BALTIMORE CITY CRIMINAL COURT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 70–5276. Argued March 28–29, 1972—Decided June 19, 1972

In this habeas corpus challenge to the constitutionality of Maryland's Defective Delinquency Law made by petitioners, who were convicted of various state crimes and committed to Patuxent Institution for indeterminate periods, *held* that the writ of certiorari must be dismissed as improvidently granted, since one of the petitioners has been unconditionally released, and the others are subject to unexpired sentences barring their release even if their claims prevailed (cf. *McNeil* v. *Director, Patuxent Institution, ante,* p. 245); moreover, petitioners' challenge to one Defective Delinquency Law should be considered in relation to other state laws regarding civil commitment for compulsory psychiatric treatment, *Baxstrom* v. *Herold,* 383 U. S. 107, and those laws are now being substantially revised to afford greater safeguards to committed persons.

436 F. 2d 1153, certiorari dismissed as improvidently granted.

Karl G. Feissner and *Andrew E. Greenwald* argued the cause for petitioners. With them on the brief were *William L. Kaplan* and *Thomas P. Smith.*

Henry R. Lord, Deputy Attorney General of Maryland, argued the cause for respondents. With him on the brief were *Francis B. Burch,* Attorney General, and *Edward F. Borgerding* and *Donald R. Stutman,* Assistant Attorneys General.

Evelle J. Younger, Attorney General, *Herbert L. Ashby,* Chief Assistant Attorney General, *William E. James,* Assistant Attorney General, and *Russell Iungerich* and *William R. Pounders,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Alan F. Charles* for the National Legal Program on Health Problems of the Poor, and by *Curtis R. Reitz* and *Julian Tepper* for the Prison Research Council of the University of Pennsylvania Law School.

PER CURIAM.

Petitioners were convicted of various state crimes and sentenced to fixed terms of imprisonment. They were then committed to the Patuxent Institution in lieu of sentence, for an indeterminate period, pursuant to the Maryland Defective Delinquency Law, Md. Ann. Code, Art. 31B. They sought federal habeas corpus, challenging on constitutional grounds the criteria and procedures that led to their commitment, and the conditions of their confinement. They contend, *inter alia,* that the statutory standard for commitment is impermissibly vague, that they are entitled to put the government to the burden of proof beyond a reasonable doubt, that at the compulsory psychiatric examination prescribed by the statute they were entitled to have the assistance of counsel and to invoke the privilege against self-incrimination, and that they are being denied a constitutional right to treatment. The District Court denied relief *sub nom. Sas* v. *Maryland,* 295 F. Supp. 389 (Md. 1969), and the Court of Appeals affirmed *sub nom. Tippett* v. *Maryland,* 436 F. 2d 1153 (CA4 1971).[1] We granted certiorari, 404 U. S. 999

[1] Petitioner Murel was originally committed as a defective delinquent in 1962, and Creswell in 1958; their separate petitions for federal habeas corpus were denied without hearing in 1963. On appeal, the Court of Appeals consolidated these and other similar cases, and remanded all of them for a hearing, *sub nom. Sas* v. *Maryland,* 334 F. 2d 506 (CA4 1964). The hearing was deferred, by agreement of the parties, pending the outcome of related litigation in the state courts, which culminated in the decision in *Director* v. *Daniels,* 243 Md. 16, 221 A. 2d 397, cert. denied *sub nom. Avey* v. *Boslow,* 385

(1971), to consider whether, and to what extent, the constitutional guarantees invoked by petitioners apply to this kind of commitment process. After briefing and oral argument, it now appears that this case does not present these issues in a manner that warrants the exercise of the certiorari jurisdiction of this Court.

1. Of the four petitioners, one has been unconditionally released from confinement, and the other three are subject to criminal sentences that have not yet expired, and that would bar their release from custody even if their claims were to prevail.[2] This fact, while not necessarily dispositive of all the claims presented by these petitioners, casts those claims in a different light, not contemplated by our original grant of the writ.[3] Cf. *McNeil* v. *Director, Patuxent Institution, ante,* p. 245.

2. Under our decisions in *Baxstrom* v. *Herold,* 383 U. S. 107 (1966), *Humphrey* v. *Cady,* 405 U. S. 504 (1972), and *Jackson* v. *Indiana,* 406 U. S. 715 (1972), petitioners' challenge to the Maryland Defective Delinquency Law should be considered in relation to the

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U. S. 940 (1966). The federal habeas hearing was then held in the consolidated cases, which by this time also included that of petitioners Hayes and Avey, who had been committed after the Court of Appeals' remand order. The petitions were again denied, 295 F. Supp. 389 (Md. 1969), and the Court of Appeals affirmed, 436 F. 2d 1153 (CA4 1971).

[2] At the start of this litigation nine years ago both Murel and Creswell were subject to confinement that was wholly attributable to the Defective Delinquency Law, their sentences having expired. This is no longer the case because Murel was recently released, and Creswell was convicted and sentenced on new charges. We therefore do not reach their claims.

[3] We do not suggest that these claims are moot, or that a case or controversy is lacking, or that habeas corpus is inappropriate to test the special incidents, if any, of these defective-delinquency confinements. See *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Jones* v. *Cunningham,* 371 U. S. 236 (1963); *North Carolina* v. *Rice,* 404 U. S. 244, 248 (1971).

criteria, procedures, and treatment that the State of Maryland makes available to other persons, not "defective delinquents," committed for compulsory psychiatric treatment. We are informed that the statutes governing civil commitment in Maryland are presently undergoing substantial revision, designed to provide greater substantive and procedural safeguards to committed persons. Accordingly, it seems a particularly inopportune time for this Court to consider a comprehensive challenge to the Defective Delinquency Law.

In these circumstances, the writ of certiorari is therefore dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

Patuxent Institution is a special prison used by the State of Maryland for the incarceration of "defective delinquents." Individuals who have demonstrated "persistent aggravated anti-social or criminal behavior," who have "a propensity toward criminal activity," and who have "either such intellectual deficiency or emotional unbalance" as to present "an actual danger to society" may be confined at Patuxent. Md. Ann. Code, Art 31B, § 5 (1971). The initial determination that one is a defective delinquent is made judicially and, for those confined to Patuxent after such a determination, there is the right to seek judicial redetermination of their status at three-year intervals. *Id.*, § 6 *et seq.* One of the objectives of Patuxent supposedly is to provide treatment for the inmates so that they may be returned to society. *Director* v. *Daniels,* 243 Md. 16, 31–32, 221 A. 2d 397, 406 (1966). Should a defective delinquent not receive treatment, or should the treatment prove inadequate to return him to society, the inmate might

well remain in Patuxent for the remainder of his life. See *McNeil* v. *Director, Patuxent Institution, ante,* p. 245.

Petitioners brought this action in the District Court challenging various aspects of their confinement at Patuxent. The District Court denied relief, *Sas* v. *Maryland,* 295 F. Supp. 389 (Md. 1969); the Court of Appeals affirmed, *Tippett* v. *Maryland,* 436 F. 2d 1153 (CA4 1971); and we granted the petition for a writ of certiorari. 404 U. S. 999. Because I base my decision on narrow grounds, I do not reach the broader issues tendered by petitioners.

When a State moves to deprive an individual of his liberty, to incarcerate him indefinitely, or to place him behind bars for what may be the rest of his life, the Federal Constitution requires that it meet a more rigorous burden of proof than that employed by Maryland to commit defective delinquents. The Defective Delinquency Law does not specify the burden of proof necessary to commit an individual to Patuxent, but the Maryland Court of Appeals has determined that the State need only prove its case by the "fair preponderance of the evidence." *E. g., Crews* v. *Director,* 245 Md. 174, 225 A. 2d 436 (1967); *Termin* v. *Director,* 243 Md. 689, 221 A. 2d 658 (1966); *Dickerson* v. *Director,* 235 Md. 668, 202 A. 2d 765 (1964); *Purks* v. *State,* 226 Md. 43, 171 A. 2d 726 (1961); *Blizzard* v. *State,* 218 Md. 384, 147 A. 2d 227 (1958); and see *Sas* v. *Maryland,* 334 F. 2d 506 (CA4 1964); *Walker* v. *Director,* 6 Md. App. 206, 250 A. 2d 900 (1969). Petitioners have thus been taken from their families and deprived of their constitutionally protected liberty under the same standard of proof applicable to run-of-the-mill automobile negligence actions.[1]

[1] In petitioner Murel's redetermination hearing on December 21, 1964, for example, the trial court instructed the jury: "The burden is on the State to prove by a preponderance of evidence, as I have

The Court of Appeals disapproved this standard but, because it felt it insignificant, nonetheless held it to be consistent with the requirements of the Due Process Clause:

> "We might all be happier had [the burden of persuasion] been stated in terms of clear and convincing proof rather than in terms of a preponderance of the evidence. However meaningful the distinction may be to us as judges, however, it is greatly to be doubted that a jury's verdict would ever be influenced by the choice of one standard or the other. We all know that juries apply the preponderance standard quite flexibly, depending upon the nature of the case. In any event, in the present state of our knowledge, choice of the standard

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stated to you, that the defendant does come within all phases of the definition of a defective delinquent." Trial Transcript 70.

The jury instructions in petitioner Creswell's December 20, 1961, redetermination trial were similar:

"The burden of proof in this particular case is governed by our normal civil rules of evidence. The burden of proof is on the State to satisfy you that this defendant is a defective delinquent. If the State has not satisfied you by a fair preponderance of the evidence that he is a defective delinquent, or if your minds are in a state of equal balance, or even balance, after considering all the evidence as to whether he is or is not a defective delinquent, then it is your duty to find him to be not a defective delinquent.

"However, if you are satisfied by a fair preponderance of the evidence that he is a defective delinquent, then it is your duty to so find him to be such defective delinquent." Trial Transcript 75–76.

The record developed in the District Court also included the jury instructions in the October 30, 1959, redetermination hearing of Charles Tippett, who was a petitioner in the District Court:

"The Court informs you that having once been determined to be a defective delinquent and now that he comes before you and asks to be released as cured of whatever defect there was, the burden is on him to convince you by a fair preponderance of the testimony that that is so." Trial Transcript 40.

> of proof should be left to the state. A legislative [*sic*] choice of the preponderance standard, the same standard governing civil commitments of mentally ill persons who have no history of criminality, ought not to be held in violation of due process requirements when we have no firm foundation for an evaluation of the practical effects of the choice." *Tippett* v. *Maryland, supra,* at 1158–1159.

Judge Sobeloff dissented in part and would have held the State to a more stringent burden:

> "The reasonable doubt standard is indispensable in both criminal and juvenile proceedings . . . for 'it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' . . .
>
> "The objections to the preponderance standard apply with equal force in defective delinquency hearings—indeed they are even more compelling in the latter class of cases, since indefinite incarceration is at stake. Due process commands that the jury must be satisfied beyond a reasonable doubt as to all objective facts in dispute, including the truth of any alleged incidents relied upon by the psychiatrists in reaching their recommendation." *Id.,* at 1165 (citations omitted).

In considering the constitutionally mandated burdens of proof applicable to particular types of cases, our decisions have attached greater significance to the varying standards than did the Court of Appeals below. In *Speiser* v. *Randall,* 357 U. S. 513, 520–521 (1958), we said:

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed

> construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights."

And see *In re Winship,* 397 U. S. 358, 368 (1970) (Harlan, J., concurring).

The reason for our continued concern over the applicable burden of proof is that a lawsuit—like any other factfinding process—is necessarily susceptible of error in the making of factual determinations. The nature of the rights implicated in the lawsuit thus determines the allocation and degree of the burden of proof and consequently the party upon whom the risk of errors in the factfinding process will be placed. We applied this reasoning in *Speiser,* where First Amendment rights were implicated:

> "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." 357 U. S., at 525–526 (citations omitted).

In *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), MR. JUSTICE BRENNAN, in an opinion joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, again applied these principles and reasoned that the important First Amendment interests present in defamation actions required plaintiffs to meet an extraordinary burden of proof. JUSTICE BRENNAN said, "In libel cases . . . an erroneous verdict for the plaintiff [is] most serious. . . . [T]he possibility of such error . . . would create a strong impetus toward self-censorship which the First Amendment cannot tolerate." *Id.*, at 50. MR. JUSTICE BRENNAN thus concluded that a more rigorous burden of proof was necessary to safeguard the important First Amendment rights involved:

> "We . . . hold that a libel action . . . by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 52.

In re Winship, supra, dealt with an individual's personal liberty which we had characterized as "an interest of transcending value" in *Speiser,* 357 U. S., at 525. There, we determined that "proof beyond a reasonable doubt" was constitutionally required "because of the possibility that [an individual might] lose his liberty" and because of the stigma of a criminal conviction. 397 U. S., at 363. And see *Woodby* v. *Immigration and Naturalization Service,* 385 U. S. 276, 285 (1966).

In the present case, petitioners were deprived of their most basic right—their personal liberty—under a burden of proof which was constitutionally inadequate. The

right to liberty is one of transcendent value. Without it, other constitutionally protected rights such as the right of free expression and the right of privacy become largely meaningless. Yet Maryland has deprived petitioners of this right, using a burden of proof which fails to give sufficient weight to the interests involved.

It is no answer to say that petitioners' commitments were in "civil" proceedings and that the requirement for proof beyond a reasonable doubt is required only in "criminal" cases. *In re Gault,* 387 U. S. 1 (1967), and *In re Winship, supra,* specifically rejected this distinction and looked instead at the interests involved and the actual nature of the proceedings. See also *Baxstrom* v. *Herold,* 383 U. S. 107 (1966); *Specht* v. *Patterson,* 386 U. S. 605 (1967). Nor would it be persuasive to argue that the difficulty in proving one's state of mind requires that the State be afforded the benefit of a lesser burden of proof. Proving a state of mind is no more difficult than many other issues with which courts and juries grapple each day.[2] An individual who is confronted with

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[2] Bruce J. Ennis, Staff Attorney of the New York Civil Liberties Union and Director of the Civil Liberties and Mental Illness Project, testified as follows before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st & 2d Sess., 277–278 (1969 and 1970):

"As I mentioned earlier, the mentally ill are possibly less dangerous than the mentally healthy. A five and a half year study of 5,000 patients discharged from New York State mental hospitals showed that 'patients with no record of prior arrest have a strikingly low rate of arrest after release. . . . Their over-all rate of arrest is less than 1/12 that of the general population and the rate for each separate offense is also far lower, especially for more serious charges.' Another psychiatrist states that there is 'not a shred of evidence that the mentally ill are any more dangerous than the mentally healthy.' A diagnosis of mental illness tells us nothing about whether the person so diagnosed is or is not dangerous. Some mental patients are dangerous, some are not. Perhaps the psychiatrist is an expert at deciding whether a person is mentally ill, but is he an expert at predicting

the possibility of commitment, moreover, runs the risk of losing his most important right—his liberty.

Speiser and *Winship* indicate that an individual's personal liberty is an interest of transcending value for the deprivation of which the State must prove its case beyond a reasonable doubt. I would follow established precedent and hold that a State may not subject individuals to lengthy—if not indefinite—incarceration under a lesser burden of proof. Accordingly, I would reverse the judgment below.

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which of the persons so diagnosed are dangerous? Sane people, too, are dangerous, and it may legitimately be inquired whether there is anything in the education, training or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior. Predictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their predictions than other professionals.

"Because predictions of dangerous behavior are so grossly unreliable, we should authorize confinement only if the predicted danger is proved 'beyond a reasonable doubt' rather than by a mere preponderance of the evidence." (Footnotes omitted.)

TURNER *v.* ARKANSAS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 71–1309. Decided June 19, 1972

Petitioner received a general verdict of acquittal on an information charging him with murder in the course of a robbery. When petitioner was subsequently indicted for the robbery, his defense, rejected by the state courts, was that constitutional principles of double jeopardy collaterally estopped the State from relitigating those factual issues already determined in his favor, determinations that make his conviction of robbery logically impossible. *Held:* It must be concluded that the jury (which had been given a charge on accessories) found that petitioner was not present at the robbery-murder scene, thus negating the possibility of a constitutionally valid conviction for the robbery. *Ashe* v. *Swenson,* 397 U. S. 436.

Petition for certiorari granted; 251 Ark. 499, 473 S. W. 2d 904, reversed and remanded.

PER CURIAM.

On December 24, 1968, petitioner, one Richard Turner (no relation to petitioner), the decedent Larry Wayne Yates, and one other person were involved in a poker game, which lasted until the early hours of Christmas morning. After he left the game, Yates was murdered and robbed, and an information filed on December 27 charged that:

> "[Petitioner] on the 25th day of December, 1968 . . . did unlawfully, wilfully, feloniously and violently take from the person of one Larry Wayne Yates . . . a sum of money in excess of $300.00 . . . forcibly and against the will of the said Larry Wayne Yates . . . and while perpetrating said crime of robbery as aforesaid, feloniously, wilfully and with malice aforethought, and with premeditation and deliberation did kill and murder one Larry Wayne Yates . . . ."

On April 24, 1969, petitioner received a general verdict of acquittal on this information.

On October 3, 1969, however, a county grand jury indicted petitioner for the robbery of Yates and alleged that petitioner

> "on the 25th day of December, 1968, in Hempstead County, Arkansas, did unlawfully take from Larry Yates by force and intimidation lawful currency in the amount of Four Hundred Dollars ($400.00) belonging to the said Larry Yates, against the peace and dignity of the State of Arkansas."

Petitioner moved to dismiss this indictment on double jeopardy and *res judicata* grounds, but the trial court denied the motion. On appeal, it was stipulated that "the murder charge, of which Defendant Dennis Turner was acquitted, and the robbery charge arose out of the same set of facts, circumstances, and the same occasion" and that "the same testimony adduced by the State of Arkansas in the murder trial will necessarily need be reintroduced in this robbery charge." A divided Arkansas Supreme Court affirmed the denial of petitioner's motion, *Turner* v. *State,* 248 Ark. 367, 452 S. W. 2d 317 (1970), holding that the only question determined at the murder trial was whether petitioner was guilty of murder. The court pointed out that under state law, murder and robbery charges could not be joined in one indictment or information and that no offense could be jointly tried with murder. Petitioner's rehearing petition, which argued the relevance of this Court's holding in *Ashe* v. *Swenson,* 397 U. S. 436 (1970), announced seven days after the Arkansas Supreme Court's decision, was denied. Petitioner then entered the complete transcript of the murder trial into the record and once again moved to dismiss the indictment on double jeopardy and *res judicata* grounds, and the trial court again denied the motion.

An amended stipulation provided that the evidence the State would present on the robbery charge would be identical with that it introduced on the murder charge. The Arkansas Supreme Court affirmed the decision of the trial court, 251 Ark. 499, 473 S. W. 2d 904 (1971), declining to consider the applicability of this Court's decision in *Ashe* v. *Swenson, supra,* because it held that its earlier decision denying petitioner relief now constituted the "law of the case."

Petitioner contends that Fifth Amendment principles of double jeopardy, see *Benton* v. *Maryland,* 395 U. S. 784 (1969), prevent his trial on the robbery indictment, because the State is collaterally estopped from relitigating those issues already determined in his favor at the murder trial, determinations that make his conviction on the robbery charge a logical impossibility. Collateral estoppel is part of the Fifth Amendment's double jeopardy guarantee, *Ashe* v. *Swenson, supra,* and it is "a matter of constitutional fact [this Court] must decide through an examination of the entire record." *Id.,* at 443. Thus, the rejection of petitioner's claim by the Arkansas Supreme Court on procedural grounds does not foreclose our inquiry on this issue.

In *Ashe,* the defendant had been tried and acquitted by a general verdict of the robbery of one member of a poker game. He was then tried and convicted of the robbery of another of the poker players. This Court reversed his conviction, concluding that "[t]he single rationally conceivable issue in dispute before the jury [in the first trial] was whether the petitioner had been one of the robbers," 397 U. S., at 445, and that, this issue once having been determined by a jury in the petitioner's favor, the State was forestalled from relitigating it.

In the present case, petitioner was not charged with robbery at the first trial, but the State has stipulated that the robbery and murder arose out of "the same set of

facts, circumstances, and the same occasion." The crucial question, therefore, is what issues a general verdict of acquittal at the murder trial resolved. The jury was instructed that it must find petitioner guilty of first-degree murder if it found that he had killed the decedent Yates either with premeditation or unintentionally during the course of a robbery. The jury's verdict thus necessarily means that it found petitioner not guilty of the killing. The State's theory, however, is that the jury might have believed that petitioner and Richard Turner robbed Yates, but that Richard actually committed the murder. This theory is belied by the actual instructions given the jury.* The trial judge charged that:

> "An accessory is one who stands by, aids, abets, or assists . . . the perpetration of the crime.
>
> . . . . . .
>
> "All persons being present, aiding and abetting, or ready and consenting to aid and abet, in any felony, shall be deemed principal offenders, and indicted or informed against, and punished as such." (Court's Instruction No. 13.)

Had the jury found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder even if it believed that he had not actually pulled the trigger. The only logical conclusion is that the jury found him not present at the scene of the murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery of Yates.

*These instructions reflect Ark. Stat. Ann. § 41–2227 which makes accessories before the fact to first-degree murder subject to the same punishment as principals. Ark. Stat. Ann. § 41–118 abolished the distinction between principals and accessories before the fact and also provides that "all accessories before the fact shall be deemed principals and punished as such." Ark. Stat. Ann. § 41–119 defines an accessory as "he who stands by, aids, abets, or assists . . . the perpetration of the crime."

This case is thus squarely controlled by *Ashe* v. *Swenson, supra,* and must be reversed. See *Harris* v. *Washington,* 404 U. S. 55 (1971).

The writ of certiorari is granted, the decision of the Arkansas Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring.

Given the decision in *Ashe* v. *Swenson,* 397 U. S. 436 (1970) (see, however, my dissent in *Harris* v. *Washington,* 404 U. S. 55, 57 (1971)), I join the judgment of the Court.

THE CHIEF JUSTICE, rather than taking summary action in this case, would hear oral argument and give the matter plenary consideration.

MILTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–5012. Argued January 12, 1972—Decided June 22, 1972

Petitioner in this habeas corpus proceeding challenged on Fifth and Sixth Amendment grounds the introduction at his trial of a post-indictment, pretrial confession he made to a police officer posing as a fellow prisoner. The denial of habeas corpus relief is affirmed without reaching the merits of petitioner's claims; any possible error in the admission of the challenged confession was harmless beyond a reasonable doubt in light of three other unchallenged confessions and strong corroborative evidence of petitioner's guilt. *Harrington* v. *California,* 395 U. S. 250; *Chapman* v. *California,* 386 U. S. 18. Pp. 372–378.

428 F. 2d 463, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post,* p. 378.

Neil P. Rutledge, by appointment of the Court, 403 U. S. 951, argued the cause and filed a brief for petitioner.

J. Robert Olian, Assistant Attorney General of Florida, argued the cause for respondent *pro hac vice.* With him on the brief was *Robert L. Shevin,* Attorney General.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ of certiorari on claims under the Fifth and Sixth Amendments arising out of the use of one of a number of confessions, all of which were received in evidence over objection. The confession challenged here was obtained by a police officer posing as an accused person confined in the cell with petitioner.

Petitioner Milton is presently serving a life sentence imposed in 1958 upon his conviction of first-degree murder following a jury trial in Dade County, Florida. During that trial, the State called as a witness a police officer who, at a time when petitioner had already been indicted and was represented by counsel, posed as a fellow prisoner and spent almost two full days sharing a cell with petitioner. The officer testified to incriminating statements made to him by petitioner during this period. Contending that the statements he made to the officer were involuntary under Fifth Amendment standards and were obtained in violation of his Sixth Amendment rights as subsequently interpreted in *Massiah* v. *United States,* 377 U. S. 201 (1964), petitioner initiated the present habeas corpus proceeding in the United States District Court for the Southern District of Florida. The District Court, finding that petitioner had exhausted his state remedies in the course of several post-conviction proceedings in the Florida courts, ruled against petitioner on the merits of his claim, holding that his statements to the police officer were not inadmissible on Fifth Amendment grounds and that his Sixth Amendment claim could not prevail since "[n]o Court has declared *Massiah* retroactive, and this Court will not be the first to do so." 306 F. Supp. 929, 933. The Court of Appeals affirmed the denial of relief to petitioner, 428 F. 2d 463.

On the basis of the argument in the case and our examination of the extensive record of petitioner's 1958 trial, we have concluded that the judgment under review must be affirmed without reaching the merits of petitioner's present claim. Assuming, *arguendo,* that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt. *Harrington* v. *California,* 395 U. S. 250 (1969); *Chapman* v. *California,* 386 U. S. 18 (1967). The jury, in addition to hearing the challenged

testimony, was presented with overwhelming evidence of petitioner's guilt, including no less than three full confessions that were made by petitioner prior to his indictment. Those confessions have been found admissible in the course of previous post-conviction proceedings brought by petitioner in his attempts to have this conviction set aside, and they are not challenged here.

The crime for which petitioner was convicted occurred in the early morning hours of June 1, 1958. The woman with whom petitioner had been living was asleep while riding as a passenger in the rear seat of an automobile driven by petitioner; she died by drowning when the car ran into the Miami River with its rear windows closed and its rear doors securely locked from the outside with safety devices designed to ensure against accidental opening of the doors. Petitioner, who jumped from the car shortly before it reached the water, was nevertheless propelled into the river by the car's momentum; he was recovered from the water when a seaman nearby heard his cries for help and found him clinging to a boat moored in the river near the point of the automobile's entry. A few hours later the car, with the victim's body still inside, was retrieved from the bottom of the river a short distance downstream from its point of entry.

The following day the Miami police arrested petitioner on manslaughter charges and placed him in the city jail. Ten days after the woman's death, petitioner, having been advised of his right to remain silent, confessed that he had deliberately killed the woman and that the accident was simulated. He first made an oral confession to a police officer during a question-and-answer exchange that was preserved on a wire-recording device. He then repeated his confession during another exchange and these statements were taken down by a stenographer; after this stenographic recording was converted to a transcript, peti-

tioner read it over in full and signed it at 11 p. m. on June 11.[1]

The following day, petitioner told a police officer that he would like to make some clarifying additions to the statements in the writing he had signed the previous night. The officer suggested that they first go with a photographer to the scene of the incident "and reconstruct how this thing . . . occurred." Petitioner agreed. He, the police officer, and a photographer then went to the scene of the crime where petitioner pointed out the route he had taken in driving the car to the river, the approximate point at which he had jumped out of the car, and the point of the car's entry into the river. Petitioner was then taken back to the police station where he went over his statement of the night before and indicated to the officer the parts of that statement he wanted to clarify. Once again, a stenographer was summoned and a question-and-answer exchange was taken down and transcribed to a writing that petitioner read over and signed.[2]

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[1] In this first written confession, petitioner made the following statements:

"Minnie Lee Claybon [the murder victim] and myself had an insurance policy together. So I started thinking about the insurance and the money that I could get if something happened to her. I knew that I could use the money if something happened. So I decided to do something about it one way or the other, so one night we had been riding around in the car. So I decided to get the whole thing over with. So I drived the car into the river and she was killed.

. . . . . .

". . . I drove the car straight toward the river, and just as I got almost to the river, . . . I jumped from the car and the car went on into the river and I skidded and kept rolling over and over until I was in the river also. I hurt my shoulder. I couldn't move that arm. It was hurting real bad."

[2] In this second writing, petitioner confirmed in major part the statements he had made the night before, but said in addition that he had "decided to kill" the woman "about a month before this

Approximately one week after he had made these confessions, petitioner secured the services of an attorney who advised him not to engage in any further discussions of his case with anyone else.

Following this, and while petitioner was under indictment and confined in the Dade County jail awaiting trial, the State, for reasons that are not altogether clear, assigned a police officer named Langford the special detail of posing as a prisoner and sharing petitioner's cell in order to "seek information" from him.

Langford entered the cell with petitioner late one Friday afternoon and presented himself as a fellow prisoner under investigation for murder; he assumed a friendly pose toward his cellmate, offering petitioner some of his prison food at their first breakfast together the next morning and telling petitioner something of his own fictitious "crime," which he described as a robbery committed with an accomplice who had used Langford's gun to kill the robbery victim. Finally, petitioner began to boast that he had not made Langford's mistake of having an accomplice who might later serve as a witness; instead, he said, he had committed the "perfect" crime with no surviving witnesses. By the time Langford left the cell on Sunday afternoon, petitioner had described his own crime in some detail and had predicted with much assurance that he would soon be released, that he would collect a lot of insurance money, and that he would then flee the State with the insurance money without ever being brought to trial for his "perfect" crime. The incriminating statements made to Langford were essentially the

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incident happened." He further stated, however, that he was not thinking of the insurance money when he made that decision, but was thinking instead of the woman's habits of associating with other men, drinking too much, and staying out late at night. He reaffirmed in express terms that he had deliberately driven the car into the river with the intention of killing the woman.

same as those given in the prior confessions not challenged here.

At petitioner's trial in state court, the wire recording of his first confession was played back, first to the judge for a ruling on its admissibility, and then to the jury. Petitioner's two written confessions were also received in evidence, as were the photographs that were taken and the statements that were made by petitioner when he reconstructed the crime at the scene of its occurrence. In addition, Langford was permitted to testify to the statements made to him by petitioner while the two men were sharing the cell in the county jail. Other evidence, highly damaging to petitioner in its totality, was also presented to the jury. For example, there was testimony that petitioner had told an acquaintance a few months before the murder that he disliked Minnie Claybon (the murder victim) and was interested only in getting some money out of her. The terms of certain insurance policies purchased by petitioner about two months before the crime were described in testimony given by the selling insurance agents; the policies provided for the payment of $8,500 to petitioner upon the accidental death of Miss Claybon, and the agents testified that petitioner had faithfully maintained his weekly premium payments on the policies. Other testimony, however, indicated that petitioner was hard pressed for money shortly before the murder, having fallen behind in his rent payments and having sold some of his personal clothing to raise small sums. There was testimony that petitioner had purchased the car in which Miss Claybon drowned on the very afternoon before the crime, making a cash down payment of $8; that the safety devices on the rear doors of the car had been left in the unlocked position by the car's former owner; that these devices could be put in the locked position only by loosening a screw, sliding the

locking device into position, and then retightening the screw; and that these devices were found securely screwed in the locked position when the car, with the victim's body still inside, was recovered from the river. After hearing all the evidence, the jury found petitioner guilty of murder in the first degree, but recommended mercy; on that recommendation, the trial judge imposed the sentence of life imprisonment.

The petitioner has made a number of collateral attacks on his conviction, primarily in the courts of Florida. In response to one of his applications for post-conviction relief, the Florida Supreme Court issued a writ of habeas corpus, heard oral argument on the voluntariness of petitioner's wire-recorded and written confessions, but thereafter discharged the writ in a reported decision upholding the voluntariness of those confessions and their admissibility at trial. *Milton* v. *Cochran,* 147 So. 2d 137 (1962), cert. denied, 375 U. S. 869 (1963). The issues raised in that proceeding are not now before us and must, for the purposes of the instant case, be treated as having been properly resolved by the Florida Supreme Court. Cf. Sup. Ct. Rule 23 (1)(c).

In initiating the present habeas corpus proceeding in the District Court, petitioner sought to have his conviction set aside on the ground that the statements he made to police officer Langford should not have been admitted against him. Our review of the record, however, leaves us with no reasonable doubt that the jury at petitioner's 1958 trial would have reached the same verdict without hearing Langford's testimony. The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases *de novo* but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14

years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless.

Affirmed.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

Under the guise of finding "harmless error," the Court today turns its back on a landmark constitutional precedent established 40 years ago. That precedent, which clearly controls this case, is *Powell* v. *Alabama,* 287 U. S. 45. I respectfully dissent.

In 1958 a Florida grand jury indicted the petitioner, George Milton, for first-degree murder. This was an offense punishable by death under Florida law. After he had been indicted, Milton was remanded to the Dade County jail to await trial. He had retained a lawyer, who had advised him not to talk about his case with anyone.

Some two weeks later the State directed a police officer named Langford to enter Milton's cell, posing as a fellow prisoner also under indictment for murder, in order to "seek information" from Milton. Langford entered the cell on a Friday evening. That night he "tried to open him [Milton] up," but Milton refused to talk about his case. The next day Langford devoted his efforts to gaining Milton's confidence. He shared his breakfast with Milton and gave him candy. He talked convincingly about his own purported crime. He tried to steer the conversation to the charge against Milton, but Milton repeatedly said he did not want to talk about it, and had been told not to talk about it by his lawyer. Finally, sometime between midnight and 3 a. m. on Sunday, after almost 36 hours of prodding

by his supposed fellow prisoner, Milton allegedly confessed the murder to Langford.

At Milton's subsequent trial, Langford, over objection, was allowed to testify in detail to this alleged confession. Milton was convicted, and, upon the recommendation of the jury, he was not sentenced to death, but to life imprisonment. His appeals to the state appellate courts were unavailing, and he ultimately filed the present federal habeas corpus proceeding in the United States District Court for the Southern District of Florida, claiming that his conviction was invalid because he had been deprived of his constitutional right to the assistance of counsel after the indictment.

The District Judge denied the writ, apparently believing that the question before him was whether this Court's decision in *Massiah* v. *United States,* 377 U. S. 201, was "retroactive":

> "This case was tried six years before the Supreme Court indicated in Massiah v. United States, 377 U. S. 201 . . . (1964), that confessions are involuntary *per se* if induced by officers or their agents from an accused after his indictment while he is without assistance of counsel. No Court has declared *Massiah* retroactive, and this Court will not be the first to do so. Counsel for Milton argues that *Massiah* was not declared retroactive because far from stating new principles of law, it merely restated principles derived from Powell v. Alabama, 287 U. S. 45 . . . (1932). However, the *Powell* case dealt with the Sixth Amendment right to appointment of counsel in a capital case, a situation far different from this case. Milton knew what he was doing. He wasn't intimidated by the police, because he didn't even know his cellmate was a policeman. He had a lawyer who had told him not to make any statements concerning

his case, but he chose not to follow that advice." 306 F. Supp. 929, 933–934.

The Court of Appeals for the Fifth Circuit affirmed *per curiam* "on the basis of [the District Court's] opinion," 428 F. 2d 463, and we granted certiorari, 403 U. S. 904.

The District Court and the Court of Appeals were in error. They were mistaken, first, in thinking that the *Massiah* case had anything to do with the "voluntariness" of a confession. They were mistaken, second, in thinking that any real question of "retroactivity" was presented. They were mistaken, third, in thinking that *Powell* v. *Alabama, supra,* dealt only with "appointment of counsel in a capital case." And they were mistaken, fourth, in thinking that *Powell* v. *Alabama* was inapplicable to this case.

Powell v. *Alabama,* decided almost 40 years ago, was one of the truly landmark constitutional decisions of this Court. It held that under the Fourteenth Amendment a man indicted for a capital offense in a state court has an absolute right, not "to appointment of," but to the *assistance* of counsel. And that constitutional right is not restricted to the trial. The Court reversed the convictions in *Powell,* because:

> "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." 287 U. S., at 57.

In *Massiah* v. *United States, supra,* we found that

this constitutional right to counsel [1] was violated when, after indictment, a defendant who had a lawyer was surreptitiously interrogated alone by an agent of the police. "[U]nder our system of justice," we said, "the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.' . . ." "[A] Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. . . ." "This view," we said, "no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama,* 287 U. S. 45." 377 U. S., at 204–205.

The "retroactivity" of the *Massiah* decision is a wholly spurious issue. For *Massiah* marked no new departure in the law. It upset no accepted prosecutorial practice. Its "retroactivity" would effect no wholesale jail deliveries. Cf. *Tehan* v. *Shott,* 382 U. S. 406, 418–419. In no case before *Massiah* had this Court, at least since *Powell* v. *Alabama,* ever countenanced the kind of post-indictment police interrogation there involved, let alone ever specifically upheld the constitutionality of any such interrogation.[2]

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[1] *Massiah* involved a federal noncapital felony charge, where the defendant had an absolute Sixth Amendment right to counsel under *Johnson* v. *Zerbst,* 304 U. S. 458. The same absolute right was secured by *Gideon* v. *Wainwright,* 372 U. S. 335, to defendants in noncapital state criminal cases under the Sixth and Fourteenth Amendments. This constitutional guarantee has now been further extended. See *Argersinger* v. *Hamlin, ante,* p. 25.

[2] An issue of the "retroactivity" of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the de-

For four decades this Court has recognized that when a State indicts a man for a capital offense, the most rudimentary constitutional principles require that he be afforded the full and effective assistance of counsel:

> "Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime. . . .
>
> "Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. At every stage in those proceedings the accused has an absolute right to a lawyer's help if the case is one in which a death sentence may be imposed. *Powell* v. *Alabama.*" *Spano* v. *New York,* 360 U. S. 315, 327 (concurring opinion).

So the question in this case is not whether *Massiah* is "retroactive," [3] for the rule in that case has been settled law ever since *Powell* v. *Alabama.*

I can find no basis for the Court's holding today that the admission of Officer Langford's testimony was harmless. In *Chapman* v. *California,* 386 U. S. 18, we said that an "error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant

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cision overrules clear past precedent, *e. g., Linkletter* v. *Walker,* 381 U. S. 618; *Desist* v. *United States,* 394 U. S. 244; *Williams* v. *United States,* 401 U. S. 646; or disrupts a practice long accepted and widely relied upon, *e. g., Johnson* v. *New Jersey,* 384 U. S. 719; *Stovall* v. *Denno,* 388 U. S. 293; *Cipriano* v. *City of Houma,* 395 U. S. 701.

[3] Even on the erroneous premise that the "retroactivity" of *Massiah* is here involved, the District Court was quite mistaken in stating that "[n]o Court has declared *Massiah* retroactive." This Court, in *McLeod* v. *Ohio,* 381 U. S. 356, reversed, citing *Massiah,* an Ohio conviction because a voluntary confession was admitted in evidence that had been obtained when police officers questioned the petitioner in the absence of counsel a week after he had been indicted. The conviction antedated *Massiah* by almost four years.

cannot, under *Fahy* [v. *Connecticut,* 375 U. S. 85], be conceived of as harmless." 386 U. S., at 23–24. And on the question of whether a jury might possibly have been influenced, the State must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.,* at 24.

Neither the District Court nor the Court of Appeals even suggested the possibility of harmless error in this case, and with very good reasons. The Court today relies on the fact that the challenged "confession" was only one of several introduced at the petitioner's trial. But it fails to mention that each of the previous statements was taken during an 18-day period after arrest but before indictment, when the petitioner was held in jail incommunicado and was questioned almost every day, often for hours at a time. For 10 days the petitioner denied that he had deliberately killed his wife. Finally, during a session in which two detectives working in tandem questioned him continuously for some eight hours, the petitioner allegedly confessed. Other statements followed that one, but all were taken during the period of incommunicado detention.

Under these circumstances, it is hardly surprising that the Miami police chose to plant an officer in the petitioner's jail cell two weeks after indictment, in the hope of obtaining admissions less tainted by the indicia of unreliability that surrounded the previous statements. They succeeded in doing so, and the alleged confession thus obtained was truly devastating to the defense at the trial. Langford's testimony was the first evidence of any incriminating statements introduced by the State at the trial, and it was referred to repeatedly by the prosecutor in his final argument.

The state courts determined that the petitioner's pre-indictment statements were voluntary, and that issue, as the Court notes, is not now before us. But the weight

given by a jury to any alleged confession is affected by the circumstances under which it was obtained, and the ability of the petitioner to discredit in the minds of the jury the evidence of his prior statements was undoubtedly destroyed by the strong corroboration and elaboration supplied by the testimony of Officer Langford, who had been unconstitutionally planted in the petitioner's jail cell. Surely there is *at the least* a reasonable doubt whether in these circumstances the introduction of Langford's testimony did not contribute to the verdict of first-degree murder returned by the jury, particularly where a conviction for a lesser degree of homicide was a distinct possibility on the evidence.

To hold otherwise, in the absence of any finding of harmless error by any of the four courts that have previously ruled on the admissibility of Langford's testimony, is to violate the very principle that the Court restates today: "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases *de novo* but rather to review for violation of federal constitutional standards." *Ante,* at 377.

Despite its admonition, the Court today refuses to rule on the constitutional question squarely presented in this case. That question is whether the great constitutional lesson of *Powell* v. *Alabama* is to be ignored. I would not ignore it, but would honor its "fundamental postulate . . . 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" *Powell* v. *Alabama,* 287 U. S., at 71–72.

For these reasons, I would reverse the judgment before us.

Syllabus

PIPEFITTERS LOCAL UNION NO. 562 ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70–74. Argued January 11, 1972—Decided June 22, 1972

Petitioner union and three of its officers were convicted of conspiracy to violate 18 U. S. C. § 610, which prohibited a labor organization from making a contribution or an expenditure in connection with a federal election. Evidence indicated that the union from 1949 through 1962 maintained a political fund to which union members and others working under the union's jurisdiction were required to contribute and that that fund was then succeeded by the present fund, which was, in form, set up as a separate "voluntary" organization; union officials, nevertheless, retained unlimited control over the fund, and no significant change was made in the regular and systematic collection of contributions at a prescribed rate based on hours worked; union agents, moreover, continued to collect donations at jobsites on union time, and the proceeds were used for a variety of purposes, including political contributions in connection with federal elections; those contributions, on the other hand, were made from accounts strictly segregated from union dues and assessments, and, although some of the contributors believed otherwise, donations to the fund were not, in fact, necessary for employment or union membership. Under instructions to determine whether the fund was in reality a union fund or the contributors' fund, the jury found each defendant guilty. The Court of Appeals rejected petitioners' challenges, and held that the fund was a subterfuge through which the union made political contributions of union monies in violation of § 610. The Federal Election Campaign Act of 1971, which became effective after oral argument here, added a paragraph at the end of § 610 that expressly authorizes labor organizations to establish, administer, and solicit contributions for political funds, provided that the fund not make a contribution or expenditure in connection with a federal election by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat thereof, or by monies required as a condition of employment or union membership. *Held:*

1. Section 610, as confirmed by the Federal Election Campaign Act, does not apply to contributions or expenditures from volun-

tarily financed union political funds. A legitimate political fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments, and solicitation by union officials, although permissible, must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without reprisal. Pp. 401–427.

2. Section 610 may be interpreted to prohibit the use of general union monies for the establishment, administration, or solicitation of contributions for union political funds. By clearly permitting such use, the Federal Election Campaign Act may, therefore, have impliedly repealed § 610. Pp. 428–432.

3. Even if there has been such an implied repeal, it, nevertheless, does not require abatement of the prosecution against petitioners because of the federal saving statute, 1 U. S. C. § 109. *United States* v. *Reisinger,* 128 U. S. 398, followed. *Hamm* v. *Rock Hill,* 379 U. S. 306, distinguished. Pp. 432–435.

4. The instructions to the jury were clearly erroneous because they permitted the jury to convict without finding that donations to the fund had been actual or effective dues or assessments. The sufficiency of the indictment is left open for determination on remand. Pp. 435–442.

434 F. 2d 1127, vacated and remanded to the District Court with instructions to dismiss indictment against petitioners Callanan and Lawler, both now deceased, and reversed and remanded to the District Court as to remaining petitioners.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post,* p. 442. BLACKMUN, J., took no part in the consideration or decision of the case.

Morris A. Shenker argued the cause for petitioners. With him on the briefs were *James F. Nangle, Jr., John L. Boeger, Cordell Siegel, Murry L. Randall,* and *Richard L. Daly.*

Deputy Solicitor General Wallace argued the cause for the United States. On the briefs were *Solicitor General Griswold, Acting Assistant Attorney General Petersen, Allan A. Tuttle,* and *Beatrice Rosenberg.*

Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, and by *Arthur J. Hilland* and *Plato Cacheris* for Officers of the United Mine Workers of America.

John L. Kilcullen filed a brief for the National Right to Work Legal Defense Foundation as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners—Pipefitters Local Union No. 562 and three individual officers of the Union—were convicted by a jury in the United States District Court for the Eastern District of Missouri of conspiracy under 18 U. S. C. § 371 to violate 18 U. S. C. § 610. At the time of trial § 610 provided in relevant part:

> "It is unlawful . . . for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in . . . Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . .
>
> "Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, . . . in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined

not more than $10,000 or imprisoned not more than two years, or both.

"For the purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist [*sic*] for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." [1]

The indictment charged, in essence, that petitioners had conspired from 1963 to May 9, 1968, to establish and maintain a fund that (1) would receive regular and systematic payments from Local 562 members and members of other locals working under the Union's jurisdiction; (2) would have the appearance, but not the reality of being an entity separate from the Union; and (3) would conceal contributions and expenditures by the Union in connection with federal elections in violation of § 610.[2]

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[1] Section 371, in turn, provided:

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

[2] Omitting the overt acts charged, the indictment, filed May 9, 1968, stated in relevant part:

"The Grand Jury charges:

"1. That at all times hereinafter mentioned defendant Pipefitters Local Union No. 562, St. Louis, Missouri, (hereinafter referred to as Local 562), affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (hereinafter referred to as

The evidence tended to show, in addition to disbursements of about $150,000 by the fund to candidates in federal elections, an identity between the fund and the

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the United Association), was a labor organization within the meaning of Section 610 of Title 18, United States Code, that is to say, an organization in which employees participated and which existed, in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

. . . . .

"3. That from on or about October 12, 1966, up to and including the date of the filing of this indictment, defendant Lawrence L. Callanan was an officer of defendant Local 562.

"4. That at all times hereinafter mentioned defendant John L. Lawler was an officer of defendant Local 562.

"5. That at all times hereinafter mentioned, defendant George Seaton was an officer of defendant Local 562.

. . . . .

"7. That at all times hereinafter mentioned, the Pipefitters Voluntary, Political, Educational, Legislative, Charity and Defense Fund (hereinafter the Fund), was a fund of defendant Local 562, established, maintained, and administered by officers, employees, members, agents, foremen and job stewards of defendant Local 562, to effect a regular and systematic collection, receipt, and expenditure of moneys obtained from working members of defendant Local 562 and from working members of other labor organizations employed under the jurisdiction of defendant Local 562.

. . . . .

"9. That from in or about 1963 and continuously thereafter up to and including the date of the filing of this indictment, in the City of St. Louis, in the Eastern District of Missouri and elsewhere, Local 562, Lawrence L. Callanan, John L. Lawler and George Seaton, the defendants herein, and John F. Burke and Edward J. Steska, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did conspire and agree with each other and with divers other persons to the grand jurors unknown, to violate Section 610 of Title 18, United States Code in that they did unlawfully, wilfully, and knowingly conspire and agree to have Local 562 make contributions and expenditures in connection with elections at which Presidential and Vice Presidential electors or United States Senators and Representatives to

Union and a collection of well over $1 million in contributions to the fund by a method similar to that employed in the collection of dues or assessments. In par-

Congress were to be voted for, and to wilfully consent to the making of such contributions and expenditures by Local 562.

"10. It was a part of said conspiracy that the defendants and co-conspirators would establish and maintain a special fund entitled 'Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund,' which fund would have the appearance of being a wholly independent entity, separate and apart from Local 562; and that the defendants and co-conspirators would thereby conceal the fact that Local 562 would make contributions and expenditures in connection with elections at which Presidential and Vice Presidential electors or United States Senators and Representatives to Congress were to be voted for.

"11. It was further a part of the conspiracy that defendant John L. Lawler would be Director of the Fund and that at a certain time he would be succeeded as Director of the Fund by defendant Lawrence L. Callanan; and that the Director of the Fund would appear to have control and management of the Fund, including the receipt and disbursement of money and the keeping of its books.

"12. It was further a part of the conspiracy that defendants John L. Lawler and Lawrence L. Callanan would not have the books of the Fund audited, or afford members of defendant Local 562 and other pipefitters contributing to the Fund any accounting for the money on hand, paid into or disbursed from the Fund.

"13. It was further a part of the conspiracy that the defendants and co-conspirators, by means of the creation and operation of the Fund, would continue in new form the practice of collecting for political purposes One Dollar ($1.00) per day worked from members of defendant Local 562 and Two Dollars ($2.00) per day worked from non-member pipefitters employed on jobs within the jurisdiction of defendant Local 562.

"14. It was further a part of the conspiracy that the defendants and co-conspirators would waive and fail to enforce Section 180 of the Constitution of the United Association in order to facilitate the payment of monies into the Fund, by failing to collect from non-members of Local 562, working under its jurisdiction, a required travel card fee of not in excess of Eight Dollars ($8.00) per month, and in lieu thereof, collecting payments to the Fund at

ticular, it was established that from 1949 through 1962 the Union maintained a political fund to which Union members and others working under the Union's jurisdiction were in fact required to contribute and that the fund was then succeeded in 1963 by the present fund, which was, in form, set up as a separate "voluntary" organization. Yet, a principal Union officer assumed the

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the rate of Two Dollars ($2.00) per eight-hour working day from such non-members.

"15. It was further a part of the conspiracy that the defendants and co-conspirators would cause general foremen, area foremen, job stewards, officers, agents, employees and other members of Local 562 acting in a supervisory capacity over members and pipefitters working on jobs under the jurisdiction of Local 562, to become agents of the Fund in order to facilitate the collection of monies for the Fund on a regular basis on job sites and at the headquarters of Local 562, 1242 Pierce Avenue, St. Louis, Missouri.

"16. It was further a part of the conspiracy that the defendants and co-conspirators, in order to facilitate an orderly, regular and systematic collection of contributions to the Fund, would cause the agents of the Fund, referred to in paragraph 15 of this Indictment to distribute to the pipefitters working at all job sites contribution agreement cards to be signed by such pipefitters, and to distribute to foremen and job stewards at such job sites printed collection sheets for the Fund upon which to record the number of hours worked by such pipefitters and the amount of the contributions paid by each into the Fund; and that such foremen or job stewards would advise newly employed pipefitters at such job sites of the existence of the Fund and of the rates of participation, that is, for members of Local 562, One Dollar ($1.00) per eight hours worked; and after January 1, 1965, Fifty Cents ($.50) per eight hours worked, and for members of other pipefitter locals Two Dollars ($2.00) per eight hours worked.

"17. It was further a part of the conspiracy that defendant Local 562 would make substantial contributions in connection with the 1964 General Election and the 1966 General Election and that defendants Lawrence L. Callanan and John L. Lawler would consent to such contributions by issuing checks drawn upon the account of the Fund in the approximate total amount of One Hundred Fifty Thousand Dollars ($150,000)."

role of director of the present fund with full and unlimited control over its disbursements. The Union's business manager, petitioner Lawler, became the first director of the fund and was later succeeded by petitioner Callanan, whom one Local 562 member described as "the Union" in explaining his influence within the local. Moreover, no significant change was made in the regular and systematic method of collection of contributions at a prescribed rate based on hours worked, and Union agents continued to collect donations at jobsites on Union time. In addition, changes in the rate of contributions were tied to changes in the rate of members' assessments. In 1966, for example, when assessments were increased from 2½% to 3¾% of gross wages, the contribution rate was decreased from $1 to 50¢ per day worked, with the result that the change did not cause, in the words of the Union's executive board, "one extra penny cost to members of Local Union 562." At the same time, the contribution rate for nonmembers, who were not required to pay the prescribed travel card fee for working under Local 562's jurisdiction, remained the same at $2 per day worked, approximately matching the total assessment and contribution of members. Finally, in addition to political contributions, the fund used its monies for nonpolitical purposes, such as aid to financially distressed members on strike, and for a period of a few months, upon the vote of its members, even suspended collections in favor of contributions to a separate gift fund for petitioner Callanan.[3] Not surprisingly, various witnesses testified that

[3] These facts petitioners, in essence, concede:

"It was undisputed that contributions to the Fund were routinely made at regular intervals at job sites; that they were routinely collected by union stewards, foremen, area foremen, general foremen, or other agents of the union; that they were determined by a formula based upon the amount of hours or overtime hours

during the indictment period contributions to the fund were often still referred to as—and actually understood by some to be—assessments, or that they paid their contributions "voluntarily" in the same sense that they paid their dues or other financial obligations.[4]

On the other hand, the evidence also indicated that the political contributions by the fund were made from accounts strictly segregated from Union dues and assessments [5] and that donations to the fund were not, in fact,

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worked upon a job under the jurisdiction of the union; that they were at one rate for 562 members and at a different rate for members of other unions; that they began, continued and terminated with employment on a job under the jurisdiction of the union; that monies of the Fund were used to provide benefits to union members [as well as to make political contributions]; that non-members were not charged any dues and assessments, including travel card dues in the amount of eight dollars per month; that monies of the Fund were used in part to promote activities permitted to the union by its Constitution and by-laws; that contributions to the Fund were only requested and received from Journeyman Pipefitters working on jobs under the jurisdiction of Local 562, and not from any other classes of persons or organizations; that expenditures from the Fund were under the control of its director who was also the principal officer of the union; and that records used in the collection of the contributions to the Fund were similar to those employed from time to time by the union in the collection of its regular dues and assessments." Brief for Petitioners 52–53.

[4] See App. 197, 212; 270, 281–283; 294; 318, 323–324; 427, 432; 457, 462; 619–621; 698–699; 746; 843; 893; 903. Judge Van Oosterhout's panel opinion, adopted by the majority in the rehearing *en banc* below, 434 F. 2d 1127 (1970), succinctly makes the point: "It would appear to be unrealistic to believe that such a large number of workmen would make such substantial voluntary contributions to be used for political purposes unless they felt that their job security required them so to do." 434 F. 2d 1116, 1122 (1970).

[5] It also appears that the costs of administration of the fund, including the solicitation of contributions, were to some extent, though by no means entirely, similarly financed. See, *e. g.*, App. 17 (indictment apparently charging fund disbursements to pay for authorization cards, see n. 6, *infra*, and collection sheets); 95–96, 99,

necessary for employment or Union membership. The fund generally required contributors to sign authorization cards, which contained a statement that their donations were "voluntary . . . [and] no part of the dues or financial obligations of Local Union No. 562 . . . ," [6] and the testimony was overwhelming from both those who contributed and those who did not, as well as from the collectors of contributions, that no specific pressure was exerted, and no reprisals were taken, to obtain donations.[7]

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513 (one-time fund employee continuing to assist in fund bookkeeping activities in evenings and on Saturdays while on Union welfare fund payroll); 107–111 (another employee assisting in fund bookkeeping and collection activities while on Union welfare fund payroll before becoming full-time fund employee); 154 *passim* (Union agent collecting contributions on Union time); 787 (Callanan never on Union and fund payrolls at same time).

[6] The authorization card read, Brief for Petitioners 21–22:

"VOLUNTARY CONTRIBUTION AGREEMENT

"I, the undersigned, of my own free will and accord, desire to make regular contributions to the Political, Education, Legislative, Charity and Defense Fund which has been established and will be maintained by persons who are members of Local Union No. 562.

"I, therefore, agree to hereafter contribute ..% per 8 hour day to said fund and authorize my contributions to be used and expended by those in charge of the fund, in their sole judgment and discretion, for political, educational, legislative, charity and defense purposes.

"I understand that contributions are voluntary on my part and that I may revoke this agreement by a written notice to that effect mailed to the fund or to persons in charge thereof. I also understand that my contributions are no part of the dues or financial obligations of Local Union No. 562 and that the Union has nothing whatsoever to do with this fund.

"Signed .....

"Date: .....

"Witness: ....."

[7] See App. 171–172; 189–190; 239–240, 244–245; 256, 259–260; 299, 311; 322–323; 347; 359–361, 363–365; 382–384; 404, 411; 446; 460; 481–483; 529; 541, 543; 554–555; 561–562; 566, 570–571; 572–573; 577–578; 581; 584–585; 593–594; 600–602, 606; 617; 633–634; 641; 653; 659; 663; 669; 685, 689; 694; 700–702; 705; 710; 715; 718;

Significantly, the Union's attorney who had advised on the organization of the fund testified on cross-examination that his advice had been that payments to the fund could not be made a condition of employment or Local 562 membership, but it was immaterial whether contributions appeared compulsory to those solicited.[8]

Under instructions to determine whether on this evidence the fund was in reality a Union fund or the con-

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723; 731; 752–753; 766; 835; 840; 845–847; 850; 854; 858; 860; 865–866; 869, 871; 872; 875; 877; 887; 889; 894; 902; 915; 919; 925; 930; 944, 947; 948; 953; 956; 962. The only contrary evidence was the testimony of William Copeland, *id.*, at 194–213, a non-562 member who was laid off from a job two days after refusing to contribute when the Union steward explained that everyone had to pay. A co-worker, however, who was also a non-562 member, but paid his contributions, was discharged at the same time, and although he was shortly thereafter put on another 562 job, Copeland did not return to the Union hiring hall for further work. Moreover, Copeland acknowledged on cross-examination that he had "strong feelings" against Local 562, not only because of the political fund, but because of an earlier dismissal at another job involving a jurisdictional dispute between 562 and his own union.

[8] The cross-examination was as follows, *id.*, at 1067–1068:

"Q. Was it of any concern to you as to what the members who were being solicited thought about it, the atmosphere in which the solicitation was made, was that of any concern to you?

"A. None, because it made no difference as a matter of law and as a matter of procedure. I would have no way of knowing what assumptions people reach. I have no way of knowing what people think. My concern is what was said, what was done, and how it was done.

. . . . .

"Q. Well, in your opinion to [the organizers of the fund] did you not make it clear that in no way should it appear compulsory to the members who were asked to contribute?

"A. No, sir, I did no such thing. I simply told them that the contributions must not be made a condition of employment or a condition of Union membership and that was the extent of my advice to them on what they must do, what they must not do, and how they should do it."

tributors' fund,[9] the jury found each defendant guilty. The jury also found specially that a willful violation of § 610 was not contemplated, and the trial court im-

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[9] The court's instructions in this regard were as follows (emphasis added):

"You will note that Section 610 prohibits contributions by labor organizations for use in connection with an election for a federal office. It does not prohibit any person from making or agreeing to make such contributions or setting up an independent fund for such purpose separate and distinct from union funds either alone or in conjunction with others, simply because such person happens to be a member of a labor organization. That is, the statute is not violated unless the contribution is in fact and in the final analysis made by the labor organization.

"In this case evidence was offered by the Government to the effect that funds were contributed to or on behalf of candidates for federal office and that such funds were paid out upon checks drawn upon the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund. *It is necessary, therefore, that the evidence establish that the Pipefitters . . . Fund was in fact a union fund, that the money therein was union money, and that the real contributor to the candidates was the union. As to this issue, the defendants contend that the fund in question was a bona fide entity separate and apart from the union, established by the voluntary good faith act of members of the pipefitters Local 562 and others, from which contributions to candidates were made on behalf of the persons who created the fund and not on behalf of the union. On the other hand, the Government contends that the fund was a mere artifice or device set up by the defendants and others as a part of the alleged conspiracy to give the outward appearance of being an independent and separate entity but in fact constituting a part of union funds.*

"In determining whether the Pipefitters Voluntary Fund was a bona fide fund, separate and distinct from the union or a mere artifice or device, you should take into consideration all the facts and circumstances in evidence, and in such consideration you may consider

"1. Whether or not payments to the fund were routinely made at regular intervals at job sites,

"2. Whether or not payments to the fund were routinely col-

posed sentence accordingly. The Union was fined $5,000, while the individual defendants were each sentenced to one year's imprisonment and fined $1,000.

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lected by union stewards, foremen, area foremen, general foremen, or other agents of the union,

"3. Whether or not the payment to the fund was determined by a formula based upon the amount of hours or overtime hours worked upon a job under the supervision of the union,

"4. Whether or not payments to the fund were at one rate for 562 members and at a different rate for members of other unions,

"5. Whether or not payments to the fund began, continued and terminated with employment on a job under the jurisdiction of the union,

"6. Whether or not monies of the fund were used to provide benefits to union members in their capacity as members,

"7. Whether or not payments to the fund by members of other unions were in lieu of payments to the union in the form of travel card dues in the amount of eight dollars per month,

"8. Whether or not monies of the fund were used in part to promote activities properly permitted to the union pursuant to Section 2.05 of its Constitution and by-laws,

"9. Whether or not payments to the fund were made by those affiliated with the union to the general exclusion of other classes of persons or organizations,

"10. Whether or not contributions to the fund were required as a condition of employment or continued employment or membership in Local 562,

"11. Whether or not the individuals who contributed to said fund signed a voluntary contribution agreement,

"12. Whether or not the contributions to said fund were made voluntarily or involuntarily,

"13. Whether or not the monies contributed to said fund were kept separate and distinct from the funds of Local 562,

"14. Whether or not some persons who worked under the jurisdiction of Local 562 did not contribute to said fund,

"15. Whether or not the monies of said fund were used in part to promote activities which were prohibited to Local 562 by its Constitution and by-laws,

"16. Whether or not said fund was established and maintained pursuant to the advice of counsel,

"17. Whether or not the monies of said fund were reported to

On appeal to the Court of Appeals for the Eighth Circuit, petitioners contended that the indictment failed to allege, and the evidence was insufficient to sustain, a conspiracy to violate § 610, and that § 610, on its face or as construed and applied, abridged their rights under the First, Fifth, Sixth, and Seventeenth Amendments and Art. I, § 2, of the Constitution. They argued further that the special finding by the jury that a willful violation of § 610 was not contemplated effectively resulted in acquittal, since such willfulness was an essential element of the conspiracy under 18 U. S. C. § 371. The Court of Appeals in a four-to-three *en banc* decision, 434

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the Department of Labor on the LM–2 forms, which required the reporting of monies of Local 562,

"18. Whether or not expenditures from the fund were under the control of the union and its officers,

"19. Whether or not records used in the collection of the payments to the fund are similar to those employed from time to time by the union in the collection of its regular dues and assessments.

"If upon consideration of all the facts and circumstances in evidence you find that the contributions to the candidates for federal office for political purposes were in fact made out of union funds by the union, and that the individual defendants as officers of the union, willfully consented thereto, then you may take this fact into consideration together with other facts in evidence in determining whether there was a prior understanding or agreement so to do.

. . . . . .

"A great deal of evidence has been introduced on the question of whether the payments into the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund by members of Local 562 and others working under its jurisdiction were voluntary or involuntary. This evidence is relevant for your consideration, along with all other facts and circumstances in evidence, in determining whether the fund is a union fund. However, the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money."

F. 2d 1127 (1970), adopted Judge Van Oosterhout's panel opinion rejecting each of these claims, 434 F. 2d 1116 (1970). The gist of the court's decision, insofar as pertinent here, was that the Pipefitters fund was a subterfuge through which the Union made political contributions of Union monies in violation of § 610, as demonstrated by the evidence that the fund regularly served Union purposes and that the donors to the fund contributed in the belief that their job security depended upon it. We granted certiorari. 402 U. S. 994 (1971).

After we heard oral argument, the President on February 7, 1972, signed into law the Federal Election Campaign Act of 1971, which in § 205 amends 18 U. S. C. § 610, see *infra,* at 409–410, effective April 7, 1972. See Federal Election Campaign Act of 1971, § 406, 86 Stat. 20. We, accordingly, requested the parties to file supplemental briefs addressing the impact of that amendment on this prosecution.[10] Having considered those briefs, we now hold that § 205 of the Federal Election Campaign Act merely codifies prior law, with one possible exception pertinent to this case; that the change in the law, if in fact made, does not in any event require this prosecution to abate; but that the judgment below must, nevertheless, be re-

[10] The questions posed to the parties were:

"Does § 205 of the Federal Election Campaign Act of 1971 [P. L. 92–225] affect the decision in this case, and, if so, with what result? More particularly, does § 205 effect a substantive change in 18 U. S. C. § 610 in any way material to this case, as, for example, by altering any of the attributes of permissible union political organizations, such as the method of organization or administration or the method of solicitation or collection of contributions? If so, must this prosecution abate under the doctrine of *United States* v. *The Schooner Peggy,* 1 Cranch 103, and its progeny? Or does the federal saving statute, 1 U. S. C. § 109, nullify any abatement of the prosecution? In answering the latter question, what effect should be given to *Hamm* v. *Rock Hill,* 379 U. S. 306?"

versed because of erroneous jury instructions.[11] This disposition makes decision of the constitutional issues premature, and we therefore do not decide them. Cf.

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[11] Petitioners Callanan and Lawler died pending our decision. The judgment affirming the convictions of those petitioners will therefore be vacated with directions to the District Court to dismiss the indictment against them. *Durham* v. *United States*, 401 U. S. 481 (1971). The remaining petitioners press the argument, rejected by the Court of Appeals, that the special finding by the jury that a willful violation of § 610 was not contemplated amounted to an acquittal, since such willfulness was an essential element of the conspiracy under 18 U. S. C. § 371. The trial court apparently required a special finding to determine whether the substantive offense that petitioners were charged with conspiring to commit was a misdemeanor or a felony. See 18 U. S. C. § 610. That, in turn, was relevant for imposing sentence under § 371. See n. 1, *supra*. Petitioners contend that § 371 punishes a conspiracy to commit a *malum prohibitum* such as § 610 only when the object of the conspiracy is known to have been unlawful, which, so the argument goes, the jury found not to have been the case here by virtue of its special finding. This argument is not persuasive. Petitioners not only failed to object to the trial court's requirement that the jury return a special finding as inconsistent with the general charge, but also failed to move for acquittal on the ground now offered once the special finding was returned. More important, even assuming, *arguendo*, the correctness of petitioners' premise that knowledge of the reach of § 610 was a requisite for conviction, but see *Keegan* v. *United States*, 325 U. S. 478, 506 (1945) (Stone, C. J., dissenting); see generally Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 936–937 (1959), petitioners would still be entitled at best to a new trial, not acquittal. The trial court specifically instructed the jury:

"The crime charged in this case requires proof of specific intent before a defendant can be convicted. . . . *To establish specific intent the Government must prove that the defendant knowingly, willfully and purposely did an act which the law forbids.* . . .

"An act is done 'knowingly' if done voluntarily and with knowledge of the facts, and not because of mistake or inadvertence or other innocent reason.

"*An act is done 'willfully' if done voluntarily and purposely and*

United States v. *Auto Workers,* 352 U. S. 567 (1957); *United States* v. *CIO,* 335 U. S. 106 (1948).

I

We begin with an analysis of § 610.

First. The parties are in agreement that § 610, despite its broad language, does not prohibit a labor organization from making, through the medium of a political fund organized by it, contributions or expenditures in connection with federal elections, so long as the monies expended are in some sense volunteered by those asked to contribute. Thus, the Government states in its brief, "Nor do we dispute [petitioners'] conclusion, following their review of the legislative history of Section 610, that a union could 'establish a political organization for the purpose of receiving ear-marked political monies directly from [voluntary contributions of] union members . . . .'" Brief for the United States 27 n. 7, quoting Brief for Petitioners 62. See also Brief for the United States 30. This construction of § 610 is clearly correct.[12]

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with the specific intent to do that which the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

"An act is done 'unlawfully' if done contrary to law." App. 1110 (emphasis added). See also *id.,* at 1116 (instruction on good-faith belief in legality of object of conspiracy).

In view of this instruction the jury's special finding may well have been inconsistent with its general verdict, but that, we hold, could require only reversal, not acquittal.

[12] The dissent declines to accept this agreement of the parties on the ground that the language of § 610 is so clear on its face that there is no warrant for turning to the legislative history of the provision. The contrary is plainly true: Section 610 wholly fails to specify what funds a labor organization is barred from contributing or expending in connection with a federal election. Moreover, as we shall shortly see, the dissent's "facial" interpretation of § 610 was expressly rejected by its proponents in 1947, both from concern that it would raise constitutional questions of invasion of First Amendment freedoms, and in an effort to ensure enactment of the

The antecedents of § 610 have previously been traced in *United States* v. *Auto Workers* and *United States* v. *CIO*, both *supra*. We need recall here only that the prohibition in § 313 of the Federal Corrupt Practices Act of 1925, 43 Stat. 1074, on contributions by corporations in connection with federal elections was extended to labor organizations in the War Labor Disputes Act of 1943, 57 Stat. 163, but only for the duration of the war. As the Court noted in *CIO*, *supra*, at 115, "It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose." The prohibition on contributions was then permanently enacted into law in § 304 of the Labor Management Relations Act, 1947, 61 Stat. 159, with the addition, however, of a proscription on "expenditures" and an extension of both prohibitions to payments in connection with federal primaries and political conventions as well as federal elections themselves. Yet, neither prohibition applied to payments by union political funds in connection with federal elections so long as the funds were financed in some sense by the

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law. In addition, Congress has only recently in the Federal Election Campaign Act of 1971 decisively rejected that interpretation on the basis of the very legislative history found dispositive herein. See n. 20, *infra*. Congress in 1947 and again only a few months ago was able to come to this conclusion solely because of the facial ambiguity of the provision.

It is also worth noting that the dissent's own analysis reveals the necessity for resorting to the legislative history of the statute. The dissent, too, appreciates "the freedom of union members, as well as that of employees and stockholders of corporations, to make uncoerced political contributions." If that is so, it obviously becomes imperative to determine the contours of that freedom, which, in turn, requires investigation of the legislative history of § 610.

voluntary donations of the union membership. Union political funds had come to prominence in the 1944 and 1946 election campaigns and had been extensively studied by special committees of both the House and the Senate. Against the backdrop of the committee findings and recommendations, the Senate debates upon the reach of § 304 attached controlling significance to the voluntary source of financing of the funds. The unequivocal view of the proponents of § 304 was that the contributions and expenditures of voluntarily financed funds did not violate that provision.

The special committees investigating the 1944 and 1946 campaigns devoted particular attention to the activities of the Political Action Committee (PAC) of the Congress of Industrial Organizations (CIO) because they had stirred considerable public controversy. See H. R. Rep. No. 2093, 78th Cong., 2d Sess., 2–6 (1945); S. Rep. No. 101, 79th Cong., 1st Sess., 20–24, 57–59 (1945); H. R. Rep. No. 2739, 79th Cong., 2d Sess., 30–31 (1946). See also S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess., 34 (1947). The committee findings were that PAC had been established by the executive board of the CIO in July 1943; that it consisted of a national office and 14 regional offices advising and coordinating numerous state and local political action committees; that its connection to the CIO was close at every level of organization; that its program, adopted by the CIO convention in November 1943, had included the re-election of President Roosevelt and the election of a "progressive" Congress; that it had initially been financed by sizable pledges from the treasuries of CIO international unions and that some of these funds had been expended in federal primaries; but that, following the nomination in July 1944 of President Roosevelt for re-election, it was generally financed by $1 contributions knowingly and freely made by individual CIO members; and that these monies were used for

political educational activities, including get-out-the-vote drives, but were not directly contributed to any candidate or political committee. Thus, PAC had limited its direct contributions in federal campaigns to primaries, to which the Act at the time expressly did not apply, and restricted its activities in the elections themselves to so-called "expenditures" rather than "contributions." The Senate Special Committee on Campaign Expenditures concluded in 1945 that, in these circumstances, there was "no clear-cut violation" by PAC of § 313 of the Corrupt Practices Act. S. Rep. No. 101, *supra,* at 23. Although there was agreement within the committee that § 313 should be extended to federal primaries and nominating conventions because of their importance in determining final election results, *id.,* at 81–82,[13] there was disagreement on whether § 313 should also be amended to proscribe "expenditures" in addition to "contributions." A majority believed that it should not be, in part because the amendment "would tend to limit the rights of freedom of speech, freedom of the press, and freedom of assembly as guaranteed by the Federal Constitution." *Id.,* at 83.[14] Senators Ball and Ferguson, who dissented from this conclusion, nevertheless conceded that even as to "expenditures" "[i]f the Political Action Committee had been organized on a voluntary basis and obtained its funds from voluntary individual contributions from the beginning, there could be no quarrel with its activities or program and in fact both are desirable in a democracy." *Id.,* at 24. The

[13] See also H. R. Rep. No. 2093, 78th Cong., 2d Sess., 9 (1945); S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess., 36 (1947). But see H. R. Rep. No. 2739, 79th Cong., 2d Sess., 46–47 (1946).

[14] The Senate committee did recommend that the use of general union funds to finance the distribution of a political pamphlet in connection with a federal election be prosecuted as a test case to determine the scope of the term "contribution" in § 313. S. Rep. No. 101, 79th Cong., 1st Sess., 57–59 (1945).

House Campaign Expenditures Committee in 1946, however, strongly urged the adoption of a prohibition on "expenditures" in terms condemning the activities of PAC without regard to the source of its funds.[15]

Then, in 1947, Congress made permanent the application of § 313 of the Corrupt Practices Act to labor organizations and closed the loopholes that were thought to have been exploited in the 1944 and 1946 elections. These changes were embodied in § 304 of the labor bill introduced by Representative Hartley, which was adopted by the House and the conference committee with little apparent discussion or opposition.[16] The provision, how-

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[15] H. R. Rep. No. 2739, *supra,* n. 13, at 39–40, 43, 46. The House Committee declared, for example, *id.,* at 43:

"The CIO Political Action Committee is a committee of the Congress of Industrial Organizations and, as such, under the Corrupt Practices Act, is likewise as a labor union prohibited [from] making any contribution in connection with any election at which a Representative to Congress is to be elected.

"The committee feels that whether or not the activities carried on by these organizations and the payment of salaries to men known as organizers or advisers who go into the congressional districts and actively assist in local campaign activities, and expenditures for radio time, newspaper advertising, printing and distribution of handbills and posters, and for transportation of voters, constitute violations of the letter of the Federal Corrupt Practices Act, they certainly constitute violations of the spirit and intent of the law and the [Act] should be so amended as to clearly and distinctly set out that such activities are prohibited."

The Senate committee studying the 1946 campaign joined this recommendation, but without any reference to PAC. See S. Rep. No. 1, pt. 2, *supra,* n. 13, at 38–39. See also H. R. Rep. No. 2093, *supra,* n. 13, at 9, 10–11 (noting the controversy over the scope of the term "contribution" and expressing views seemingly sympathetic with prohibiting "expenditures").

[16] See H. R. Rep. No. 245, 80th Cong., 1st Sess., 46 (1947); 93 Cong. Rec. 3428, 3522–3523 (1947); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 67–68 (1947). See also 93 Cong. Rec. 6389 (critical remarks of Rep. Sabath following the conference com-

ever, provoked lengthy debate on the Senate floor when Senator Taft, sponsor of the Senate labor bill and one of the Senate conferees, sought to explain its import. That debate compellingly demonstrates that voluntarily financed union political funds were not believed to be prohibited by the broad wording of § 304. Thus, Senator Taft stated:

> "[I]t seems to me the conditions are exactly parallel, both as to corporations and labor organizations. [An association of manufacturers] receiving corporation funds and using them in an election would violate the law, in my opinion, exactly as the PAC, if it got its fund from labor unions, would violate the law. *If the labor people should desire to set up a political organization and obtain direct contributions for it, there would be nothing unlawful in that.* If the National Association of Manufacturers, we will say, wanted to obtain individual contributions for a series of advertisements, and if it, itself, were not a corporation, then, just as in the case of PAC, it could take an active part in a political campaign." 93 Cong. Rec. 6439 (1947) (emphasis added).

In response to a question by Senator Magnuson whether unions would be prohibited from publishing a newspaper "favoring a candidate, mentioning his name, or endorsing him for public office," Taft continued:

> "No; I do not think it means that. The union can issue a newspaper, and can charge the members for the newspaper, that is, the members who buy

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mittee report). The only statement offering a rationale for § 304 was made by Representative Robsion after the House had voted to override President Truman's veto of the Act. Robsion stressed that it was unfair to union members to allow the expenditure of union funds in support of candidates for federal office whom they opposed. See 93 Cong. Rec. 7492.

> copies of the newspaper, and the union can put such matters in the newspaper if it wants to. The union can separate the payment of dues from the payment for a newspaper if its members are willing to do so, that is, if the members are willing to subscribe to that kind of a newspaper. I presume the members would be willing to do so. A union can publish such a newspaper, *or unions can do as was done last year, organize something like the PAC, a political organization, and receive direct contributions, just so long as members of the union know what they are contributing to, and the dues which they pay into the union treasury are not used for such purpose." Id.,* at 6440 (emphasis added).

When Magnuson rejoined that "all union members know that a part of their dues in these cases go for the publication of some labor [newspaper] organ," Taft concluded:

> "Yes. How fair is it? We will assume that 60 percent of a union's employees are for a Republican candidate and 40 percent are for a Democratic candidate. Does the Senator think the union members should be forced to contribute, without being asked to do so specifically, and without having a right to withdraw their payments, to the election of someone whom they do not favor? Assume the paper favors a Democratic candidate whom they oppose or a Republican candidate whom they oppose. Why should they be forced to contribute money for the election of someone to whose election they are opposed? *If they are asked to contribute directly to the support of a newspaper or to the support of a labor political organization, they know what their money is to be used for and presumably approve it. From such contribution the organization can spend all the money it wants to with respect to such*

> *matters. But the prohibition is against labor unions using their members' dues for political purposes,* which is exactly the same as the prohibition against a corporation using its stockholders' money for political purposes, and perhaps in violation of the wishes of many of its stockholders." *Ibid.* (emphasis added).

See also *id.*, at 6437, 6438.

Senator Taft's view that a union cannot violate the law by spending political funds volunteered by its members was consistent with the legislative history of the War Labor Disputes Act and an express interpretation given to that Act by the Attorney General in 1944.[17] His

[17] See Hearings on H. R. 804 and H. R. 1483, before a Subcommittee of the House Committee on Labor, 78th Cong., 1st Sess., 117, 133 (1943) (statements of Rep. Landis, sponsor of the measure) ("Individual union members would not be prohibited from contributing." "If you have a membership of 500,000, and all the Democrats wanted to give a dollar apiece, and there were 300,000, that would be $300,000. . . . Your whole organization could give as high as that if they donated only a dollar apiece"); letter from Attorney General Biddle to Sen. E. H. Moore (Sept. 23, 1944) (emphasis added), reproduced in Department of Justice Press Release, Sept. 25, 1944, and noted in 4 Law. Guild Rev., No. 5, p. 49 (1944):

"You also point out [the Attorney General wrote] that committees composed of members of unions are engaged in the solicitation of funds from individual union members and you assert that committees of this kind 'are as much a labor organization as a union organization itself.' This contention is inconsistent with the provisions of the statute. In amending section 313 of the Corrupt Practices Act, the [War Labor Disputes Act] provided that for the purposes of the amendment the words 'labor organization' should have the same meaning they have under the National Labor Relations Act. . . . I think it clear that committees of the kind that you describe are not labor organizations within the meaning of this definition and they would not be recognized as bargaining agencies by the National Labor Relations Board. *Even if it were true that these committees were identical with the*

view also reflected concern that a broader application of § 610 might raise constitutional questions of invasion of First Amendment freedoms, and he wished particularly to reassure colleagues who had reservations on that score and whose votes were necessary to override a predictable presidential veto, see 93 Cong. Rec. 7485, of the Labor Management Relations Act.[18] We conclude, accordingly, that his view of the limited reach of § 610, entitled in any event to great weight, is in this instance controlling. Cf. *Newspaper Pub. Assn.* v. *NLRB,* 345 U. S. 100, 106–111 (1953); *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, 392 n. 15 (1951). We therefore hold that § 610 does not apply to union contributions and expenditures from political funds financed in some sense by the voluntary donations of employees. Cf. *United States* v. *Auto Workers,* 352 U. S., at 592; *United States* v. *CIO,* 335 U. S., at 123.

Section 205 of the Federal Election Campaign Act confirms this conclusion by adding at the end of § 610 the following paragraph:

> "*As used in this section, the phrase 'contribution or expenditure'* shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank

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labor organizations to which their members belong—which I believe not to be the fact—there would still be no violation of law because the statute applies to contributions made by labor organizations and in this case the contributions are made by individuals and not by the committees."

[18] See, *e. g.,* 93 Cong. Rec. 6448, 6522–6523 (exchange between Sen. Pepper, who, in opposing § 304, decried it as Republican legislation in contravention of the First Amendment, and Sen. Ellender, who, as a Democratic representative on the conference committee, rose in support of Sen. Taft's construction). See also *United States* v. *CIO,* 335 U. S. 106, 120 (1948).

made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but *shall not include* communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; *the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: Provided, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment,* or by monies obtained in any commercial transaction." 86 Stat. 10 (emphasis added).

This amendment stemmed from a proposal offered by Representative Hansen on the House floor, see 117 Cong. Rec. 43379, to which the Senate acquiesced in conference. See *id.*, at 46799 (joint conference committee report). Hansen stated that the purpose of his proposal was, with one exception not pertinent here,[19] "to codify the court decisions interpreting [and the legislative history explicating] section 610 . . . and to spell out in

[19] The exception involved whether nonpartisan registration and get-out-the-vote campaigns could be directed to the public at large. See 117 Cong. Rec. 43379–43381, 43390.

more detail what a labor union or corporation can or cannot do in connection with a Federal election." [20] Moreover, there was substantial agreement among his colleagues that the effect of his amendment was, in fact, mere codification and clarification,[21] and even those who disagreed did not dispute that voluntarily financed union political funds are permissible. Indeed, Representative Crane, who led the opposition to the Hansen amendment,[22] himself had written the House committee provision for which the Hansen amendment was, in effect, substituted.[23] Mr. Crane's provision, like the Hansen amendment, was said in some measure to codify existing law,[24] and would also have specifically authorized voluntary funds.[25] This consensus that has now been captured in

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[20] *Id.*, at 43379. See also 118 Cong. Rec. 329. In determining that § 610 has always permitted unions to organize voluntarily financed political funds, Hansen relied, as we have done, on Sen. Taft's floor explanation of § 304 of the Hartley bill. See 117 Cong. Rec. 43381; 118 Cong. Rec. 329.

[21] See, *e. g.*, 117 Cong. Rec. 43381 (remarks of Rep. Hays), 43383–43385 (remarks of Rep. Thompson), 43388–43389 (remarks of Reps. Steiger and Gude).

[22] See, *e. g.*, 117 Cong. Rec. 43382, 43386, 43390–43391; 118 Cong. Rec. 323–324.

[23] The Hansen proposal was offered as an amendment to an amendment in the nature of a substitute to the bill as reported out of committee. Although the substitute amendment had no provision relating to § 610, see 117 Cong. Rec. 43365–43366, it was expected that the Crane provision would be taken up as an amendment to the substitute amendment if the Hansen amendment failed to carry. See, *e. g.*, *id.*, at 43389–43390 (remarks of Reps. Devine and Crane). [REPORTER'S NOTE: The remarks of Rep. Devine, whose name was erroneously omitted from 117 Cong. Rec. 43389, col. 3, par. 5, line 1, begin with the language, "Mr. Chairman, I rise in opposition . . . ."]

[24] See, *e. g.*, *id.*, at 43389–43390 (remarks of Rep. Devine).

[25] The Crane provision would have added the following paragraph at the end of § 610:

"As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, ad-

express terms in § 610 cannot, of course, by itself conclusively establish what Congress had in mind in 1947. But it does " 'throw a cross light' " on the earlier enactment that, together with the latter's legislative history, demonstrates beyond doubt the correctness of the parties' common ground of interpretation of § 610. *Michigan Nat. Bank* v. *Michigan*, 365 U. S. 467, 481 (1961) (quoting L. Hand, J.). Cf. *NLRB* v. *Allis-Chalmers Mfg. Co.*,

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vance, deposit, or gift, of money, or any services, or anything of value to any candidate, compaign [*sic*] committee, or political party or organization, in connection with any election to any of the offices referred to in this section, including any expenditure in connection with get-out-the-vote activities. *Nothing in this section shall preclude an organization from establishing and administering a separate contributory fund for any political purpose, including voter registration or get-out-the-vote drives, if all contributions, gifts, or payments to such fund are made freely and voluntarily, and are unrelated to dues, fees, or other moneys required as a condition of membership in such organization or as a condition of employment.*" H. R. Rep. No. 92–564, p. 19 (1971) (emphasis different).

The principal bone of contention between the proponents and opponents of the Hansen amendment when it was first introduced was whether union or corporation treasuries could and should be available to finance get-out-the-vote drives. Representative Frenzel, for example, summarized the debate shortly before the House vote on the Hansen amendment was taken, 117 Cong. Rec. 43391:

"[I]t is important that we understand neither the Crane amendment nor the Hansen amendment is directed toward voluntary or COPE [the successor of PAC] moneys. What we are talking about is Treasury money. The principal distinction is that the Hansen amendment would allow its use to get-out-the-vote drives for union members while the Crane amendment would not."

Following the conference committee report, Crane rose once again in opposition to the Hansen amendment, this time and for the first time criticizing the amendment in its treatment of union political funds. The dispute centered then, however, not on whether voluntary funds were permissible, but on exactly what their prerequisites were. See *infra*, at 422–426.

388 U. S. 175, 194 (1967); *NLRB* v. *Drivers Local Union,* 362 U. S. 274, 291–292 (1960).

Second. Where the litigants part company is in defining precisely when political contributions and expenditures by a union political fund fall outside the ambit of § 610. The Government maintains, first, that a valid fund may not be the alter ego of the sponsoring union in the sense of being dominated by it and serving its purposes, regardless of the fund's source of financing:

> "Section 610 was violated [the Government explains] if in fact the [Pipefitters] Fund was merely a subterfuge through which the union itself made proscribed political contributions, irrespective of whether the moneys so contributed were voluntarily given to the Fund by the contributors. . . . [T]he evidence that the payments were voluntary [was only a factor relevant] in determining if it was the union or the Fund as a separate entity that made the political contributions in question . . . ." Brief for the United States in Opposition to the Petition for Certiorari 7.

See also Brief for the United States 24. The requirement that the fund be separate from the sponsoring union eliminates, in the Government's view, "the corroding effect of money employed in elections by aggregated powers," *United States* v. *Auto Workers,* 352 U. S., at 582, which this Court has found to be one of the dual purposes underlying § 610. See *id., passim; United States* v. *CIO,* 335 U. S., at 113, 115. The Government urges, secondly, that in accordance with the legislative intent to protect minority interests from overbearing union leadership, which we have found to be the other purpose of § 610, see *ibid.,* the fund may not be financed by monies actually required for employment or union membership *or* by payments that

are effectively assessed, that is, solicited in circumstances inherently coercive.[26] Petitioners, on the other hand, contend that, to be valid, a political fund need not be distinct from the sponsoring union and, further, that § 610 permits the union to exercise institutional pressure, much as recognized charities do, in soliciting donations. See Brief for Petitioners 71, 73 n. 22.

We think that neither side fully and accurately portrays the attributes of legitimate political funds. We hold that such a fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments.[27] We hold, too, that, although solicitation by union officials is permissible, such solicitation must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power. Thus, we agree with the second half of the Government's position, but reject the first.

As Senator Taft's remarks quoted above indicate, *supra,* at 406–408, the test of voluntariness under § 610 focuses on whether the contributions solicited for political use are knowing free-choice donations. The dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union

[26] "A union member [the Government explains] may find irresistible the union's demand—through its steward on the jobsite—for contributions fixed as a regular percentage of days worked and money earned. Section 610 reduces this institutional pressure by forbidding the unions from making direct political contributions from money that is effectively assessed." Brief for the United States 38. As we shall see, *infra,* at 435–442, the Government's theory in prosecuting this case focused on the first, but not the second, of its arguments here presented.

[27] For the scope of the required segregation of funds, see *infra,* at 428–432.

member. Whether the solicitation scheme is designed to inform the individual solicited of the political nature of the fund and his freedom to refuse support is, therefore, determinative.

Nowhere, however, has Congress required that the political organization be formally or functionally independent of union control or that union officials be barred from soliciting contributions or even precluded from determining how the monies raised will be spent. The Government's argument to the contrary in the first half of its position is based on a misunderstanding of the purposes of § 610.[28] When Congress pro-

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[28] The Government relies on *United States* v. *Lewis Food Co.*, 366 F. 2d 710 (1966), where the Court of Appeals for the Ninth Circuit upheld an indictment under § 610 that failed to allege, *inter alia,* that an expenditure by a corporation in connection with a federal election was made against the wishes of an individual stockholder. The court there explained, *id.*, at 713–714:

"The statute itself . . . does not provide an exception when stockholders consent. We are of the opinion that Congress intended to insure against officers proceeding in such matters without obtaining the consent of shareholders by forbidding all such expenditures.

"The Supreme Court stated that the other legislative motivation [in addition to the protection of minority interests] for enactment of legislation such as section 610 was the necessity for destroying the influence over elections which corporations exercised through financial contributions. [*United States* v. *CIO,* 335 U. S., at 113.] This consideration would be meaningless if a corporation could make expenditures for activities otherwise forbidden by section 610 by simply obtaining unanimous consent of its shareholders. In the *Auto Workers* case, the indictment contained no allegation that the expenditure of union funds [to finance television broadcasts designed to influence the electorate at large] was contrary to the wish of members. Nevertheless, the Supreme Court found the indictment sufficient."

The Ninth Circuit's reliance on *Auto Workers* was misplaced. The indictment there did allege, as we noted, 352 U. S., at 584, " 'that the fund used came from the Union's dues, was not obtained by

hibited labor organizations from making contributions or expenditures in connection with federal elections, it was, of course, concerned not only to protect minority interests within the union but to eliminate the effect of aggregated wealth on federal elections. But the aggregated wealth it plainly had in mind was the general union treasury—not the funds donated by union members of their own free and knowing choice. Again, Senator Taft adamantly maintained that labor organizations were not prohibited from expending those monies in connection with federal elections. Indeed, Taft clearly espoused the union political organization merely as an alternative to permissible direct political action by the union itself through publications endorsing candidates in federal elections. The only conditions for that kind of direct electioneering were that the costs of publication be financed through individual subscriptions rather than through union dues and that the newspapers be recognized by the subscribers as political organs

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voluntary political contributions or subscriptions from members of the Union, and was not paid for by advertising or sales.'" In *Auto Workers*, therefore, we had no occasion to address the legitimacy of union-controlled political contributions financed from the knowing free-choice donations of union members. More important, the court in *Lewis* labored under the same misapprehension on which the Government's argument rests here—namely, that the legislative purpose to eliminate the effects of aggregated wealth on federal elections reaches union- or corporation-controlled contributions and expenditures financed not from the general treasury, but from voluntary donations.

By saying this, we do not mean to suggest that the result in *Lewis* was incorrect. To the contrary, an indictment that alleges a contribution or expenditure from the general treasury of a union or corporation in connection with a federal election states an offense. See nn. 47 and 48, *infra*. The unanimous vote of the union members or stockholders may at most (but we need not now decide) be a defense.

that they could refuse to purchase.[29] Neither the absence of even a formally separate organization, the solicitation of subscriptions by the union, nor the method for choosing the candidates to be supported was mentioned as being material. Similarly, the only requirements for permissible political organizations were that they be funded through separate contributions and that they be recognized by the donors as political organizations to which they could refuse support. As Taft said, "If the labor people should desire to set up a political organization and obtain direct contributions for it, there would be nothing unlawful in that," "just so long as members of the union know what they are contributing to, and the dues which they pay into the union treasury are not used for such purpose." *Supra,* at 406, 407.

The operations of PAC, the organization that dominated the congressional investigations of the 1944 and 1946 campaigns and that was expressly approved by the 80th Congress, are especially instructive in this regard. Significantly, it was exactly the knowing free-choice donation test of voluntariness that PAC sought scrupulously to observe in soliciting contributions. Sidney Hillman, Chairman of PAC, testified before the House Campaign Expenditures Committee in 1944:

> "[W]e have utilized every avenue to tell the people not to become overenthusiastic about collections. We want this contribution on a voluntary basis and would rather have no contribution than to have any

[29] In *United States* v. *CIO,* this Court, of course, went further than Senator Taft's comments would allow by holding that § 304 did not bar a union from using union funds to publish a periodical, in regular course and for distribution to those accustomed to receiving it, that urged union members to vote for a candidate for Congress. The Court, however, arrived at that construction because the contrary interpretation would create "the gravest doubt" of the statute's constitutionality. 335 U. S., at 121.

> taint of coercion or even any interference. We do not want any money except from those who want to see the reelection of Roosevelt." [30]

PAC was, nevertheless, generally regarded, not as a functionally separate organization (except for its method of financing [31]), but as an instrumentality of the CIO, itself subsumed within the definition of "labor organization." [32] It was, as we have seen, established by

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[30] Hearings before the House Committee to Investigate Campaign Expenditures on H. Res. 551, 78th Cong., 2d Sess., 79 (1944). See also *id.*, at 16–17. PAC's method of collection of contributions appears, in large measure, to have been true to Hillman's words, since both its political and voluntary nature were well known. See *id.*, at 51, 76–79, 712–713, 728–729, 800–801, 822–823, 844–845, 851, 864–866, 871, 880, 885–886, 921–925, 928, 935–936, 941, 946, 962, 964, 988, 999, 1017, 1021–1031, 1033–1038, 1041. In some instances complaints were lodged that pressure had been exercised in obtaining donations, and the House Committee noted in its report that in California some PAC monies were taken directly from union treasuries and "that at least one local union . . . upon vote by its entire membership levied an assessment of 25 cents per month upon each member . . . ." H. R. Rep. No. 2093, *supra*, n. 13, at 6. This, nevertheless, was recognized as an exception "[to] the general national plan" following Roosevelt's nomination for re-election, under which PAC was generally financed by individual contributions "largely . . . taken by shop stewards outside working hours." *Id.*, at 5. Indeed, the amount of individual contributions actually collected by PAC evidences that it successfully informed CIO members that donations were not mandatory assessments. Cf. L. Overacker, Presidential Campaign Funds 61 (1946). From an estimated CIO membership of five million PAC might have collected $5 million at the requested rate of $1 a member. Yet the national PAC office, which received 50¢ of each $1 donated, obtained only $376,910.77 in 1944, S. Rep. No. 101, *supra*, n. 14, at 23, suggesting contributions by less than 800,000 CIO members. See also H. R. Rep. No. 2739, *supra*, n. 13, at 31 ($218,415.98 received in 1946).

[31] See *infra*, at 428–429.

[32] Indeed, in a letter to regional PAC directors, the national PAC office itself referred to the organization "as an instrumentality of the Congress of Industrial Organizations." S. Rep. No. 101, *supra*, n. 14, at 22. See also Hearing before the Senate Special Committee to

the executive board of the CIO, its program was adopted at the national CIO convention, and its relationship to the CIO was close at every level of organization.[33] Furthermore, union agents generally collected contributions, H. R. Rep. No. 2093, 78th Cong.,

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Investigate Presidential, Vice Presidential, and Senatorial Campaign Expenditures on S. Res. 263, 78th Cong., 2d Sess., 19 (1944) (testimony of Sidney Hillman) ("We just speak and act for the C. I. O. organizations"); House Hearings, *supra,* n. 30, at 839–840 (testimony of state PAC president) (local PAC is agent of union local). It is true that Senator Taft stated at one point in the Senate debates that "[t]he PAC is a *separate* organization which raises its own funds for political purposes, and does so perfectly properly." 93 Cong. Rec. 6437 (1947) (emphasis added). But if meant to indicate anything more than that PAC had a *formal* identity separate from the CIO, this isolated statement was clearly inconsistent with well-known facts about the organization. Moreover, neither Taft nor any of his colleagues appears to have attached any particular significance to the statement. Nor can we, in view of Taft's endorsement of direct union electioneering through political newspapers paid for through subscriptions. See *supra,* at 406–408, 416–417. It is also true that the Attorney General in his letter to Senator Moore in 1944 opined that committees like PAC were not "labor organizations" within the meaning of the War Labor Disputes Act inasmuch as they were not bargaining agencies. See n. 17, *supra.* But the Senate Campaign Expenditures Committee, implicitly in 1945, and the House Committee, expressly in 1946, rejected that conclusion. See S. Rep. No. 101, *supra,* n. 14, at 23; H. R. Rep. No. 2739, *supra,* n. 13, at 43 (quoted in n. 15, *supra*). See also House Hearings, *supra,* n. 30, at 27 (whether PAC was a "labor organization" "highly debatable" in opinion of PAC counsel).

[33] The House Committee observed in its 1945 report, H. R. Rep. No. 2093, *supra,* n. 13, at 5:

"The relationship between the Political Action Committee and the Congress of Industrial Organizations is . . . close on every level of organization. Mr. Hillman is president of the Amalgamated Clothing Workers of America, as well as chairman of the Political Action Committee. The State political action committees typically utilize the existing mechanism of the Congress of Industrial Organizations State councils; and the local political action committees are similarly set up as committees of the Congress of Industrial Organizations locals."

2d Sess., 5 (1945), and the union leadership was instrumental in choosing candidates to be supported.[34] Thus, far from being a separate organization sprouting from the desires of the rank and file to engage in political action, PAC, the paradigm union political fund, was a medium for organized labor, conceived and administered by union officials, to pursue through the political forum the goals of the working man.[35] And the only prerequisite for its con-

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[34] The national PAC organization did not endorse senatorial, congressional, state, or local candidates, but gave advice to state and local political action committees in that regard. The national organization did endorse President Roosevelt on May 17, 1944, when, in the words of Sidney Hillman, "substantially all of the C. I. O. international unions and the great majority of its State councils had already acted . . . ." House Hearings, *supra*, n. 30, at 8. The national organization also endorsed Vice President Truman. Candidates for Congress were apparently chosen for endorsement by state or local PAC committees composed of representatives of the international CIO unions after review of incumbents' voting records in consultation with the regional PAC offices. See S. Rep. No. 101, *supra*, n. 14, at 21; Senate Hearing, *supra*, n. 32, at 12–13, 20–22; House Hearings, *supra*, at 8, 39–41, 43–46, 709–712, 714–715, 725–728, 842–845, 896–898, 904, 906–908, 942–944, 949–950, 954–960, 977–979, 983–985, 993–995, 1001, 1003, 1006–1007. PAC's endorsement procedures were described in 1951 as follows: The chairman of the local political action committee, who was usually the union president, would consult with a prospective candidate together with a screening committee. If that committee acted favorably, the candidate would then be presented to the political action committee for a vote on formal endorsement. Any endorsement would then be reported to the constituent unions of the area PAC and to the state and national PAC offices, and activity in support of the candidate would get under way. J. Kroll, The CIO–PAC and How it Works, in The House of Labor 120, 122–123 (J. Hardman & M. Neufeld eds. 1951).

[35] Accord, Overacker, *supra*, n. 30, at 61–62:

"Although the political action committee of the CIO was separately organized, and in most cases its separate identity was scrupulously preserved, it is hard to escape the conclusion that it was the *alter ego* of the organization which inspired it. The cir-

tinued operation after enactment of § 304 of the Labor Management Relations Act was that it be strictly financed by solicitations designed to result in knowing free-choice donations.

This conclusion, too, we find confirmed by § 205 of the Federal Election Campaign Act, *supra,* at 409–410. That provision expressly authorizes "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization . . . ." The provision then states in a proviso clause that "it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment . . . ." Thus, § 205 plainly permits union officials to establish, administer, and solicit contributions for a political fund. The conditions for that activity are that the fund be "separate" and "segregated" and that its contributions and expenditures not be financed through physical force, job discrimination, or financial reprisal or the "threat" thereof, or through "dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment." The quoted language is admittedly subject to contrary interpretations. "Separate" could (and normally when juxtaposed to "segregated" would) be read to mean an apartness beyond "segregated"; "threat" could be construed as referring only to the expression of an actual intention to inflict

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cumstances under which it came into being, the 'interlocking of directorates' at the top, and the close cooperation at the local level all point in that direction."

injury; and "dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment" could be interpreted to mean only actual dues or assessments. But we think that the legislative history of § 205 establishes that "separate" is synonymous with "segregated"; that "threat" includes the creation of an appearance of an intent to inflict injury even without a design to carry it out; and that "dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment" includes contributions effectively assessed even if not actually required for employment or union membership.

The Hansen amendment was an alternative to Representative Crane's proposal, which declared in relevant part, n. 25, *supra:*

> "Nothing in this section shall preclude an organization from establishing and administering a *separate* contributory fund for any political purpose . . . , if all contributions, gifts, or payments to such fund are made *freely and voluntarily,* and are unrelated to dues, fees, or other moneys required as a condition of membership in such organization or as a condition of employment." (Emphasis added.)

The debate on the differences between the Crane and Hansen provisions did not involve this language when the Hansen amendment was first introduced and adopted by the House. See *ibid.* At that point Hansen merely indicated in general explanation of his amendment that a permissible fund had to be "separate," which in context clearly meant "segregated," see 117 Cong. Rec. 43379,[36] and that, although the law could not "control

[36] "This fund [Hansen stated] must be *separate* from any union or corporate funds, and contributions must be voluntary. To insure that contributions are voluntary, the amendment prohibits

the mental reaction" of a union member solicited by his union chief, *id.*, at 43381,[37] the monies obtained had to come "in a truly voluntary manner and without the employment of the kinds of threats or reprisals or other methods that are prohibited by this amendment." *Ibid.* Thus interpreted, the Hansen amendment, as its author explained, served the traditional purposes of § 610:

> "[T]he underlying theory of section 610 is that substantial general purpose treasuries should not be diverted to political purposes, both because of the effect on the political process of such aggregated wealth and out of concern for the dissenting member or stockholder. Obviously, neither of these considerations cuts against allowing voluntary political funds. For no one who objects to the organization's politics has to lend his support, and the money col-

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the use by the *separate* political fund of any money or anything of value obtained by the use or threat of force, job discrimination, or financial reprisal, or by dues or fees, or other monies required as a condition of employment or membership in a labor organization . . . ." (Emphasis added.)

[37] "The essential prerequisite [Hansen said] for the validity of such political funds is that the contributions to them be voluntary. For that reason the final section of this amendment makes it a violation of section 610 to use physical force, job discrimination, financial reprisals or the threat thereof, in seeking contributions. This is intended to insure that a solicitor for COPE or BIPAC [union political funds] cannot abuse his organizational authority in seeking political contributions. Of course, nothing can completely erase some residual effects on this score, any more than the law can control the mental reaction of a businessman asked for a contribution by an individual who happens to be his banker, or of a farmer approached by the head of his local farm organization. The proper approach, and the one adopted here, is to provide the strong assurance that a refusal to contribute will not lead to reprisals and to leave the rest to the independence and good sense of each individual."

> lected is that intended by those who contribute to be used for political purposes and not money diverted from another source." *Ibid.*

No one at that time disputed that the Crane and Hansen provisions were the same in these respects in codifying prior law.

After the conference committee had adopted the Hansen amendment, however, Crane inserted in the record a Wall Street Journal article suggesting that the Hansen amendment had been inspired by the AFL–CIO to overrule the Court of Appeals decision in this case by authorizing a union political fund even if it is not separate and distinct from the sponsoring union, and by altering the test of voluntariness to focus on the absence of force rather than on the contributor's intent to make a donation of his own free and knowing choice. See 118 Cong. Rec. 323–324.[38] Crane did not significantly elaborate on the article or specifically endorse each of the particular points it made.

Hansen rejoined that he "[stood] fully behind every word of the statement" he had made during the earlier debate on his amendment and "[repeated] . . . that the purpose and effect of my amendment is [*sic*] to codify and clarify the existing law and not to make any substantive

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[38] In particular, the article quoted "a man at the Justice Department" as saying that "'[t]he (Hansen) provision . . . not only doesn't codify existing law, but it overrules existing law'"; stated that Hansen had "[ignored the Court of Appeals decision in this case] that holds that labor can raise campaign cash only through voluntary funds that are 'separate and distinct' from the sponsoring union"; asserted that under the Hansen amendment "union chiefs . . . wouldn't be required to tell members for what purpose the money [solicited] is going"; and quoted an Associate Deputy Attorney General as reporting the Government's position to be "'that a contribution to a political fund [must] be not only "voluntary," in the sense of an absence of force, but also knowingly made.'"

changes in the law." *Id.*, at 328.[39] He stated further that his "amendment is consistent with the position taken by the Justice Department in the brief it filed with the U. S. Supreme Court in the Pipefitter case [which charged that the contributions to the Pipefitters fund 'were assessed by the union as part of its dues structure'] . . . ," since his amendment prohibited financing political funds through monies required for employment or union membership. His amendment, therefore, would not have the effect of "thwarting" that prosecution. *Id.*, at 328–329 (emphasis omitted). Hansen stated, too, that his "amendment is also consistent with the provisions of the so-called Crane amendment dealing with the legality of a separate, voluntary political fund." *Ibid.* The only difference he appears to have seen between his amendment and the text of the Crane provision quoted above was that the one made explicit what the other treated implicitly. Hansen explained:

> "[A]s Senator DOMINICK stated, speaking in support of an amendment to section 610 he offered to the other body, the general view is that:
>
> " 'If a member wishes to pay money voluntarily to a candidate or to a labor organization fund for a candidate or even to a fund which the union will determine how it is to be spent, I have no objections.' [117 Cong. Rec. 29329.[40]]
>
> "The Hansen amendment building on this consensus tracks this language with a single addition

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[39] At this point Representative Hays, a supporter of the Hansen amendment, interjected, 118 Cong. Rec. 328:

"I will say to the gentleman that what he is saying will be the legitimate legislative history and that what somebody down in the Department of Justice, some Assistant Attorney General's opinion [see n. 38, *supra*], is worth exactly as much as the piece of paper it is printed on, no more and no less."

[40] See also 117 Cong. Rec. 43380 (Hansen quoting approvingly same statement by Sen. Dominick).

> making explicit what is implicit in the Crane amendment—that unions and corporations may solicit contributions to these funds as long as they do so without attempting to secure money through 'physical force, job discrimination, financial reprisals' or the threat thereof. Thus the Hansen amendment does not break new ground, it merely writes currently accepted practices into clear and explicit statutory language." *Id.*, at 329.

Crane made no reply to these assertions.

We conclude from this legislative history that the term "separate" in the Hansen amendment is synonymous with "segregated." Nothing in the legislative history indicates that the word is to be understood in any other way. To the contrary, Hansen's comments in general explanation of his amendment support that interpretation, as does the use of the term in the Crane provision, with which, Hansen said, his amendment was consistent. Moreover, Hansen did not deny that his amendment departed from the Court of Appeals' insistence in the *Pipefitters* decision that a permissible political fund be separate and distinct from the sponsoring union; instead, he merely found his amendment consistent with the Government's argument before this Court that political contributions and expenditures cannot be made from dues or assessments. Finally, both the Crane and the Hansen amendments expressly authorize unions to establish and administer voluntary political funds. The Hansen amendment also expressly authorizes union officials to solicit contributions and, as the quoted statement of Senator Dominick indicates, further permits them to determine the disposition of the monies raised. In these circumstances, it is difficult to conceive how a valid political fund can be meaningfully "separate" from the sponsoring union in any way other than "segregated."

Similarly, we conclude that the term "threat" and the phrase "dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment" must be read broadly to encompass solicitation schemes that do not make plain the political nature of the union fund and the freedom of the individual solicited to refuse to contribute without reprisal. The term and the phrase, in other words, include apparent as well as actual threats and dues or assessments respectively. Again, Hansen's explanatory statements are all consistent with that interpretation. Even his observation that the law cannot "control the mental reaction" of a union member approached by a union official seems better taken simply as justification for allowing solicitation by union officials at all rather than as condoning the use of tacit force or pressure. Moreover, if the Hansen amendment is to be construed, as Hansen indicated it should be, *in pari materia* with the Crane provision, it, too, must require that donations be made "freely and voluntarily." Likewise, if the amendment is meant, as Hansen said it was, to embrace the Government's position in this case, we merely implement his purpose by interpreting "dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment" as including not only actual but also effective dues or assessments.

Construed as we have done, § 205 of the Federal Election Campaign Act does nothing more than accomplish the expressed purpose of its author—that is, codify and clarify prior law. But since we have arrived at our interpretation without reference to prior law, § 205 once again throws on § 610 as embodied in § 304 of the Labor Management Relations Act "a cross light" that confirms our understanding of the law applicable to this prosecution.

Third. Arguably, however, there is one change effected by § 205 material to this case, and that is with regard to the *use* of general union monies for the establishment, administration, and solicitation of contributions for political funds. Section 304 of the Labor Management Relations Act may be interpreted to prohibit such use, while the Hansen amendment plainly permits it.

As we have seen, *supra,* at 403, PAC was initially financed from general union treasuries. After the nomination of President Roosevelt for re-election, however, the costs of administration of PAC as well as its political expenditures were mainly, although not entirely, financed from a segregated account of voluntary individual donations. The House campaign expenditures committee explained in its 1945 report, H. R. Rep. No. 2093, 78th Cong. 2d Sess., 5 (1945):

> "[I]t is not . . . possible completely to separate the resources and facilities made available to the Political Action Committee even after July 23, 1944 [when Roosevelt became a candidate for re-election], from those of the Congress of Industrial Organizations and its unions. On the national level and in most States that separation appears to have been preserved so far as cash income and cash expenditures for strictly Political Action Committee as distinguished from union activities are concerned. The local distribution of Political Action Committee literature, for example, has been largely handled by volunteers on their own time; and the contributions have largely been taken by shop stewards outside working hours. But no such separation has proved possible where the use of union offices [41] and office

[41] Compare Senate Hearing, *supra,* n. 32, at 41 (regional PAC offices, to Sidney Hillman's knowledge, separate from CIO offices, as "we don't like them to mix their union business with political activities"), and House Hearings, *supra,* n. 30, at 717, 901 (testimony

> personnel is concerned. Union personnel assigned to full-time Political Action Committee work have typically been transferred from the union to the Political Action Committee pay roll. But the part time Political Action Committee services of persons who are both union and Political Action Committee officers cannot be thus readily segregated."

In endorsing PAC in the enactment of § 304 of the Labor Management Relations Act, Congress clearly had in mind PAC's financial structure after July 1944. Congress, therefore, may have considered that PAC's activities in the future could be financed only from voluntary donations separate from union dues and assessments, except for incidental expenses such as office space and part-time personnel. Alternatively, in view of the emphasis on protecting minority union interests and maintaining a strict segregation of funds, Congress may have thought that all of PAC's activities, including the costs of administration and solicitation of contributions, had to be paid for exclusively from voluntary contributions. The evidence is strong at least that Congress believed the costs of organization of new union political funds had to be financed in that way. See, *e. g.*, S. Rep. No. 101, 79th Cong., 1st Sess., 24 (1945) (statement by Sens. Ball and Ferguson, quoted, *supra*, at 404).

In contrast, the Hansen amendment provides that "it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured" in a prohibited way. Conceivably this language could be read to forbid making contributions or expenditures through the establishment or administration of a political fund or through the solicitation of

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of regional PAC directors) (regional office financed from national PAC headquarters), with House Hearings, *id.*, at 717–718, 736, 841, 857–861, 867–868, 872 (overlapping use of offices on state and local level).

donations financed by general union monies. But that is neither the plain meaning nor, as the legislative history of § 205 shows, the intended construction of the provision. When the Hansen amendment was first introduced, its sponsor explained:

> "As a further safeguard [against the use of a compulsory fund for political purposes] the proviso also makes it a violation for such a fund to make a contribution or expenditure from money collected as dues or other fees required as a condition of membership or employment or obtained through commercial transactions. This insures that any money, service, or tangible item—such as a typewriter, Xerox machine, and so forth—provided to a candidate by such a fund must be financed by the voluntary political donations it has collected." 117 Cong. Rec. 43381.

At no point in the debate on § 205 did Hansen suggest that his amendment was to be read more broadly than this, despite the fact that the Wall Street Journal article inserted in the record by Representative Crane specifically charged that "union chiefs could use dues money to pay for the soliciting . . . ." 118 Cong. Rec. 323. Furthermore, the exemption for the establishment, administration, and solicitation of contributions for voluntary political funds was but one of three exceptions to the general rule prohibiting corporations and labor organizations from making contributions or expenditures in connection with federal elections. The other two exceptions were communications to, and nonpartisan registration and get-out-the-vote campaigns aimed at, stockholders or union members and their families. In explaining the three exemptions, Hansen clearly regarded each of them as a permissible activity to be financed by general union funds, for each, in his view, was an activity where group

interests predominated [42] and "the interest of the minority [was] weakest . . . ." 117 Cong. Rec. 43380.

> "At the present time [Hansen summarized] there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote, and to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language." *Id.*, at 43381.

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[42] With the exemption for communications to stockholders or union members and their families apparently in mind, Hansen stated, for example, 117 Cong. Rec. 43380:

"[E]very organization should be allowed to take the steps necessary for its growth and survival. There is, of course, no need to belabor the point that Government policies profoundly affect both business and labor. . . . If an organization, whether it be the NAM, the AMA or the AFL–CIO, believes that certain candidates pose a threat to its well-being or the well-being of its members or stockholders, it should be able to get its views to those members or stockholders. As fiduciaries for their members and stockholders the officers of these institutions have a duty to share their informed insights on all issues affecting their institution with their constituents. Both union members and stockholders have the right to expect this expert guidance."

This reasoning, of course, applies as well to solicitations for contributions to voluntary political funds.

Thus, § 205 may in one respect have impliedly repealed the substantive law relating to this prosecution.[43] But we need not now decide that question, because even if there has been such an implied repeal, it would not affect this prosecution for reasons to which we now turn.

II

The rule is well established that prosecutions under statutes impliedly or expressly repealed while the case is still pending on direct review must abate in the absence of a demonstration of contrary congressional intent or a general saving statute. For, "[p]rosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it." *United States* v. *Chambers,* 291 U. S. 217, 226 (1934). This doctrine had its earliest expression in *United States* v. *Schooner Peggy,* 1 Cranch 103 (1801), and has since "been consistently recognized and applied by this Court." *Bell* v. *Maryland,* 378 U. S. 226, 231 n. 2 (1964). As Chief Justice Hughes observed in *Chambers, supra,* at 226, "The principle involved is . . . not archaic but rather is continuing and vital,—that the people are free to withdraw the authority they have conferred and, when withdrawn, . . . the courts [cannot] assume the right to continue to exercise it."

In this case, however, although we do not find a demonstration of contrary congressional intent that would

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[43] See, *e. g., United States* v. *Tynen,* 11 Wall. 88, 92 (1871): "[I]t is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first . . . ."

overcome application of this rule if applicable,[44] we do hold that the general federal saving statute, 61 Stat. 635, 1 U. S. C. § 109, operates to nullify any abatement of the prosecution. That statute provides in pertinent part:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

In *United States* v. *Reisinger,* 128 U. S. 398 (1888), the Court reviewed an indictment, returned in 1885, alleging that the defendant, an attorney, had in 1883 charged

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[44] The Government in response to the questions posed in n. 10, *supra,* argues that "[h]ere there is no problem of inferring legislative intent because Congress [in the House debates] clearly expressed its intention that pending prosecutions should not abate." Supplemental Brief for the United States 7. Representative Hansen, to be sure, did state in the debate that this prosecution would not abate. See *supra,* at 425. But he also indicated that the effect of his amendment on pending cases was not, and should not be, a matter of concern:

"Obviously, the members of the joint Senate-House conference committee were not concerned about the suggested effect of this amendment on pending cases. Nor were Members of the other body who approved the conference report by a voice vote. There is no reason for Members of this body to be concerned. This is much needed and meritorious legislation. I strongly urge an overwhelming vote of approval." 118 Cong. Rec. 329.

More important, Hansen's view that this prosecution would continue was possibly premised, as we have seen, on a mistaken understanding of what § 610 previously provided in terms pertinent to this case. If his understanding was, in fact, mistaken, we would have to assume that Congress would intend the general rule of abatement "applicable as part of the background against which [it] acts," *Hamm* v. *Rock Hill,* 379 U. S. 306, 314 (1964), to prevail.

clients in pension cases against the Government $100 and $50 respectively in violation of a $10 maximum fee established by Act of Congress, June 20, 1878, 20 Stat. 243. Despite the fact that Congress had expressly repealed that Act and raised the maximum permissible fee in pension cases to $25 in 1884, Act of Congress, July 4, 1884, § 3, 23 Stat. 99, the Court sustained the indictment on the basis of the federal saving statute. In *Hamm* v. *Rock Hill,* 379 U. S. 306 (1964), on the other hand, we held that the saving statute would not nullify abatement of federal prosecutions for trespass in public luncheon facilities following enactment of the public accommodation requirements of the Civil Rights Act of 1964. We explained, *id.,* at 314:

> "The federal saving statute was originally enacted in 1871, 16 Stat. 432. It was meant to obviate mere technical abatement such as that illustrated by the application of the rule in [*United States* v. *Tynen,* 11 Wall. 88,] decided in 1871. There a substitution of a new statute with a greater schedule of penalties was held to abate the previous prosecution. In contrast, the Civil Rights Act works no such technical abatement. It substitutes a right for a crime. So drastic a change is well beyond the narrow language of amendment and repeal. It is clear, therefore, that if the convictions were under a federal statute they would be abated."

The instant case is controlled by *Reisinger* rather than by *Hamm.* Section 205 of the Federal Election Campaign Act may, of course, make lawful what was previously unlawful—namely, the financing of the establishment, administration, and solicitation of contributions for voluntary political funds from general union monies. But § 205 does not, in any event, "[substitute] a right for a crime." To the contrary, as in *Reisinger* and *Tynen,* it

retains the basic offense—contributions or expenditures by labor organizations in connection with federal elections are still forbidden so long as they are paid for from actual or effective dues or assessments. We therefore hold that even if there has been an implied repeal of § 610, petitioners remain punishable under that provision. We turn now to determine whether the convictions below have been returned consistently with that law.

III

The Government urges:

> "The essential charge of the indictment and the theory on which the case was tried was that the [Pipefitters] Fund, although formally set up as an entity independent of Local 562, *was in fact a union fund, controlled by the union,* contributions to which were assessed by the union as part of its dues structure, collected from non-members in lieu of dues, and expended, when deemed necessary, for union purposes and the personal use of the directors of the Fund." Brief for the United States 23 (emphasis added).

See also Brief for the United States in Opposition to the Petition for Certiorari 11–12.[45] This was indeed, as we shall shortly see, the theory on which the indictment was drawn, the jury was instructed, and petitioners' convictions were affirmed. It is also the construction of

[45] The Government in response to the questions posed in n. 10, *supra,* confirms that this was the theory of the prosecution:

"In short, the case was tried on the theory that the fund here involved was *not* the kind of a fund which the amended statute permits but was the kind of a fund which was and still is a violation of Section 610—a fund which, while ostensibly separate, was in fact a union fund, supported by money collected as union money and used, when deemed desirable, as general union funds." Supplemental Brief for the United States 5 (emphasis in original).

§ 610 that we have rejected in favor of the Government's narrower construction that the prerequisite for a permissible political fund is simply that it not be financed by actual or effective dues or assessments. See *supra,* at 413–414. On the other hand, we find that the indictment may be read to allege not only that the Pipefitters fund was "a union fund, controlled by the union," but that "contributions to [it] were assessed by the union as part of its dues structure, [and were] collected from non-members in lieu of dues . . . ." For reasons that follow, however, we do not now construe the indictment as making this essential allegation, but leave that question open for determination on remand. We hold now only that the jury instructions failed to require proof of the essential element for conviction, and hence reverse the judgment below.

First. Petitioners moved before trial to dismiss the indictment on the following ground, App. 28:

> "The gist of the indictment is to allege that Section 610 . . . prohibits labor unions from forming parallel political organizations which receive voluntary contributions from the members of the union to be contributed and expended in Federal elections. Congress intended such political organizations to be legally authorized. Thus, the indictment fails to state an offense . . . ."

Petitioners also moved for a bill of particulars, *id.,* at 30:

> "whether it is the government's position and theory of the case that the mere fact that the [Pipefitters fund] was established, maintained, and administered by members, officers, employees, agents, foremen and shop [stewards] of Local 562 is, in and of itself, sufficient to make said Fund, under the law, a Fund of Local 562[;] . . . whether or not it is the govern-

> ment's position that Section 610 . . . prohibits the members, officers, employees, agents, foremen and shop [stewards] of a union from establishing any political organization or fund for the purpose of making contributions and expenditures in connection with [federal] elections . . . [;] . . . whether it is the government's position and theory of the case that the alleged 'regular and systematic collection, receipt, and expenditures of money obtained from working members of Local 562 and from working members of other labor organizations employed under jurisdiction of the defendant Local 562' were voluntary or involuntary collections and contributions." [46]

In a memorandum in opposition to the motion to dismiss, the Government acknowledged petitioners' argument "that the indictment is defective in that it does not allege that the funds involved were not voluntary" and took the position that "[p]roof of the offense charged here does not depend upon whether the funds were volunteered or not by union members. The issue is whether these funds were the general funds of Local 562," *id.*, at 56, which the indictment, in the Government's view, impliedly charged in alleging that petitioners " 'unlawfully, wilfully and knowingly did conspire and agree with each other . . . to violate Section 610 . . . .' " *Id.*, at 54. The trial court overruled each of petitioners' motions without opinion.

On appeal the Court of Appeals adopted the Government's theory of the case. First, it ruled that by implication "[t]he gist of the government's claim as reflected by the indictment is that the money in the fund is in

[46] These inquiries were addressed to paragraphs 7, 10, and 17 of the indictment, see n. 2, *supra*. Comparable inquiries were generally leveled at other pertinent paragraphs of the indictment.

truth and in fact money belonging to Local 562." 434 F. 2d, at 1120.[47] The court then held, *ibid.*:

> "The failure of the indictment to allege that the payments to the fund were involuntary is not fatal. . . . If [the allegation that the money in the fund is in fact Union money] is established by the evidence, the issue of whether the payment to the fund is voluntary or involuntary is not controlling.
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> "Of course as observed by the [trial] court in its instructions, the issue of whether the payments to the fund were voluntary is relevant and material on the issue of whether the fund is the property of Local 562. Other considerations such as the intention of the donors as to ownership and control of the fund also bear upon the issue."

This account of the proceedings below indicates that the question of the voluntariness of the contributions to the Pipefitters fund was regarded both at trial and on appeal as a matter relating to, but not essential for the basic charge of the indictment that Local 562 concealed political contributions of Union monies through the subterfuge of a Union-controlled fund. This theory, of course, flies in the face of the legislative history of

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[47] The court arrived at this conclusion on the basis of *United States* v. *Lewis Food Co., supra,* n. 28, where the Court of Appeals for the Ninth Circuit sustained an indictment under § 610 that failed to allege expressly that an expenditure by a corporation in connection with a federal election was financed from the general corporate treasury (or, as discussed in n. 28, *supra,* that it was made against the wishes of an individual stockholder).

"In our opinion [the court there explained], the allegation in the indictment that the corporation made an 'expenditure' for the stated purpose, necessarily infers [*sic*] an allegation that general corporate funds were used. Corporate expenditures normally come from a corporation's general funds and not from some independent fund contributed by shareholders or otherwise obtained." 366 F. 2d, at 713.

§ 610. The impressive lesson of that history in this regard is that the political contributions in issue violated § 610 if, and only if, payments to the fund were actually or effectively required for employment or union membership. In other words, the essence of the crime in this respect is whether the method of solicitation for the fund was calculated to result in knowing free-choice donations. Whether the fund was otherwise controlled by the Union is immaterial.

We think, nevertheless, that the indictment may be read, consistently with the proper interpretation of § 610, to allege that the contributions to the Pipefitters fund derived from effective dues or assessments.[48] But

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[48] The heart of the indictment is found in paragraph 10, which states, *supra,* n. 2:

"It was a part of said conspiracy that the defendants . . . would establish and maintain a special fund . . . , which fund would have the appearance of being a wholly independent entity, separate and apart from Local 562; and that the defendants . . . would thereby conceal the fact that Local 562 would make contributions and expenditures in connection with [federal] elections . . . ."

As in *Lewis Food Co., supra,* n. 47, it is a fair inference from this allegation that the union made prohibited political contributions and expenditures from general union monies rather than from the knowing free-choice donations of individual members. Moreover, the indictment not only expressly alleges that collections for the fund were "regular and systematic" at an established rate, see paragraphs 7, 13, 15, and 16 of the indictment, *supra,* n. 2, but specifically charges in paragraph 14, *ibid.* (emphasis added):

"It was further a part of the conspiracy that the defendants . . . would waive and fail to enforce Section 180 of the Constitution of the United Association in order to facilitate the payment of monies into the Fund, *by failing to collect* from non-members of Local 562, working under its jurisdiction, *a required travel card fee* of not in excess of Eight Dollars ($8.00) per month, *and in lieu thereof, collecting payments to the Fund at the rate of Two Dollars ($2.00) per eight-hour working day* from such non-members."

These allegations together, although not a model of clarity, might (but we do not now decide for the reasons stated in the text) consti-

whether the indictment should now be construed in light of the proceedings below to make this allegation is an altogether different question.[49] Since this precise question was not addressed below and has not been briefed or argued before us and since the case must, in any event, be remanded, whereupon the issue may become moot,[50] we do not now undertake to decide it. Instead, in the event that the Government chooses to proceed with the indictment before us, petitioners shall have leave to renew their motion to dismiss.

Second. The jury instructions embody an interpretation of § 610 that is plainly erroneous. The trial court refused requests by petitioners for instructions that the jury should acquit if it found that contributions to the Pipefitters fund were made voluntarily.[51] Adopting a

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tute "a plain, concise and definite" statement, within the meaning of Rule 7 (c) of the Federal Rules of Criminal Procedure, that the conspiracy included the actual or effective assessment of contributions to the Pipefitters fund as part of the Union's compulsory dues structure.

[49] Compare, *e. g., Hagner* v. *United States,* 285 U. S. 427 (1932); *United States* v. *Comyns,* 248 U. S. 349 (1919), and *Dunlop* v. *United States,* 165 U. S. 486 (1897), with, *e. g., United States* v. *Boston & M. R. Co.,* 380 U. S. 157, 159 n. 1 (1965), and *Russell* v. *United States,* 369 U. S. 749 (1962).

[50] Although two of the petitioners died pending decision in this case, see n. 11, *supra,* the Government may decide on remand to seek a new indictment against the remaining petitioners. The present indictment charges that the conspiracy continued up to the date of the indictment, May 9, 1968, and that an overt act was committed in furtherance of the conspiracy on July 14, 1967, in which case it does not appear that the five-year statute of limitations governing noncapital offenses has run. See 18 U. S. C. § 3282; *Grunewald* v. *United States,* 353 U. S. 391, 396–397 (1957). See also *United States* v. *Reisinger,* 128 U. S. 398 (1888) (indictment valid, though returned after law repealed).

[51] Petitioners offered seven instructions on "voluntariness." Two merely used the term without further definition, while others referred to whether the contributions constituted union dues or

contrary view, the court instructed the jury, over petitioners' objections, that it should return verdicts of guilty if the fund "was in fact a union fund, . . . the money therein was union money, and . . . the real contributor to the candidates was the union." "In determining whether the Pipefitters Voluntary Fund was a bona fide fund, separate and distinct from the union or a mere artifice or device," the jury was further instructed to "take into consideration all the facts and circumstances in evidence, and in such consideration . . . [to] consider" 19 factors, several of which related to the regularity, rate, method of collection, and segregation from Union monies of payments to the fund. Others concerned the kinds of expenditures the fund made and the Union's control over them. Still others involved whether the payments to the fund were made voluntarily. In the latter regard the court charged (emphasis added):

> "A great deal of evidence has been introduced on the question of whether the payments into the Pipefitters Voluntary . . . Fund by members of Local 562 and others working under its jurisdiction were voluntary or involuntary. This evidence is relevant for your consideration, along with all other facts and circumstances in evidence, in determining whether the fund is a union fund. *However, the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money.*" See n. 9, *supra.*

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assessments or were made by the donors for political purposes. See App. 1096–1100. Hereafter, proper instructions on the question of voluntariness may be framed in terms of the application to the proofs of the language of § 205 of the Federal Election Campaign Act as herein construed. See *supra,* at 421–427.

On appeal the Court of Appeals did not address the validity of these instructions other than to agree with the trial judge that "the issue of whether the payments to the fund were voluntary is relevant and material [but not determinative] on the issue of whether the fund is the property of Local 562." *Supra,* at 438.

The instructions, as the Court of Appeals confirmed, clearly permitted the jury to convict without finding that donations to the Pipefitters fund had been actual or effective dues or assessments. This was plain error.[52]

The judgment of the Court of Appeals as to petitioners Callanan and Lawler is vacated, and the case is remanded to the District Court with directions to dismiss the indictment against them. See n. 11, *supra.* The judgment of the Court of Appeals as to petitioners Local 562 and Seaton is reversed, and the case is remanded to the District Court for proceedings as to them consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, dissenting.

The decision of the Court today will have a profound effect upon the role of labor unions and corporations in

[52] The Court of Appeals did not directly rule on the validity of the instructions because, in the majority's view, petitioners had failed to preserve their objections on appeal. See 434 F. 2d, at 1125. See also *id.,* at 1128 (Matthes, C. J., concurring). The dissent below makes a strong argument to the contrary, see *id.,* at 1135 (Lay, J.), but we need not address the question, since the instructions were plainly erroneous, the claim of error was brought to the attention of the trial court, and we may notice a plain error not presented. See, *e. g., Silber* v. *United States,* 370 U. S. 717 (1962). See also 434 F. 2d, at 1130 (Heaney, J., dissenting), 1135 (Lay, J., dissenting).

the political life of this country. The holding, reversing a trend since 1907, opens the way for major participation in politics by the largest aggregations of economic power, the great unions and corporations. This occurs at a time, paradoxically, when public and legislative interest has focused on limiting—rather than enlarging—the influence upon the elective process of concentrations of wealth and power.

I

The majority opinion holds that *unions* lawfully may make political contributions so long as they come from funds voluntarily given to the union for such purpose. The Court seeks to buttress this holding by a long and scholarly presentation of the legislative history of 18 U. S. C. § 610. But some of that history invites conflicting inferences, and the background of § 205 of the Federal Election Campaign Act of 1971, to which the majority also devotes extensive attention, is of dubious value in interpreting an earlier statute which on its face is clear and unambiguous.[1]

In its preoccupation with the legislative history, the Court has overlooked the central point involved in this case: that the conviction of petitioners accords with the plain language of the controlling statute. Nor does the majority demonstrate an ambiguity in that statutory language that makes relevant its long journey into the legislative history.

The operative language of § 610 states that: "It is unlawful . . . for any corporation whatever, or any labor

[1] The majority opinion finds confirmation of its interpretation of the legislative history of § 610 in the recently enacted § 205 of the Federal Election Campaign Act of 1971. The majority concludes, however, that § 205 is not retroactive and therefore is inapplicable to this case, a view which I share. I find it unnecessary to the disposition of this case to intertwine the legislative history of the two statutes when only one of them is applicable.

organization to make a contribution or expenditure in connection with" any federal election. Despite this unqualified proscription, the majority opinion sustains the right of unions and corporations to make political contributions *directly,* provided only that the funds therefor come voluntarily from members, employees, or stockholders and are maintained separately from the other funds of the union or corporation.[2] With all respect, this holding is precisely contrary to the express language of the law. At the risk of unnecessary repetition I set forth in juxtaposition the operative language in § 610 as contrasted with that of the Court's holding:

Section 610	*Court's Holding*
"It is unlawful . . . for . . . any labor organization to make a contribution or expenditure in connection with any [federal] election . . . ."	"[Section] 610 does not apply to union contributions and expenditures from political funds financed in some sense by the voluntary donations of employees." *Ante,* at 409.

If words are given their normal meaning, the statute and the Court's holding flatly contradict each other. One says that it shall be unlawful for a union to make a political contribution or expenditure. The other says this is perfectly lawful, so long as the funds which the union contributes or expends were donated freely and knowingly. The Court has simply added a qualification,

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[2] The alleged separate fund involved in this case was segregated only in the sense that there was a separate ledger and bank account. The Court of Appeals held that there was "substantial evidence to support a jury finding that the fund was not a bona fide separate and distinct entity." 434 F. 2d 1116, 1121 (1970). The decision of the majority focuses attention on the issue of voluntariness and gives little indication that a more realistic segregation of the fund is required.

not found in the statutory language, which significantly changes the meaning of this Act of the Congress.

The Court's holding, moreover, directly counters the purposes for which § 610 was enacted. Congress passed this legislation to restrict and minimize the influence corporations and unions might exert on elections. In *United States* v. *CIO*, 335 U. S. 106, 113 (1948), with respect to corporations, the Court stated:

> "This legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders."

In commenting on the reasons for extending the legislation to labor organizations, the Court in the same case observed:

> "Its legislative history indicates congressional belief that labor unions should then be put under the same restraints as had been imposed upon corporations. It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose." *Id.*, at 115.

The two principal motivations for the enactment of § 610, as identified in *CIO*, are (i) the minimizing of influence of labor unions (as well as corporations) on elections "through monetary expenditures"; and (ii) the elimination of the unfairness "to individual union members" of allowing union management to make political

contributions from general union funds. It seems self-evident that both of these legislative purposes will be frustrated by the Court's holding that, despite the language of the statute forbidding union contributions, unions may now make political contributions and expenditures, provided only that the source of a fund is voluntary.

To be sure, there is some language in the congressional debates which emphasizes the freedom of union members, as well as that of employees and stockholders of corporations, to make uncoerced political contributions. No one contests this basic freedom. But whatever may have been said in congressional debates, courts are bound by what is written into legislation. If the language of a statute is clear and unambiguous there is no occasion to resort to legislative history. Nor can such history, however illuminating it may seem, be relied upon to contradict, or dilute, or add unspecified conditions to statutory language which is perfectly clear. Where statutory provisions were "clear and unequivocal on their face," the Court has found "no need to resort to the legislative history of the Act." *United States* v. *Oregon,* 366 U. S. 643, 648 (1961). As Justice Black observed, "[n]o legislative history can justify judicial emasculation" of the unambiguous language of a statute. *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 437 (1954) (dissenting).[3]

II

Accepting, as I think we must, § 610 as written, the issue in this case is whether the political fund of Local

[3] It has been an ancient and cardinal tenet of statutory construction that "where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *Lake County* v. *Rollins,* 130 U. S. 662, 670–671 (1889); *Yates* v. *United States,* 354 U. S. 298, 305 (1957); *United States* v. *Standard Brewery,* 251 U. S. 210, 217 (1920).

562 was in reality a sham or subterfuge through which the union itself made the contributions forbidden by the statute. The indictment in this case was framed on this basis, and the jury was so instructed. The question properly addressed by the Court of Appeals was "whether the contributions or expenditures were [in fact] made by a labor organization." 434 F. 2d 1116, 1121 (1970). After summarizing the evidence submitted to the jury on this issue, the Court of Appeals concluded:

> "There is substantial evidence to support a jury finding that the fund was not a bona fide separate and distinct entity but was in fact a device set up to circumvent the provisions of § 610 and that the fund constituted union money." 434 F. 2d, at 1121.

It is not normally the function of this Court in a case of this kind to determine whether a jury verdict is supported by substantial evidence. It may not be inappropriate, however, to say—in light of the record before us—that the evidence was more than sufficient to show that union officials supervised closely the collection of the "contributions," sought "contributions" in much the same manner as compulsory assessments, viewed them as part of the total cost burden which the union member had to bear, expended them freely both for union projects and political purposes, and so generally commingled the administration of the fund with the administration of the union as to entitle the jury to believe the gifts by Local 562 from the fund to candidates for federal office constituted union political contributions in violation of § 610.[4]

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[4] Even on the issue of voluntariness, which the Court of Appeals rightly found "relevant and material" though "not controlling," 434 F. 2d, at 1120, the evidence was impressive that the collection scheme was inherently coercive. Since Local 562 had consistently collected contributions to its political funds since 1949, "contributions" appear to have become a customary *de facto* condition to union membership

The majority opinion of this Court does not contest this view. It concludes, rather, that the jury was erroneously instructed, and that accordingly the verdict and judgment must be set aside. If a new trial is held, the jury must be instructed in accordance with the Court's interpretation of § 610 that a union may lawfully make political contributions from a fund it collects and administers so long as the payments into it are voluntary.

It is from this interpretation of § 610—one which in my view will render the statute largely ineffectual—that I dissent.[5]

III

The consequences of today's decision could be far-reaching indeed. The opinion of the Court provides a blueprint for compliance with § 610, as now construed,

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or employment within Local 562's jurisdiction. Moreover, the regularity of these contributions—week by week and year by year and each in the same amount as requested by the union—seems suspiciously incompatible with the concept of free-will gifts.

[5] My interpretation of the statute does not imply that no "separate fund" would be permissible. I recognize that, consistently with the statute (as amended by § 205), a union or corporation may be instrumental in establishing a political fund, provided it is a bona fide one—separate and segregated from the union in a genuine, not merely formalistic, way. For example, such a fund might be managed by a separate nonprofit entity, with independent trustees not subservient to the union or corporate sponsor, who engage independent auditors, who make regular reports to contributors, and who provide realistic means by which contributors can express their preference as to political candidates or parties. Safeguards would be required to assure that contributions were not coerced, either directly or by means of an inherently coercive system or relationship. Such a bona fide fund would contrast quite sharply with that operated by Local 562, where there were no bylaws, no constitution, no independent trustees, no audit, no report to contributors, or other indications of genuine separateness or segregation; and where the union itself collected, operated, and expended the "contributions" in substantially the same manner as union dues and assessments.

which will be welcomed by every corporation and union which wishes to take advantage of a heretofore unrecognized opportunity to influence elections in this country.[6]

It may be that the unions, by virtue of a system of collecting "political contributions" simultaneously with the collection of dues and regularizing such collections to the point where they are indistinguishable from dues, will be the primary beneficiaries. But the corporations are more numerous than the unions. They have millions of stockholders and hundreds of thousands of nonunion employees. Both unions and corporations have large financial resources. Today's interpretation of § 610 will enable a more direct and extensive political employment of these resources by both union and corporation.

By refusing to affirm the judgment below, the majority renders the ultimate fate of this litigation uncertain. If, on remand, the techniques of Local 562 should be sanctioned, other unions and corporations could easily follow Local 562 and obtain from members, employees, and shareholders a consent form attesting that the contribution (or withholding) is "voluntary." The trappings of voluntariness might be achieved while the substance of coercion remained. Union members and corporate employees might find themselves the objects of regular and systematized solicitation by the very agent which exercises direct control over their jobs and livelihood.

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[6] I recognize, of course, that the recent enactment of § 205 of the Federal Election Campaign Act of 1971 has supplemented and extended § 610 in defining permissible limits of union and corporate contributions. But § 205 still leaves intact the operative language of § 610 which explicitly proscribes political contributions by unions and corporations. The interpretative gloss today added unnecessarily on this language will result in rendering ineffectual the basic intention of the Congress to prevent the intrusion of corporate and union power into our political system.

The only remaining requirement to meet the new standards is that the fund be separate from other union or corporate funds, although under the majority's interpretation of § 205 it may be established and administered, and the contributions to it solicited, by the union or corporation with its own funds. Again, if Local 562 were to provide the standards, the separateness of such a fund need be nothing more than a separate ledger and bank account.

In sum, the opinion of the Court today, adopting an interpretation of § 610 at variance with its language and purpose, goes a long way toward returning unions and corporations to an unregulated status with respect to political contributions. This opening of the door to extensive corporate and union influence on the elective and legislative processes must be viewed with genuine concern. This seems to me to be a regressive step as contrasted with the numerous legislative and judicial actions in recent years designed to assure that elections are indeed free and representative.

I would affirm the judgment below.

Syllabus

WRIGHT ET AL. *v.* COUNCIL OF THE CITY OF EMPORIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 70–188. Argued March 1, 1972—Decided June 22, 1972

In 1967, Emporia, Virginia, which is located in the center of Greensville County, changed from a "town" to a politically independent "city" authorized by state law to provide its own public school system. By a shared-cost agreement with the county, Emporia in 1968 continued an arrangement, which antedated its change of status, to use the county public school system for education of its children. As a consequence of the present desegregation lawsuit initiated in 1965, the single school division was operating under a "freedom of choice" plan approved by the District Court. Petitioners moved to modify that plan following this Court's decision in *Green* v. *County School Board*, 391 U. S. 430. The District Court, after a hearing, on June 25, 1969, ordered petitioners' "pairing" plan, to take effect as of the start of the 1969–1970 school year. Two weeks after entry of the District Court's decree, the city announced its plan to operate a separate school system and sought termination of the 1968 agreement. On August 1, 1969, petitioners filed a supplemental complaint seeking to enjoin the city council and school board (named as additional parties defendant) from withdrawing Emporia children from the county schools. Following hearings, the District Court found that the effect of Emporia's withdrawal would be a "substantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools." In addition to the disparity in racial percentages, the court found that the proportion of whites in county schools might drop as county-school whites shifted to private academies, while some whites might return to city schools from the academies they previously attended; that two formerly all-white schools (both better equipped and better located than the county schools) are in Emporia, while all the schools in the surrounding county were formerly all-Negro; and that Emporia, which long had the right to establish a separate school system, did not decide to do so until the court's order prevented the county from continuing its long-maintained segregated school system. The court concluded that Emporia's withdrawal would frustrate the June 25 decree, and enjoined respondents from

pursuing their plan. Holding that the question whether new school district boundaries should be permitted in areas with a history of state-enforced racial segregation must be resolved in terms of the "dominant purpose of [the] boundary realignment," the Court of Appeals concluded that Emporia's primary purpose was "benign" and not a mere "cover-up" for racial discrimination, and reversed. *Held:*

1. In determining whether realignment of school districts by officials comports with the requirements of the Fourteenth Amendment, courts will be guided, not by the motivation of the officials, but by the effect of their action. Pp. 461–462.

2. In the totality of the circumstances of this case, the District Court was justified in concluding that Emporia's establishment of a separate school system would impede the process of dismantling the segregated school system. Pp. 463–471.

442 F. 2d 570, reversed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN, POWELL, and REHNQUIST, JJ., joined, *post*, p. 471.

Samuel W. Tucker argued the cause for petitioners. With him on the brief were *Jack Greenberg, James M. Nabrit III,* and *Norman J. Chachkin.*

D. Dortch Warriner argued the cause for respondents. With him on the brief was *John F. Kay, Jr.*

Solicitor General Griswold, Assistant Attorney General Norman, and *Deputy Solicitor General Wallace* filed a memorandum for the United States as *amicus curiae* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

We granted certiorari in this case, as in No. 70–130, *United States* v. *Scotland Neck City Board of Education*,[1] *post*, p. 484, to consider the circumstances under

[1] Together with No. 70–187, *Cotton* v. *Scotland Neck City Board of Education.*

which a federal court may enjoin state or local officials from carving out a new school district from an existing district that has not yet completed the process of dismantling a system of enforced racial segregation. We did not address ourselves to this rather narrow question in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, and its companion cases decided last Term,[2] but the problem has confronted other federal courts in one form or another on numerous occasions in recent years.[3] Here, as in *Scotland Neck,* the Court of Appeals reversed a district court decision enjoining the creation of a new school district. 442 F. 2d 570. We conclude that the Court of Appeals erred in its interpretation of the legal principles applicable in cases such as these, and that the District Court's order was proper in the circumstances of this case.

I

The City of Emporia lies near the center of Greensville County, Virginia, a largely rural area located on the North Carolina border. Until 1967, Emporia was

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[2] The companion cases were *Davis* v. *Board of School Commissioners,* 402 U. S. 33; *McDaniel* v. *Barresi,* 402 U. S. 39; *Board of Education* v. *Swann,* 402 U. S. 43; and *Moore* v. *Board of Education,* 402 U. S. 47.

[3] On the same day that it reversed the District Court orders in this case and in the *Scotland Neck* cases, the Court of Appeals for the Fourth Circuit affirmed an order enjoining the creation of a new school district in another county of North Carolina. *Turner* v. *Littleton-Lake Gaston School District,* 442 F. 2d 584. Other cases dealing with attempts to split school districts in the process of desegregation are *Lee* v. *Macon County Board of Education,* 448 F. 2d 746; *Stout* v. *Jefferson County Board of Education,* 448 F. 2d 403; *Haney* v. *County Board of Education,* 410 F. 2d 920; *United States* v. *Texas,* 321 F. Supp. 1043, 1052, aff'd, with modifications, 447 F. 2d 441; *Burleson* v. *County Board of Election Commissioners,* 308 F. Supp. 352, aff'd, 432 F. 2d 1356; *Aytch* v. *Mitchell,* 320 F. Supp. 1372.

a "town" under Virginia law, which meant that it was a part of the surrounding county for practically all purposes, including the purpose of providing public education for children residing in the county.

In 1967, Emporia, apparently dissatisfied with the county's allocation of revenues from the newly enacted state sales tax, successfully sought designation as a "city of the second class." [4] As such, it became politically independent from the surrounding county, and undertook a separate obligation under state law to provide free public schooling to children residing within its borders.[5] To fulfill this responsibility, Emporia at first sought the county's agreement to continue operating the school system on virtually the same basis as before, with Emporia sharing in the administration as well as the financing of the schools.[6] When the county officials refused to enter into an arrangement of this kind, Emporia agreed to a contract whereby the county would continue to educate students residing in the city in exchange for Emporia's payment of a specified share of the total cost of the system. Under this agreement, signed in April 1968, Emporia had a formal voice in the administration of the schools only through its par-

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[4] Va. Code Ann. § 15.1–982.

[5] See Va. Code Ann. § 22–93; *Colonial Heights* v. *County of Chesterfield,* 196 Va. 155, 82 S. E. 2d 566 (1954).

[6] Emporia was entitled under state law to establish an independent school system when it became a city in 1967, but it chose not to do so because, according to the testimony of the chairman of the city school board, a separate system did not seem practical at the time. In a letter to the County Board of Supervisors in July 1969, the Emporia City Council stated that it had authorized a combined system in 1968 because it believed that "the educational interest of Emporia citizens, their children and those of the citizens and children of Greensville County, could best be served by continuing a combined City-County school division, thus giving students from both political subdivisions full benefits of a larger school system."

ticipation in the selection of a superintendent. The city and county were designated as a single school "division" by the State Board of Education,[7] and this arrangement was still in effect at the time of the District Court's order challenged in this case.

This lawsuit began in 1965, when a complaint was filed on behalf of Negro children seeking an end to state-enforced racial segregation in the Greensville County school system. Prior to 1965, the elementary and high schools located in Emporia served all white children in the county, while Negro children throughout the county were assigned to a single high school or one of four elementary schools, all but one of which were located outside the Emporia town boundary. In January 1966, the District Court approved a so-called "freedom of choice" plan that had been adopted by the county in April of the previous year. *Wright* v. *School Board of Greensville County,* 252 F. Supp. 378. No white students ever attended the Negro schools under this plan, and in the 1968–1969 school year only 98 of the county's 2,510 Negro students attended white schools. The school faculties remained completely segregated.

Following our decision in *Green* v. *County School Board,* 391 U. S. 430, holding that a freedom-of-choice plan was an unacceptable method of desegregation where it failed "to provide meaningful assurance of prompt and effective disestablishment of a dual system," *id.,* at 438, the petitioners filed a motion for further relief. The District Court ordered the county to demonstrate its compliance with the holding in *Green,* or to submit a plan designed to bring the schools into compliance. After various delays, during which the freedom-of-choice sys-

[7] Under Virginia law as it stood in 1969, the school "division" was the basic unit for the purpose of school administration. See Va. Code Ann. §§ 22–30, 22–34, 22–100.1.

tem remained in effect, the county submitted two alternative plans. The first would have preserved the existing system with slight modifications, and the second would have assigned students to schools on the basis of curricular choices or standardized test scores. The District Court promptly rejected the first of these proposals, and took the second under advisement. Meanwhile, the petitioners submitted their own proposal, under which all children enrolled in a particular grade level would be assigned to the same school, thus eliminating any possibility of racial bias in pupil assignments. Following an evidentiary hearing on June 23, 1969, the District Court rejected the county's alternative plan, finding that it would "substitute . . . one segregated school system for another segregated school system." By an order dated June 25, the court ordered the county to implement the plan submitted by the petitioners, referred to by the parties as the "pairing" plan, as of the start of the 1969–1970 school year.[8]

Two weeks after the District Court entered its decree, the Emporia City Council sent a letter to the county Board of Supervisors announcing the city's intention to operate a separate school system beginning in September. The letter stated that an "in-depth study and analysis of the directed school arrangement reflects a totally unacceptable situation to the Citizens and City Council of the City of Emporia." It asked that the 1968 city-county agreement be terminated by mutual consent, and that title to school property located within Emporia be transferred to the city. The letter further

[8] The plan was later modified in certain respects at the request of the county school board, and as modified it has been in operation since September 1969. Because the four schools located outside Emporia's city limits are all in close proximity to the city, the "pairing" plan apparently involved little additional transportation of students.

advised that children residing in the county would be permitted to enroll in the city schools on a tuition basis.[9] At no time during this period did the city officials meet with the county council or school board to discuss the implementation of the pairing decree, nor did they inform the District Court of their intentions with respect to the separate school system.

The county school board refused either to terminate the existing agreement or to transfer school buildings to Emporia, citing its belief that Emporia's proposed action was "not in the best interest of the children in Greensville County." The City Council and the City School Board nevertheless continued to take steps toward implementing the separate system throughout the month of July. Notices were circulated inviting parents to register their children in the city system, and a request was made to the State Board of Education to certify Emporia as a separate school division. This request was tabled by the State Board at its August meeting, "in light of matters pending in the federal court."

According to figures later supplied to the District Court, there were 3,759 children enrolled in the unitary system contemplated by the desegregation decree, of whom 66% were Negro and 34% were white. Had Emporia established a separate school system, 1,123 of these students would have attended the city schools, of whom 48% were white. It is undisputed that the city proposed to operate its own schools on a unitary

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[9] The District Court took special note of this transfer arrangement in its memorandum accompanying the preliminary injunction issued in August 1969. At the time of the final hearing, however, the respondents assured the court that if allowed to operate a separate system, they would not permit transfers from the county without prior permission of the court.

basis, with all children enrolled in any particular grade attending the same school.

On August 1, 1969, the petitioners filed a supplemental complaint naming the members of the Emporia City Council and the City School Board as additional parties defendant,[10] and seeking to enjoin them from withdrawing Emporia children from the county schools. At the conclusion of a hearing on August 8, the District Court found that the establishment of a separate school system by the city would constitute "an impermissible interference with and frustration of" its order of June 25, and preliminarily enjoined the respondents from taking "any action which would interfere in any manner whatsoever with the implementation of the Court's order heretofore entered. . . ."

The schools opened in September under the pairing order, while Emporia continued to work out detailed plans and budget estimates for a separate school system in the hope that the District Court would allow its implementation during the following school year. At a further hearing in December, the respondents presented an expert witness to testify as to the educational advantages of the proposed city system, and asked that the preliminary injunction be dissolved. On March 2, 1970, the District Court entered a memorandum opinion and order denying the respondents' motion and making the injunction permanent. 309 F. Supp. 671. The

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[10] Because the county school board had ultimate responsibility for the administration of the schools under the combined system, the members of the Emporia school board were not originally parties to the lawsuit. But the District Court's desegregation decree bound both county officials "and their successors," and the District Court treated the Emporia school board members, insofar as they intended to replace the county board as administrators of part of the system under court order, as "successors" to the members of the county board.

Court of Appeals for the Fourth Circuit reversed, 442 F. 2d 570, but stayed its mandate pending action by this Court on a petition for certiorari, which we granted. 404 U. S. 820.

II

Emporia takes the position that since it is a separate political jurisdiction entitled under state law to establish a school system independent of the county, its action may be enjoined only upon a finding either that the state law under which it acted is invalid, that the boundaries of the city are drawn so as to exclude Negroes, or that the disparity of the racial balance of the city and county schools of itself violates the Constitution. As we read its opinion, the District Court made no such findings; nor do we.

The constitutional violation that formed the predicate for the District Court's action was the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part. That finding has not been challenged, nor has Emporia questioned the propriety of the "pairing" order of June 25, 1969, which was designed to remedy the condition that offended the Constitution. Both before and after it became a city, Emporia educated its children in the county schools. Only when it became clear—15 years after our decision in *Brown* v. *Board of Education,* 347 U. S. 483—that segregation in the county system was finally to be abolished, did Emporia attempt to take its children out of the county system. Under these circumstances, the power of the District Court to enjoin Emporia's withdrawal from that system need not rest upon an independent constitutional violation. The court's remedial power was invoked on the basis of a finding that the dual school system violated the Constitution, and since the city and the county constituted

but one unit for the purpose of student assignments during the entire time that the dual system was maintained, they were properly treated as a single unit for the purpose of dismantling that system.

In *Green* v. *County School Board,* 391 U. S. 430, the issue was whether the school board's adoption of a "freedom of choice" plan constituted adequate compliance with the mandate of *Brown* v. *Board of Education,* 349 U. S. 294 (*Brown II*). We did not hold that a freedom-of-choice plan is of itself unconstitutional. Rather, we decided that *any* plan is "unacceptable" where it "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system. . . ." 391 U. S., at 438. In *Monroe* v. *Board of Commissioners,* 391 U. S. 450, we applied the same principle in rejecting a "free transfer" plan adopted by the school board as a method of desegregation:

> "We do not hold that 'free transfer' can have no place in a desegregation plan. But like 'freedom of choice,' if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable." *Id.,* at 459.

The effect of Emporia's proposal was to erect new boundary lines for the purpose of school attendance in a district where no such lines had previously existed, and where a dual school system had long flourished. Under the principles of *Green* and *Monroe,* such a proposal must be judged according to whether it hinders or furthers the process of school desegregation. If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out.

The Court of Appeals apparently did not believe this case to be governed by the principles of *Green* and

Monroe.[11] It held that the question whether new school district boundaries should be permitted in areas with a history of state-enforced racial segregation is to be resolved in terms of the "dominant purpose of [the] boundary realignment."

> "If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation." 442 F. 2d, at 572.

Although the District Court had found that "in a sense, race was a factor in the city's decision to secede," 309 F. Supp., at 680, the Court of Appeals found that the primary purpose of Emporia's action was "benign," and was not "merely a cover-up" for racial discrimination. 442 F. 2d, at 574.

This "dominant purpose" test finds no precedent in our decisions. It is true that where an action by school authorities is motivated by a demonstrated discriminatory purpose, the existence of that purpose may add to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority. And where a school board offers nonracial justifications for a plan that is less effective than other alternatives for dismantling a dual school system, a demonstrated racial purpose may be taken into consideration in determining the weight to be given to the proffered justification.

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[11] The decision of the Court of Appeals was rendered less than a month prior to our decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1.

Cf. *Green, supra,* at 439. But as we said in *Palmer* v. *Thompson,* 403 U. S. 217, 225, it "is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," and the same may be said of the choices of a school board. In addition, an inquiry into the "dominant" motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools, and we have said that "[t]he measure of any desegregation plan is its effectiveness." *Davis* v. *School Commissioners of Mobile County,* 402 U. S. 33, 37. Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect.

The reasoning of the Court of Appeals in this case is at odds with that of other federal courts that have held that splinter school districts may not be created "where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on desegregation of the county school district." *Lee* v. *Macon County Board of Education,* 448 F. 2d 746, 752. See also *Stout* v. *Jefferson County Board of Education,* 448 F. 2d 403, 404; *Haney* v. *County Board of Education,* 410 F. 2d 920, 924; *Burleson* v. *County Board of Election Commissioners,* 308 F. Supp. 352, 356, aff'd, 432 F. 2d 1356; *Aytch* v. *Mitchell,* 320 F. Supp. 1372, 1377. Though the *purpose* of the new school districts was found to be discriminatory in many of these cases, the courts' holdings rested not on motivation or purpose, but on the *effect* of the action upon the dismantling of the dual school systems involved. That was the focus of the District Court in this case, and we hold that its approach was proper.

III

The basis for the District Court's ruling was its conclusion that if Emporia were allowed to establish an independent system, Negroes remaining in the county schools would be deprived of what *Brown II* promised them: a school system in which all vestiges of enforced racial segregation have been eliminated. The District Court noted that the effect of Emporia's withdrawal would be a "substantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools." 309 F. Supp., at 680. In addition, the court found that the departure of the city's students, its leadership, and its financial support, together with the possible loss of teachers to the new system, would diminish the chances that transition to unitary schools in the county would prove "successful."

Certainly, desegregation is not achieved by splitting a single school system operating "white schools" and "Negro schools" into two new systems, each operating unitary schools within its borders, where one of the two new systems is, in fact, "white" and the other is, in fact, "Negro." Nor does a court supervising the process of desegregation exercise its remedial discretion responsibly where it approves a plan that, in the hope of providing better "quality education" to some children, has a substantial adverse effect upon the quality of education available to others. In some cases, it may be readily perceived that a proposed subdivision of a school district will produce one or both of these results. In other cases, the likelihood of such results may be less apparent. This case is of the latter kind, but an examination of the record shows that the District Court's conclusions were adequately supported by the evidence.

Data submitted to the District Court at its December hearing showed that the school system in operation under the "pairing" plan, including both Emporia and the county, had a racial composition of 34% white and 66% Negro. If Emporia had established its own system, and if total enrollment had remained the same, the city's schools would have been 48% white and 52% Negro, while the county's schools would have been 28% white and 72% Negro.

We need not and do not hold that this disparity in the racial composition of the two systems would be a sufficient reason, standing alone, to enjoin the creation of the separate school district. The fact that a school board's desegregation plan leaves some disparity in racial balance among various schools in the system does not alone make that plan unacceptable.[12] We observed in *Swann, supra,* that "[t]he 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." 402 U. S., at 24.

But there is more to this case than the disparity in racial percentages reflected by the figures supplied by the school board. In the first place, the District Court found that if Emporia were allowed to withdraw from the existing system, it "may be anticipated that the proportion of whites in county schools may drop as those who can register in private academies," 309 F. Supp., at 680, while some whites might return to the city schools from the private schools in which they had previously enrolled. Thus, in the judgment of the District Court, the statistical breakdown of the 1969–1970 enrollment figures between city residents and county

[12] The court order that we approved in *Swann, supra,* itself provided for student bodies ranging from 9% Negro to 38% Negro.

residents did not reflect what the situation would have been had Emporia established its own school system.

Second, the significance of any racial disparity in this case is enhanced by the fact that the two formerly all-white schools are located within Emporia, while all the schools located in the surrounding county were formerly all-Negro. The record further reflects that the school buildings in Emporia are better equipped and are located on better sites than are those in the county. We noted in *Swann* that factors such as these may in themselves indicate that enforced racial segregation has been perpetuated:

> "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 402 U. S., at 18.

Just as racial balance is not required in remedying a dual system, neither are racial ratios the sole consideration to be taken into account in devising a workable remedy.

The timing of Emporia's action is a third factor that was properly taken into account by the District Court in assessing the effect of the action upon children remaining in the county schools. While Emporia had long had the right under state law to establish a separate school system, its decision to do so came only upon the basis of—and, as the city officials conceded, in reaction to—a court order that prevented the county system from maintaining any longer the segregated system that had lingered for 15 years after *Brown I*. In the words of Judge Winter, dissenting in the Court

of Appeals, "[i]f the establishment of an Emporia school district is not enjoined, the black students in the county will watch as nearly one-half the total number of white students in the county abandon the county schools for a substantially whiter system." 442 F. 2d, at 590. The message of this action, coming when it did, cannot have escaped the Negro children in the county. As we noted in *Brown I:* "To separate [Negro school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U. S., at 494. We think that, under the circumstances, the District Court could rationally have concluded that the same adverse psychological effect was likely to result from Emporia's withdrawal of its children from the Greensville County system.

The weighing of these factors to determine their effect upon the process of desegregation is a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district judge. See *Brown II, supra,* at 299.[13] Given the totality of the circumstances, we hold that the District Court was justified in its conclusion that Emporia's establishment of a separate system would actually impede the process of dismantling the existing dual system.

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[13] "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." 349 U. S., at 299.

IV

Against these considerations, Emporia advances arguments that a separate system is necessary to achieve "quality education" for city residents, and that it is unfair in any event to force the city to continue to send its children to schools over which the city, because of the character of its arrangement with the county, has very little control. These arguments are entitled to consideration by a court exercising its equitable discretion where they are directed to the feasibility or practicality of the proposed remedy. See *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* at 31. But, as we said in *Green* v. *County School Board, supra,* the availability of "more promising courses of action" to dismantle a dual system "at the least . . . places a heavy burden upon the board to explain its preference for an apparently less effective method." 391 U. S., at 439.

In evaluating Emporia's claims, it must be remembered that the city represents the interests of less than one-third of the students in the system being desegregated. Only the city officials argue that their plan is preferable to the "pairing" plan encompassing the whole of the city-county system. Although the county school board took no position in the District Court either for or against Emporia's action, it had previously adopted a resolution stating its belief that the city's action was not in the best interests of the county children. In terms of *Green,* it was only the respondents—not the county school board—who expressed a "preference for an apparently less effective method" of desegregation.

At the final hearing in the District Court, the respondents presented detailed budgetary proposals and other evidence demonstrating that they contemplated a more

diverse and more expensive educational program than that to which the city children had been accustomed in the Greensville County schools. These plans for the city system were developed after the preliminary injunction was issued in this case. In August 1969, one month before classes were scheduled to open, the city officials were intent upon operating a separate system despite the fact that the city had no buildings under lease, no teachers under contract, and no specific plans for the operation of the schools. Thus, the persuasiveness of the "quality education" rationale was open to question. More important, however, any increased quality of education provided to city students would, under the circumstances found by the District Court, have been purchased only at the price of a substantial adverse effect upon the viability of the county system. The District Court, with its responsibility to provide an effective remedy for segregation in the entire city-county system, could not properly allow the city to make its part of that system more attractive where such a result would be accomplished at the expense of the children remaining in the county.

A more weighty consideration put forth by Emporia is its lack of formal control over the school system under the terms of its contract with the county. This argument is properly addressed to the practicality of the District Court's action. As we said in *Davis* v. *School Commissioners of Mobile County,* 402 U. S., at 37:

> "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."

And in *Swann, supra,* we noted that a desegregation plan cannot be regarded as a proper exercise of a dis-

trict court's discretion where it is not "reasonable, feasible and workable." 402 U. S., at 31.

We do not underestimate the deficiencies, from Emporia's standpoint, in the arrangement by which it undertook in 1968 to provide for the education of its children. Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society, and since 1967 the citizens of Emporia have had little of that control. But Emporia did find its arrangement with the county both feasible and practical up until the time of the desegregation decree issued in the summer of 1969. While city officials testified that they were dissatisfied with the terms of the contract prior to that time, they did not attempt to change it. They argued that the arrangement became intolerable when the "pairing" decree was entered, because the county officials who would control the budget of the unitary system lacked the desire to make the unitary system work. The District Court did not accept the contention that a lack of enthusiasm on the part of county leaders would, if Emporia children remained in the system, block a successful transition to unitary schools. The court felt that the "desire of the city leaders, coupled with their obvious leadership ability," would make itself felt despite the absence of any formal control by the city over the system's budget and operation, and that the city's leadership would be "an important facet in the successful operation of any court-ordered plan." 309 F. Supp., at 679. Under these circumstances, we cannot say that the enforced continuation of the single city-county system was not "reasonable, feasible and workable." [14]

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[14] City officials testified that one of the primary objections to the court's "pairing" decree was that it required a student to attend six schools in the space of 12 years. Dr. Tracey, the expert witness for the respondents, expressed the view that this aspect of the decree

The District Court explicitly noted in its opinion that its injunction does not have the effect of locking Emporia into its present circumstances for all time. As already noted, our holding today does not rest upon a conclusion that the disparity in racial balance between the city and county schools resulting from separate systems would, absent any other considerations, be unacceptable. The city's creation of a separate school system was enjoined because of the effect it would have had at the time upon the effectiveness of the remedy ordered to dismantle the dual system that had long existed in the area. Once the unitary system has been established and accepted, it may be that Emporia, if it still desires to do so, may establish an independent system without such an adverse effect upon the students remaining in the county, or it may be able to work out a more satisfactory arrangement with the county for joint operation of the existing system. We hold only that a new school district may not be created where its effect would be to impede the process of dismantling a dual system. And in making that essentially factual determination in any particular case, "we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals." *Swann, supra,* at 28. In this case, we believe that the District Court

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had undesirable effects from an educator's point of view. This argument, however, was never made to the District Court either before or at the time it adopted the "pairing" plan. Indeed, the city officials never even met with the county school board or participated in the hearings that preceded the decree. After the June 25 order was entered, the District Court modified it at the request of the county board, and at the hearing on a preliminary injunction against Emporia's withdrawal from the system, the court noted that it would be "delighted to entertain motions for amendment of the [pairing] plan at any time." App. 185a.

did not abuse its discretion. For these reasons, the judgment of the Court of Appeals is

Reversed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

If it appeared that the city of Emporia's operation of a separate school system would either perpetuate racial segregation in the schools of the Greensville County area or otherwise frustrate the dismantling of the dual system in that area, I would unhesitatingly join in reversing the judgment of the Court of Appeals and reinstating the judgment of the District Court. However, I do not believe the record supports such findings and can only conclude that the District Court abused its discretion in preventing Emporia from exercising its lawful right to provide for the education of its own children.

By accepting the District Court's conclusion that Emporia's operation of its own schools would "impede the dismantling of the dual system," the Court necessarily implies that the result of the severance would be something less than unitary schools, and that segregated education would persist in some measure in the classrooms of the Greensville County area. The Court does not articulate the standard by which it reaches this conclusion, and its result far exceeds the contemplation of *Brown* v. *Board of Education,* 347 U. S. 483 (1954), and all succeeding cases, including *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971).

If the severance of the two systems were permitted to proceed, the assignment of children to schools would depend solely on their residence. County residents would attend county schools, and city residents would attend city schools. Assignment to schools would in no sense

depend on race. Such a geographic assignment pattern is prima facie consistent with the Equal Protection Clause. See *Spencer* v. *Kugler,* 326 F. Supp. 1235 (N. J. 1971), aff'd, 404 U. S. 1027 (1972).

However, where a school system has been operated on a segregated basis in the past, and where ostensibly neutral attendance zones or district lines are drawn where none have existed before, we do not close our eyes to the facts in favor of theory. In *Green* v. *County School Board,* 391 U. S. 430 (1968), the Court ruled that dual school systems must cease to exist in an objective sense as well as under the law. It was apparent that under the freedom-of-choice plan before the Court in *Green,* the mere elimination of mandatory segregation had provided no meaningful remedy. *Green* imposed on school boards the responsibility to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U. S., at 442. That, I believe, is precisely what would result if Emporia were permitted to operate its own school system—schools neither Negro nor white, "but just schools." As separate systems, both Emporia and Greensville County would have a majority of Negro students, the former slightly more than half, the latter slightly more than two-thirds. In the words of the Court of Appeals, "[t]he Emporia city unit would not be a white island in an otherwise black county." 442 F. 2d, at 573. Moreover, the Negro majority in the remaining county system would only slightly exceed that of the entire county area including Emporia. It is undisputed that education would be conducted on a completely desegregated basis within the separate systems. Thus, the situation would in no sense be comparable to that where the creation of attendance zones within a single formerly segregated school system leaves an inordinate number

of one-race schools, such as were found in *Davis* v. *Board of School Comm'rs,* 402 U. S. 33 (1971). Rather than perpetuating a dual system, I believe the proposed arrangement would completely eliminate all traces of state-imposed segregation.

It is quite true that the racial ratios of the two school systems would differ, but the elimination of such disparities is not the mission of desegregation. We stated in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S., at 24:

> "If we were to read the holding of the District Court 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."

It can no more be said that racial balance is the norm to be sought, than it can be said that mere racial imbalance was the condition requiring a judicial remedy. The pointlessness of such a "racial balancing" approach is well illustrated by the facts of this case. The District Court and the petitioners have placed great emphasis on the estimated six-percent increase in the proportion of Negro students in the county schools that would result from Emporia's withdrawal. I do not see how a difference of one or two children per class [1] would even be noticed, let alone how it would render

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[1] The record shows that the pupil-teacher ratio in the county schools is less than 25 to 1. Assuming some rough correspondence between this ratio and the size of classes, a 6% racial shift would represent a change in the racial identity of 1.5 students per class on the average.

a school part of a dual system. We have seen that the normal movement of populations could bring about such shifts in a relatively short period of time. Obsession with such minor statistical differences reflects the gravely mistaken view that a plan providing more consistent racial ratios is somehow more unitary than one which tolerates a lack of racial balance. Since the goal is to dismantle dual school systems rather than to reproduce in each classroom a microcosmic reflection of the racial proportions of a given geographical area, there is no basis for saying that a plan providing a uniform racial balance is more effective or constitutionally preferred. School authorities may wish to pursue that goal as a matter of policy, but we have made it plain that it is not constitutionally mandated. See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S., at 16.

The Court disavows a "racial balancing" approach, and seeks to justify the District Court's ruling by relying on several additional factors thought to aggravate the effect of the racial disparity. The real significance of these additional factors is so negligible as to suggest that the racial imbalance itself may be what the Court finds most unacceptable.

First, the Court raises the specter of resegregation resulting from the operation of separate school systems in the county area, but on the record in this case this is, at best, highly speculative. The Court suggests two reasons why such an additional racial shift could be anticipated with the existence of a separate school system for Emporia: white students residing in the county might abandon the public schools in favor of private academies, and white students residing in the city might leave private schools and enroll in the city school.

In assessing these projections it is necessary to compare the nature of the proposed separate systems with

that of the court-ordered "pairing" system. Thus the first possibility, that white students from the county might enter private schools, assumes that white families would be more likely to withdraw their children from public schools that are 72% Negro than from those that are 66% Negro. At most, any such difference would be marginal, and in fact it seems highly improbable that there would be any difference at all. The second possibility postulated by the Court seems equally unlikely; it assumes that families from the city who had previously withdrawn their children from the public schools due to impending desegregation, would return their children to public schools having more Negro than white pupils.

The Court does not mention the possibility of some form of mass migration of white families into the city from the outlying county. Of course, when there are adjoining school districts differing in their racial compositions, it is always conceivable that the differences will be accentuated by the so-called "white flight" phenomenon. But that danger seems remote in a situation such as this where there is a predominantly Negro population throughout the entire area of concern.

Second, the Court attaches significance to the fact that the school buildings located in the county were formerly used as all-Negro schools and intimates that these facilities are of generally poorer quality than those in the city. But the District Court made no such finding of fact, and the record does not support the Court's suggestion on this point. Admittedly, some dissatisfaction was expressed with the sites of the elementary schools in the county, and only the city elementary school has an auditorium. However, all three elementary schools located in the county are more modern than any school building located in the city, and the county and city high school buildings are identical in every respect.

On a fair reading of the entire record, it can only be said that any differences between the educational facilities located in the city and those in the county are *de minimis*.

Finally, the Court states that the process of desegregation would be impeded by the "adverse psychological effect" that a separate city system would have on Negro students in the county. Here, again, the Court seeks to justify the District Court's discretionary action by reliance on a factor never considered by that court. More important, it surpasses the bounds of reason to equate the psychological impact of creating adjoining unitary school systems, both having Negro majorities, with the feelings of inferiority referred to in *Brown I* as engendered by a segregated school system. In *Brown I* the Court emphasized that the legal policy of separating children in schools solely according to their race inevitably generates a sense of inferiority. These observations were supported by common human experience and reinforced by psychological authority. Here the Court seeks to make a similar judgment in a setting where no child is accorded differing treatment on the basis of race. This wholly speculative observation by the Court is supported neither by common experience nor by scientific authority.

Even giving maximum rational weight to all of the factors mentioned by the Court, I cannot conclude that separate systems for Emporia and Greensville County would be anything less than fully unitary and nonracial. The foundation and superstructure of the dual system would be dissolved, and the result would not factually preserve the separation of races that existed in the past. We noted in *Swann* "that the 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 that still practices segregation by law." 402

U. S., at 26. This reflects our consistent emphasis on the elimination of the discriminatory *systems,* rather than on mere numbers in particular schools. The proposed systems here would retain no "one-race, or virtually one-race schools," but more important, all vestiges of the discriminatory system would be removed. That is all the Constitution commands.

It is argued that even if Emporia's operation of its own unitary school system would have been constitutionally permissible, it was nevertheless within the equitable discretion of the District Court to insist on a "more effective" plan of desegregation in the form of a county-wide school system. In *Brown* v. *Board of Education,* 349 U. S. 294 (1955) (*Brown II*), the Court first conferred on the district courts the responsibility to enforce the desegregation of the schools, if school authorities failed to do so, according to equitable remedial principles. While we have emphasized the flexibility of the power of district courts in this process, the invocation of remedial jurisdiction is not equivalent to having a school district placed in receivership. It has been implicit in all of our decisions from *Brown II* to *Swann,* that if local authorities devise a plan that will effectively eliminate segregation in the schools, a district court must accept such a plan unless there are strong reasons why a different plan is to be preferred. A local school board plan that will eliminate dual schools, stop discrimination, and improve the quality of education ought not be cast aside because a judge can evolve some other plan that accomplishes the same result, or what he considers a preferable result, with a two percent, four percent, or six percent difference in racial composition. Such an approach gives controlling weight to sociological theories, not constitutional doctrine.

This limitation on the discretion of the district courts involves more than polite deference to the role of local

governments. Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extracurricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day supervision that a judge cannot. A plan devised by school officials is apt to be attuned to these highly relevant educational goals; a plan deemed preferable in the abstract by a judge might well overlook and thus undermine these primary concerns.

The discretion of a district court is further limited where, as here, it deals with totally separate political entities. This is a very different case from one where a school board proposes attendance zones within a single school district or even one where a school district is newly formed within a county unit. Under Virginia law, Emporia is as independent from Greensville County as one State is from another. See *City of Richmond* v. *County Board,* 199 Va. 679, 684, 101 S. E. 2d 641, 644 (1958); *Murray* v. *City of Roanoke,* 192 Va. 321, 324, 64 S. E. 2d 804, 807 (1951). This may be an anomaly in municipal jurisprudence, but it is Virginia's anomaly; it is of ancient origin, and it is not forbidden by the Constitution. To bar the city of Emporia from operating its own school system is to strip it of its most important governmental responsibility, and thus largely to deny its existence as an independent governmental entity. It is a serious step and, absent the factors that persuade me to the contrary in *Scotland Neck,*[2] decided today, I am unwilling to go that far.

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[2] *United States* v. *Scotland Neck City Board of Education* and *Cotton* v. *Scotland Neck City Board of Education, post,* p. 484.

Although the rights and powers of a bona fide political entity may not be used as a cloak for evasive action, neither can those powers be nullified by judicial intervention to achieve a unitary system in a particular way. When a plan devised by local authorities crosses the threshold of achieving actual desegregation, it is not for the district courts to overstep local prerogatives and insist on some other alternative. Judicial power ends when a dual school system has ceased to exist.

Since Emporia's operation of a separate school system would not compromise the goal of eliminating dual schools, there is no basis for requiring Emporia to demonstrate the necessity of its decision. The "heavy burden" test referred to in *Green* applies only where there is serious reason to doubt the efficacy of a school board's plan as a means of achieving desegregation, and there is no basis for such doubt here. Nonetheless, the Court's treatment of Emporia's reasons for establishing a separate system merits comment.

The Court makes light of Emporia's desire to create a high-quality, unitary school system for the children of its citizens. In so doing, the Court disregards the following explicit finding of the District Court:

> "The city clearly contemplates a superior quality educational program. It is anticipated that the cost will be such as to require higher tax payments by city residents. A kindergarten program, ungraded primary levels, health services, adult education, and a low pupil-teacher ratio are included in the plan . . . ." 309 F. Supp., at 674.

Furthermore, the Court suggests that if Emporia were in fact to provide the top-flight educational program the District Judge anticipated, it could only worsen the quality of education in the remaining county schools. To be sure, there was cause for concern over the relative quality of education offered in the county schools;

as the District Court observed, county officials did "not embrace the court-ordered unitary plan with enthusiasm." 309 F. Supp., at 680. The record shows that prior to the 1969–1970 school year, per-pupil expenditures in Greensville County lagged behind the state median, and that the increase in the county school budget for the 1969–1970 school year was insufficient to keep abreast of inflation, not to mention increased transportation costs. But the city of Emporia was in no position to alleviate this problem for the county. The county had previously refused to allow the city to participate in joint administration of the schools, and the city had absolutely no power to affect the level of funding for the county schools. Under the contract, Emporia was the purchaser of whatever educational services the county had to offer. Out of understandable concern for the quality of these services, it sought to alter the contractual arrangement in order to provide better unitary schools.

There is no basis on this record for assuming that the quality of education in the county schools was likely to suffer further due to Emporia's withdrawal. The Court relies on the District Court's finding that "the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of any court-ordered plan." 309 F. Supp., at 679. The District Court made this finding despite the fact that the county had refused to administer the schools jointly with the city, and despite uncontradicted evidence that there was no line of communications between the city and county governments, that the city government had been unable to get any cooperation from the county government, and that there was an atmosphere of active antagonism between the two governments. With all deference to the trier of fact, I cannot accept this finding as supported by evidence in the record of this case. It appears that the District Court wanted

that "obvious leadership ability" of Emporia's citizens to exert its influence on the more reluctant leadership in the county. This is a laudable goal in the abstract, but the courts must adjust their remedies to the facts of each case as they bear on the central problem of eliminating a dual system.

Although acknowledging Emporia's need to have some "[d]irect control over decisions vitally affecting the education of [its] children," the Court states that since Emporia found the contractual arrangement tolerable prior to 1969, it should not now be heard to complain. However, the city did not enter that contract of its own free choice. From the time Emporia became a city, consideration was given to the formation of a separate school system, and it was at least thought necessary that the city participate in administration of the county school system. After the county rejected the city's proposal for joint administration, the county threatened to terminate educational services for city children unless the city entered an agreement by April 30, 1968. Only then—under virtual duress—did the city submit to the contractual arrangement. It was not until June 1969 that the city was advised by its counsel that the agreement might be illegal. Steps were then taken to terminate the strained relationship.

Recognizing the tensions inherent in a contractual arrangement put together under these conditions, the Court indicates that Emporia might be permitted to operate a separate school system at some future time. The Court does not explain how the passage of time will substantially alter the situation that existed at the time the District Court entered its injunction. If, as the Court states, desegregation in the county was destined to fail if Emporia established its own school system in 1969, it is difficult to understand why it would not be an undue risk to allow separation in the future.

The more realistic view is that there was never such a danger, and that the District Court had no cause to disregard Emporia's desire to free itself from its ties to Greensville County. However, even on the Court's terms, I assume that Emporia could go back to the District Court tomorrow and renew its request to operate a separate system. The county-wide plan has been in effect for the past three years, and the city should now be relieved of the court-imposed duty to purchase whatever quality of education the county sees fit to provide.

Finally, some discussion is warranted of the relevance of discriminatory purpose in cases such as these. It is, of course, correct that "[t]he measure of any desegregation plan is its effectiveness," *Davis* v. *Board of School Comm'rs,* 402 U. S., at 37, and that a plan that stops short of dismantling a dual school system cannot be redeemed by benevolent motives. But it is also true that even where a dual system has in fact been dismantled, as it plainly has been in Emporia, we must still be alert to make sure that ostensibly nondiscriminatory actions are not designed to exclude children from schools because of their race. We are well aware that the progress of school desegregation since 1954 has been hampered by persistent resistance and evasion in many places. Thus, the normal judicial reluctance to probe the motives or purposes underlying official acts must yield to the realities in this very sensitive area of constitutional adjudication. Compare *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218 (1964), with *Palmer* v. *Thompson,* 403 U. S. 217 (1971).

There is no basis for concluding, on this record, that Emporia's decision to operate a separate school system was the manifestation of a discriminatory purpose. The strongest finding made by the District Court was that race was "in a sense" a factor in the city's decision; read in context, this ambiguous finding does not relate to any

invidious consideration of race. The District Court relied solely on the following testimony of the chairman of the city school board:

> "Race, of course, affected the operation of the schools by the county, and I again say, I do not think, or we felt that the county was not capable of putting the monies in and the effort and the leadership into a system that would effectively make a unitary system work . . . ," 309 F. Supp., at 680.

I cannot view this kind of consideration of race as discriminatory or even objectionable. The same doubts about the county's commitment to the operation of a high-quality unitary system would have come into play even if the racial composition of Emporia were precisely the same as that of the entire county area, including Emporia.

Nor is this a case where we can presume a discriminatory purpose from an obviously discriminatory effect. Cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). We are not confronted with an awkward gerrymander or striking shift in racial proportions. The modest difference between the racial composition of Emporia's proposed separate school system and that of the county as a whole affords no basis for an inference of racial motivation. And while it seems that the more cumbersome features of the District Court's plan hastened the city's inevitable decision to operate a separate unitary school system, this was not because of any desire to manipulate the racial balance of its schools.

Read as a whole, this record suggests that the District Court, acting before our decision in *Swann,* was reaching for some hypothetical perfection in racial balance, rather than the elimination of a dual school system. To put it in the simplest terms, the Court, in adopting the District Court's approach, goes too far.

UNITED STATES *v.* SCOTLAND NECK CITY BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 70–130. Argued February 29–March 1, 1972—Decided June 22, 1972*

A state statute authorized creation of a new school district for Scotland Neck, N. C., a city that was part of the larger Halifax County school district, then in the process of dismantling a dual school system. The District Court in this litigation instituted by the United States enjoined implementation of the statute as creating a refuge for white students and promoting school segregation in the county. The Court of Appeals reversed, ruling that the statute's impact on dismantling the county dual system was minimal and that it should not be regarded as an alternative desegregation plan for the county since it was enacted by the legislature and not by the school board. *Held:* Whether the action affecting dismantling of a dual school system is initiated by the legislature or by the school board is immaterial, *North Carolina Board of Education* v. *Swann*, 402 U. S. 43; the criterion is whether the dismantling is furthered or hindered by carving a new school district from the larger district having the dual school system, and a proposal that would impede the dismantling process may be enjoined. *Wright* v. *Council of City of Emporia, ante*, p. 451. Pp. 488–491.

442 F. 2d 575, reversed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., filed an opinion concurring in the result, in which BLACKMUN, POWELL, and REHNQUIST, JJ., joined, *post*, p. 491.

Deputy Solicitor General Wallace argued the cause for petitioner in No. 70–130. With him on the brief were *Solicitor General Griswold, Assistant Attorney General*

*Together with No. 70–187, *Cotton et al.* v. *Scotland Neck City Board of Education et al.*, also on certiorari to the same court.

Norman, and *Brian K. Landsberg. Adam Stein* argued the cause for petitioners in No. 70–187. With him on the brief were *Jack Greenberg, James M. Nabrit III, Norman J. Chachkin, J. LeVonne Chambers, James R. Walker, Jr.,* and *Samuel S. Mitchell.*

C. Kitchin Josey and *William T. Joyner* argued the cause for respondents in both cases. With them on the brief were *Robert Morgan,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners in these consolidated cases challenge the implementation of a North Carolina statute authorizing the creation of a new school district for Scotland Neck, a city which at the time of the statute's enactment was part of a larger school district then in the process of dismantling a dual school system. In a judgment entered the same day as its judgment in *Council of City of Emporia* v. *Wright,* 442 F. 2d 570, a decision which we reverse today, *ante,* p. 451, the Court of Appeals held that the District Court erred in enjoining the creation of the new school district.

Scotland Neck is a community of about 3,000 persons, located in the southeastern portion of Halifax County, North Carolina. Since 1936, the city has been a part of the Halifax County Administrative Unit, a school district comprising the entire county with the exception of two towns located in the northern section. In the 1968–1969 school year, 10,655 students attended schools in this system, of whom 77% were Negro, 22% white, and 1% American Indian.

The schools of Halifax County were completely segregated by race until 1965. In that year, the school board adopted a freedom-of-choice plan that produced very

little actual desegregation. In the 1967–1968 school year, all of the white students in the county attended the four traditionally all-white schools, while 97% of the Negro students attended the 14 traditionally all-Negro schools. The school-busing system, used by 90% of the students, was segregated by race, and faculty desegregation was minimal.

In 1968, the United States Department of Justice entered into negotiations with the Halifax County School Board to bring the county's school system into compliance with federal law. An agreement was reached whereby the school board undertook to provide some desegregation in the fall of 1968, and to effect a completely unitary system in the 1969–1970 school year. The State Department of Public Instruction, acting on a request from the county board, recommended a detailed plan (the Interim Plan) for the unitary system that would have put some white students in every school in the county, and that would have left a white majority in only one school.

In January 1969, after the Interim Plan had been submitted to the county school board but before any action had been taken upon it, a bill was introduced in the state legislature to authorize the creation of a new school district bounded by the city limits of Scotland Neck, upon approval by a majority of the city's voters.[1] The bill was enacted on March 3, 1969, as Chapter 31 of the 1969 Session Laws of North Carolina. The citizens of Scotland Neck approved the new school

[1] An earlier bill had been introduced in the 1965 session of the legislature, which would have created a separate school district for Scotland Neck and the four surrounding townships, an area with a three-to-one Negro majority. It was contemplated that the new district would operate under a freedom-of-choice plan similar to that existing in the county at the the time. The bill was defeated in the State Senate.

district in a referendum a month later,[2] and the new district began taking steps toward beginning a separate school system in the fall of 1969.

The effect of Chapter 31 was to carve out of the Halifax school district a new unit with 695 students, of whom 399 (57%) were white and 296 (43%) were Negro. Under a transfer plan devised by the newly appointed Scotland Neck City Board of Education, 360 students (350 white and 10 Negro) residing outside the city limits applied to transfer into the Scotland Neck schools, while 44 students (all Negro) applied to transfer out of the city system to a nearby school in the Halifax County system. The new district planned to use the facilities of the formerly all-white Scotland Neck High School, including one building located outside the city limits that would be leased from the county.

The United States filed this lawsuit in June 1969 against both city and county officials, seeking desegregation of the existing Halifax County schools.[3] The complaint asked for preliminary and permanent injunctions against the implementation of Chapter 31. Various Negro children, parents, and teachers, the petitioners in No. 70–187, were permitted to intervene as plaintiffs.

After a three-day hearing before two district judges on both this case and a similar case involving two newly created school districts in neighboring Warren County,

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[2] The vote in the referendum was 813 to 332 in favor of the new school district. Of Scotland Neck's 1,382 registered voters, 360 were Negro.

[3] After the preliminary injunction was issued in this case, the District Court dismissed the Halifax County Board of Education from that part of the case dealing with Scotland Neck's efforts to implement a separate school system. On May 19, 1970, the court ordered the county school board to implement, beginning in the fall of 1970, the Interim Plan proposed by the State Department of Public Instruction, with certain modifications proposed by the school board.

the District Court preliminarily enjoined the implementation of Chapter 31, finding that "the Act in its application creates a refuge for white students, and promotes segregated schools in Halifax County," and further that "[t]he Act impedes and defeats the Halifax County Board of Education from implementing its plan to completely desegregate all of the public schools in Halifax County by the opening of the school year 1969–70." [4] After further hearings, the District Court on May 23, 1970, found Chapter 31 unconstitutional and permanently enjoined its enforcement. 314 F. Supp. 65. The Court of Appeals reversed, 442 F. 2d 575, and we granted certiorari. 404 U. S. 821.

The Court of Appeals did not believe that the separation of Scotland Neck from the Halifax County system should be viewed as an alternative plan for desegregating the county system, because the "severance was not part of a desegregation plan proposed by the school board but was instead an action by the Legislature redefining the boundaries of local governmental units." 442 F. 2d, at 583. This suggests that an action of a state legislature affecting the desegregation of a dual system stands on a footing different from an action of a school board. But in *North Carolina Board of Education* v. *Swann*, 402 U. S. 43, decided after the decision of the Court of Appeals in this case, we held that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct . . . 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." *Id.*, at 45. The fact that the creation of the Scotland Neck school district was authorized by a special act of the state legisla-

[4] The opinion of the District Court on the issuance of the preliminary injunction is unreported.

ture rather than by the school board or city authorities thus has no constitutional significance.

We have today held that any attempt by state or local officials to carve out a new school district from an existing district that is in the process of dismantling a dual school system "must be judged according to whether it hinders or furthers the process of school desegregation. If the proposal would impede the dismantling of a dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out." *Wright* v. *Council of City of Emporia, supra,* at 460. The District Court in this case concluded that Chapter 31 "was enacted with the effect of creating a refuge for white students of the Halifax County School system, and interferes with the desegregation of the Halifax County School system . . . ." 314 F. Supp., at 78. The Court of Appeals, however, did not regard the separation of Scotland Neck as creating a refuge for white students seeking to escape desegregation, and it held that "the effect of the separation of the Scotland Neck schools and students on the desegregation of the remainder of the Halifax County system is minimal and insufficient to invalidate Chapter 31." 442 F. 2d, at 582. Our review of the record leads us to conclude that the District Court's determination was the only proper inference to be drawn from the facts of this litigation, and we thus reverse the judgment of the Court of Appeals.

The major impact of Chapter 31 would fall on the southeastern portion of Halifax County, designated as District I in the Interim Plan for unitary schools proposed by the State Department of Public Instruction. The projected enrollment in the schools of this district under the Interim Plan was 2,948 students, of whom 78% were Negro. If Chapter 31 were implemented, the Scotland Neck schools would be 57%

white, while the schools remaining in District I would be 89% Negro. The traditional racial identities of the schools in the area would be maintained; the formerly all-white Scotland Neck school would retain a white majority, while the formerly all-Negro Brawley school, a high school located just outside Scotland Neck, would be 91% Negro.

In *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, we said that district judges or school authorities "should make every effort to achieve the greatest possible degree of actual desegregation," and that in formulating a plan to remedy state-enforced school segregation there should be "a presumption against schools that are substantially disproportionate in their racial composition." *Id.,* at 26. And we have said today in *Wright* v. *Council of City of Emporia, supra,* at 463, that "desegregation is not achieved by splitting a single school system operating 'white schools' and 'Negro schools' into two new systems, each operating unitary schools within its borders, where one of the two new systems, is, in fact, 'white' and the other is, in fact, 'Negro.' "

In this litigation, the disparity in the racial composition of the Scotland Neck schools and the schools remaining in District I of the Halifax County system would be "substantial" by any standard of measurement. And the enthusiastic response among whites residing outside Scotland Neck to the school board's proposed transfer plan confirmed what the figures suggest: the Scotland Neck school was to be the "white school" of the area, while the other District I schools would remain "Negro schools." Given these facts, we cannot but conclude that the implementation of Chapter 31 would have the effect of impeding the disestablishment of the dual school system that existed in Halifax County.

The primary argument made by the respondents in

support of Chapter 31 is that the separation of the Scotland Neck schools from those of Halifax County was necessary to avoid "white flight" by Scotland Neck residents into private schools that would follow complete dismantling of the dual school system. Supplemental affidavits were submitted to the Court of Appeals documenting the degree to which the system has undergone a loss of students since the unitary school plan took effect in the fall of 1970.[5] But while this development may be cause for deep concern to the respondents, it cannot, as the Court of Appeals recognized, be accepted as a reason for achieving anything less than complete uprooting of the dual public school system. See *Monroe* v. *Board of Commissioners,* 391 U. S. 450, 459.

Reversed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, concurring in the result.

I agree that the creation of a separate school system in Scotland Neck would tend to undermine desegregation efforts in Halifax County, and I thus join in the result reached by the Court. However, since I dissented from the Court's decision in *Wright* v. *Council of City of Emporia, ante,* p. 471, I feel constrained to set forth briefly the reasons why I distinguish the cases.

First, the operation of a separate school system in Scotland Neck would preclude meaningful desegregation in the southeastern portion of Halifax County. If Scotland Neck were permitted to operate separate schools, more than 2,200 of the nearly 3,000 students in this sector would attend virtually all-Negro schools located just

[5] The figures supplied to the Court of Appeals were updated by an affidavit submitted to this Court, showing the total enrollment in the Halifax County schools at the start of the 1971–1972 school year to have been 9,094, of whom 14% were white.

outside of the corporate limits of Scotland Neck. The schools located within Scotland Neck would be predominantly white. Further shifts could reasonably be anticipated. In a very real sense, the children residing in this relatively small area would continue to attend "Negro schools" and "white schools." The effect of the withdrawal would thus be dramatically different from the effect which could be anticipated in *Emporia.*

Second, Scotland Neck's action cannot be seen as the fulfillment of its destiny as an independent governmental entity. Scotland Neck had been a part of the county-wide school system for many years; special legislation had to be pushed through the North Carolina General Assembly to enable Scotland Neck to operate its own school system. The movement toward the creation of a separate school system in Scotland Neck was prompted solely by the likelihood of desegregation in the county, not by any change in the political status of the municipality. Scotland Neck was and is a part of Halifax County. The city of Emporia, by contrast, is totally independent from Greensville County; Emporia's only ties to the county are contractual. When Emporia became a city, a status derived pursuant to longstanding statutory procedures, it took on the legal responsibility of providing for the education of its children and was no longer entitled to avail itself of the county school facilities.

Third, the District Court found, and it is undisputed, that the Scotland Neck severance was substantially motivated by the desire to create a predominantly white system more acceptable to the white parents of Scotland Neck. In other words, the new system was designed to minimize the number of Negro children attending school with the white children residing in Scotland Neck. No similar finding was made by the District Court in *Emporia,* and the record shows that Emporia's decision was not based on the projected racial composition of the proposed new system.

Syllabus

PETERS *v.* KIFF, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–5078. Argued February 22, 1972—Decided June 22, 1972

Petitioner contends in this habeas corpus proceeding that the systematic exclusion of Negroes from the grand jury that indicted him and the petit jury that convicted him deprived him of his rights to due process and equal protection. The Court of Appeals affirmed the District Court's denial of relief on the ground that petitioner, not being a Negro, suffered no unconstitutional discrimination. *Held:* The judgment is reversed. Pp. 495–507.

441 F. 2d 370, reversed and remanded.

MR. JUSTICE MARSHALL, joined by MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART, concluded that:

1. Petitioner, under the circumstances of this case, has not abandoned his challenge to the petit jury by failing to include it in the list of questions presented by the writ of certiorari. Pp. 495–496.

2. A State cannot, consistent with due process, subject a defendant to indictment by a grand jury or trial by a petit jury that has been selected in an arbitrary and discriminatory manner contrary to federal constitutional and statutory requirements, and regardless of any showing of actual bias, petitioner had standing to attack the systematic exclusion of Negroes from grand jury and petit jury service. Pp. 496–505.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE POWELL, would implement the longstanding and strong policy of 18 U. S. C. § 243 against excluding qualified jurors on account of race by permitting petitioner to challenge his conviction on the ground that Negroes were arbitrarily excluded from the grand jury that indicted him. *Hill* v. *Texas*, 316 U. S. 400. Pp. 505–507.

MARSHALL, J., announced the Court's judgment and delivered an opinion, in which DOUGLAS and STEWART, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BRENNAN and POWELL, JJ., joined, *post*, p. 505. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 507.

Edward T. M. Garland argued the cause and filed a brief for petitioner.

Dorothy T. Beasley, Assistant Attorney General of Georgia, argued the cause for respondent. With her on the brief were *Arthur K. Bolton,* Attorney General, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Courtney Wilder Stanton* and *David L. G. King, Jr.,* Assistant Attorneys General.

Jack Greenberg, James M. Nabrit III, and *Charles Stephen Ralston* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae,* urging reversal.

MR. JUSTICE MARSHALL announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join.

Petitioner alleges that Negroes were systematically excluded from the grand jury that indicted him and the petit jury that convicted him of burglary in the Superior Court of Muscogee County, Georgia. In consequence he contends that his conviction is invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Because he is not himself a Negro, the respondent contends that he has not suffered any unconstitutional discrimination, and that his conviction must stand. On that ground, the Court of Appeals affirmed the denial of his petition for federal habeas corpus. 441 F. 2d 370 (CA5 1971).[1] We granted certiorari. 404 U. S. 964 (1971). We reverse.

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[1] The history of this litigation is long and complicated. Petitioner was indicted on June 6, 1966. His first trial resulted in a conviction that was reversed on Fourth Amendment grounds, 114 Ga. App. 595, 152 S. E. 2d 647 (1966). A second trial, held on December 8, 1966, resulted in the conviction challenged here,

I

At the outset, we reject the contention that the only issue before this Court is petitioner's challenge to the composition of the grand jury that indicted him. The respondent argues that the challenge to the petit jury is not before us, because it fails to appear in the list of questions presented by the petition for certiorari. We do not regard that omission as controlling, however, in light of the fact that the two claims have been treated together at every stage of the proceedings below, they are treated together in the body of the petition for certiorari, and they are treated together in the brief filed by petitioner on the merits in this Court. Petitioner cannot fairly be said to have abandoned his challenge to the petit jury, and the State has had ample opportunity to respond to that challenge, having done so at length below.[2]

Moreover, in this case the principles governing the two claims are identical. First, it appears that the same selection process was used for both the grand jury and

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which was affirmed, 115 Ga. App. 743, 156 S. E. 2d 195 (1967). Petitioner for the first time raised the claim of discriminatory jury selection in a petition for federal habeas corpus, which was summarily denied on July 5, 1967. The Court of Appeals affirmed on the ground that petitioner had failed to exhaust then-available state remedies with respect to his otherwise highly colorable claim, 397 F. 2d 731, 735–741 (CA5 1968). Petitioner then filed a second petition for federal habeas corpus on the same ground, alleging that intervening state court decisions clearly foreclosed his claim in the state courts. That petition was denied on the grounds (1) that it was repetitious, (2) that petitioner had failed to exhaust, and (3) that his claims were lacking in merit. App. 15. The Court of Appeals again affirmed, rejecting the first two grounds and resting entirely on the third, *i. e.*, rejecting petitioner's substantive claims. 441 F. 2d 370 (1971). The exhaustion point thus having been resolved in petitioner's favor below, the State quite properly does not press it here.

[2] See Brief for Appellee in Court of Appeals 28–43.

the petit jury.[3] Consequently, the question whether jurors were in fact excluded on the basis of race will be answered the same way for both tribunals. Second, both the grand jury and the petit jury in this case must be measured solely by the general Fourteenth Amendment guarantees of due process and equal protection, and not by the specific constitutional provisions for the grand jury and the petit jury. For the Fifth Amendment right to a grand jury does not apply in a state prosecution. *Hurtado* v. *California,* 110 U. S. 516 (1884). And the Sixth Amendment right to a petit jury, made applicable to the States through the Due Process Clause of the Fourteenth Amendment in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), does not apply to state trials that took place before the decision in *Duncan,* as petitioner's trial did. *De Stefano* v. *Woods,* 392 U. S. 631 (1968). Accordingly, we turn now to the commands of equal protection and of due process.

II

This Court has never before considered a white defendant's challenge to the exclusion of Negroes from jury service.[4] The essence of petitioner's claim is this:

[3] The jury lists were made up from the tax digests, which were by law segregated according to race; moreover, the jury lists contained a proportion of Negroes much smaller than the proportion in the population or in the tax digests. The jury-selection system of Muscogee County, Georgia, was explored in detail and struck down as unconstitutional in *Vanleeward* v. *Rutledge,* 369 F. 2d 584 (CA5 1966), contemporaneously with petitioner's trial. On petitioner's first federal appeal, the Court of Appeals suggested, though it did not hold, that the *Vanleeward* findings and conclusions on this point should be regarded as conclusive with respect to Peters, and thereby the expense and delay of a full evidentiary hearing might be avoided, 397 F. 2d, at 740.

[4] A number of state courts and lower federal courts have imposed a "same class" rule on challenges to discriminatory jury selection, holding that the exclusion of a class from jury service is subject to

that the tribunals that indicted and convicted him were constituted in a manner that is prohibited by the Constitution and by statute; that the impact of that error on any individual trial is unascertainable; and that consequently any indictment or conviction returned by such tribunals must be set aside.[5]

There can be no doubt that, if petitioner's allegations are true, both tribunals involved in this case were illegally constituted. He alleges that Negroes were systematically excluded from both the grand jury and the petit jury. This Court has repeatedly held that the Constitution prohibits such selection practices, with respect to the grand jury,[6] the petit jury,[7] or both.[8] Moreover, Con-

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challenge only by a member of the excluded class. Only a few courts have rejected the rule; *e. g., Allen* v. *State,* 110 Ga. App. 56, 137 S. E. 2d 711 (1964) (not followed by other panels of same court); *State* v. *Madison,* 240 Md. 265, 213 A. 2d 880 (1965). The cases are collected, and criticized, in Note, The Defendant's Challenge to a Racial Criterion in Jury Selection, 74 Yale L. J. 919 (1965). See also Note, The Congress, The Court and Jury Selection, 52 Va. L. Rev. 1069 (1966). This Court avoided passing on the "same class" rule in *Fay* v. *New York,* 332 U. S. 261, 289–290 (1947), and has never since then approved or rejected it.

[5] He also claims his own rights under the Equal Protection Clause have been violated, a claim we need not consider in light of our disposition.

[6] *Alexander* v. *Louisiana,* 405 U. S. 625 (1972); *Arnold* v. *North Carolina,* 376 U. S. 773 (1964); *Eubanks* v. *Louisiana,* 356 U. S. 584 (1958); *Reece* v. *Georgia,* 350 U. S. 85 (1955); *Cassell* v. *Texas,* 339 U. S. 282 (1950); *Hill* v. *Texas,* 316 U. S. 400 (1942); *Smith* v. *Texas,* 311 U. S. 128 (1940); *Pierre* v. *Louisiana,* 306 U. S. 354 (1939); *Rogers* v. *Alabama,* 192 U. S. 226 (1904); *Carter* v. *Texas,* 177 U. S. 442 (1900); *Bush* v. *Kentucky,* 107 U. S. 110 (1883).

[7] *Avery* v. *Georgia,* 345 U. S. 559 (1953); *Hollins* v. *Oklahoma,* 295 U. S. 394 (1935).

[8] *Sims* v. *Georgia,* 389 U. S. 404 (1967); *Jones* v. *Georgia,* 389 U. S. 24 (1967); *Whitus* v. *Georgia,* 385 U. S. 545 (1967); *Coleman* v. *Alabama,* 377 U. S. 129 (1964); *Patton* v. *Mississippi,* 332 U. S. 463 (1947); *Hale* v. *Kentucky,* 303 U. S. 613 (1938); *Norris* v.

gress has made it a crime for a public official to exclude anyone from a grand or petit jury on the basis of race, 18 U. S. C. § 243, and this Court upheld the statute, approving the congressional determination that such exclusion would violate the express prohibitions of the Equal Protection Clause. *Ex parte Virginia,* 100 U. S. 339 (1880). The crime, and the unconstitutional state action, occur whether the defendant is white or Negro, whether he is acquitted or convicted. In short, when a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim.

It is a separate question, however, whether petitioner is entitled to the relief he seeks on the basis of that constitutional violation. Respondent argues that even if the grand and petit juries were unconstitutionally selected, petitioner is not entitled to relief on that account because he has not shown how he was harmed by the error. It is argued that a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on a presumption that a jury so constituted will be prejudiced against him; that no such presumption is available to a white defendant; and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief.

That argument takes too narrow a view of the kinds of harm that flow from discrimination in jury selection. The exclusion of Negroes from jury service, like the arbitrary exclusion of any other well-defined class of citizens, offends a number of related constitutional values.

In *Strauder* v. *West Virginia,* 100 U. S. 303, 308–309 (1880), this Court considered the question from the point

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Alabama, 294 U. S. 587 (1935); *Martin* v. *Texas,* 200 U. S. 316 (1906); *Neal* v. *Delaware,* 103 U. S. 370 (1881); *Strauder* v. *West Virginia,* 100 U. S. 303 (1880).

of view of the Negro defendant's right to equal protection of the laws. *Strauder* was part of a landmark trilogy of cases, in which this Court first dealt with the problem of racial discrimination in jury selection. In *Strauder* itself, a Negro defendant sought to remove his criminal trial to the federal courts, pursuant to statute, on the ground that Negroes were excluded by law from the grand and petit juries in the state courts; the Court upheld his claim. In *Virginia* v. *Rives,* 100 U. S. 313 (1880), a Negro defendant sought removal on the ground that there were in fact no Negroes in the venire from which his jury was drawn; the Court held that, without more, his claim did not come within the precise terms of the removal statute. Finally, in *Ex parte Virginia,* 100 U. S. 339 (1880), a state judge challenged the statute under which he was convicted for the federal crime of excluding Negroes from state grand and petit juries; the Court upheld the statute as a valid means of enforcing the Equal Protection Clause. Because each of these three cases was amenable to decision on the narrow basis of an analysis of the Negro defendant's right to equal protection, the Court brought all three under that single analytical umbrella.

But even in 1880 the Court recognized that other constitutional values were implicated. In *Strauder,* the Court observed that the exclusion of Negroes from jury service injures not only defendants, but also other members of the excluded class: it denies the class of potential jurors the "privilege of participating equally . . . in the administration of justice," 100 U. S., at 308, and it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting "a brand upon them, affixed by law, an assertion of their inferiority." *Ibid.* It is now clear that injunctive relief is available to vindicate these interests of the excluded jurors and the stigmatized class.

Carter v. *Jury Commission of Greene County,* 396 U. S. 320 (1970); *Turner* v. *Fouche,* 396 U. S. 346 (1970); *White* v. *Crook,* 251 F. Supp. 401 (MD Ala. 1966).

Moreover, the Court has also recognized that the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community. In *Williams* v. *Florida,* 399 U. S. 78 (1970), we sought to delineate some of the essential features of the jury that is guaranteed, in certain circumstances, by the Sixth Amendment. We concluded that it comprehends, *inter alia,* "a fair possibility for obtaining a representative cross-section of the community." 399 U. S., at 100.[9] Thus if the Sixth Amendment were applicable here, and petitioner were challenging a post-*Duncan* petit jury, he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service.[10]

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[9] The principle of the representative jury was first articulated by this Court as a requirement of equal protection, in cases vindicating the right of a Negro defendant to challenge the systematic exclusion of Negroes from his grand and petit juries. *E. g., Smith* v. *Texas,* 311 U. S. 128, 130 (1940). Subsequently, in the exercise of its supervisory power over federal courts, this Court extended the principle, to permit any defendant to challenge the arbitrary exclusion from jury service of his own or any other class. *E. g., Glasser* v. *United States,* 315 U. S. 60, 83–87 (1942); *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 220 (1946); *Ballard* v. *United States,* 329 U. S. 187 (1946). Finally it emerged as an aspect of the constitutional right to jury trial in *Williams* v. *Florida,* 399 U. S. 78, 100 (1970).

[10] It is of course a separate question whether his challenge would prevail, *i. e.,* whether the exclusion might be found to have sufficient justification. See *Rawlins* v. *Georgia,* 201 U. S. 638, 640 (1906), holding that a State may exclude certain occupational categories from jury service "on the bona fide ground that it [is] for the good of the community that their regular work should not be inter-

The precise question in this case, then, is whether a State may subject a defendant to indictment and trial by grand and petit juries that are plainly illegal in their composition, and leave the defendant without recourse on the ground that he had in any event no right to a grand or petit jury at all. We conclude, for reasons that follow, that to do so denies the defendant due process of law.

III

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U. S. 133, 136 (1955). The due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding. Due process requires a competent and impartial tribunal in administrative hearings, *Goldberg* v. *Kelly,* 397 U. S. 254, 271 (1970), and in trials to a judge, *Tumey* v. *Ohio,* 273 U. S. 510 (1927). Similarly, if a State chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury.

Long before this Court held that the Constitution imposes the requirement of jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law. Thus a defendant cannot, consistent with due process, be subjected to trial by an insane juror, *Jordan* v. *Massachusetts,* 225 U. S. 167, 176 (1912), by jurors who are intimidated by the threat of mob violence, *Moore* v. *Dempsey,* 261 U. S. 86 (1923), or by jurors who

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rupted." We have no occasion here to consider what interests might justify an exclusion, or what standard should be applied, since the only question in this case is not the validity of an exclusion but simply standing to challenge it.

have formed a fixed opinion about the case from newspaper publicity, *Irvin* v. *Dowd,* 366 U. S. 717 (1961).

Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias. This rule, too, was well established long before the right to jury trial was made applicable in state trials, and does not depend on it. Thus it has been invoked in trials to a judge, *e. g., Tumey* v. *Ohio,* 273 U. S. 510 (1927); *In re Murchison,* 349 U. S. 133 (1955); *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971); and in pre-*Duncan* state jury trials, *e. g., Turner* v. *Louisiana,* 379 U. S. 466 (1965); *Estes* v. *Texas,* 381 U. S. 532, 550 (1965). In *Tumey* v. *Ohio, supra,* this Court held that a judge could not, consistent with due process, try a case when he had a financial stake in the outcome, notwithstanding the possibility that he might resist the temptation to be influenced by that interest. And in *Turner* v. *Louisiana, supra,* the Court held that a jury could not, consistent with due process, try a case after it had been placed in the protective custody of the principal prosecution witnesses, notwithstanding the possibility that the jurors might not be influenced by the association. As this Court said in *In re Murchison, supra,* "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." 349 U. S., at 136.

These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.

They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

If it were possible to say with confidence that the risk of bias resulting from the arbitrary action involved here is confined to cases involving Negro defendants,[11] then perhaps the right to challenge the tribunal on that ground could be similarly confined. The case of the white defendant might then be thought to present a species of harmless error.

But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. First, if we assume that the exclusion of Negroes affects the fairness of the jury only with respect to issues presenting a clear opportunity for the operation of race prejudice, that assumption does not provide a workable guide for decision in particular cases. For the opportunity to appeal to race prejudice is latent in a vast range of issues, cutting across the entire fabric of our society.

Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a

[11] Or the class may be expanded slightly to include white civil rights workers, see *Allen* v. *State,* 110 Ga. App. 56, 62, 137 S. E. 2d 711, 715 (1964) (alternative holding).

perspective on human events that may have unsuspected importance in any case that may be presented.[12]

It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case. Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty. See *Speiser* v. *Randall,* 357 U. S. 513, 525–526 (1958); *In re Winship,* 397 U. S. 358, 370–373 (1970) (Harlan, J., concurring). In light of the great potential for harm latent in an unconstitutional jury-selection system,[13] and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.

Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. This certainly is true in this case, where the claim is that Negroes were systematically excluded from jury service.

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[12] In rejecting, for the federal courts, the exclusion of women from jury service, this Court made the following observations, which are equally relevant to the exclusion of other discernible groups:

"The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded." *Ballard* v. *United States,* 329 U. S. 187, 193–194 (1946) (footnote omitted).

[13] *Hill* v. *Texas,* 316 U. S. 400, 406 (1942).

For Congress has made such exclusion a crime. 18 U. S. C. § 243.

IV

Having resolved the question of standing, we turn briefly to the further disposition of this case. There is, of course, no question here of justifying the system under attack. For whatever may be the law with regard to other exclusions from jury service, it is clear beyond all doubt that the exclusion of Negroes cannot pass constitutional muster. Accordingly, if petitioner's allegations are correct, and Negroes were systematically excluded from his grand and petit juries, then he was indicted and convicted by tribunals that fail to satisfy the elementary requirements of due process, and neither the indictment nor the conviction can stand. Since he was precluded from proving the facts alleged in support of his claim, the judgment must be reversed and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, concurring in the judgment.

Since March 1, 1875, the criminal laws of the United States have contained a proscription to the following effect:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude . . . ."

By this unambiguous provision, now contained in 18 U. S. C. § 243, Congress put cases involving exclusions

from jury service on grounds of race in a class by themselves. "For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York,* 332 U. S. 261, 282–283 (1947).

The consequence is that where jury commissioners disqualify citizens on the grounds of race, they fail "to perform their constitutional duty—recognized by § 4 of the Civil Rights Act of March 1, 1875 . . . and fully established since the decision in 1881 of *Neal* v. *Delaware* . . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill* v. *Texas,* 316 U. S. 400, 404 (1942). Thus, "no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid . . . . [I]t is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained." *Id.,* at 406.

It is true that the defendant in *Hill* was a Negro and petitioner here is a white man. It is also true that there is no case in this Court setting aside a conviction for arbitrary exclusions of a class of citizens from jury service where the defendant was not a member of the excluded class. I also recognize that, as in this case, the courts of appeals reflecting the generally accepted constitutional view, have rejected claims such as petitioner presents here. For me, however, the rationale and operative language of *Hill* v. *Texas* suggest a broader

sweep; and I would implement the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. This is the better view, and it is time that we now recognized it in this case and as the standard governing criminal proceedings instituted hereafter. Hence, I join the judgment of the Court.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

There is no longer any question, of course, that persons may not be excluded from juries on account of race. Such exclusions are plainly unlawful and deserving of condemnation. That, however, is not the issue before us. The real issue is whether such illegality necessarily voids a criminal conviction, absent any demonstration of prejudice, or basis for presuming prejudice, to the accused.

Petitioner was indicted for the offense of burglary on June 6, 1966, and thereafter convicted. The conviction was reversed on direct appeal, and the case was remanded for a new trial. Petitioner was retried on December 8, 1966, was found guilty, and was sentenced to 10 years' imprisonment. Petitioner is not a Negro and the record in no way suggests that race was relevant in the proceedings against him. At trial, petitioner made no challenge to the method of selection of the grand and petit juries, and he made no challenge to the array of the petit jury. In his appeal to the Court of Appeals of Georgia, petitioner still made no claim addressed to the method of selection of the grand and petit juries. His conviction was affirmed.

Seven months after his trial, petitioner filed a writ of habeas corpus in the United States District Court, asserting for the first time that Negroes were systematically excluded from the grand and petit juries. If petitioner's allegations are true, then the officials responsible for the jury selection acted in violation of the Constitution, denying potential Negro jurors the equal opportunity to participate in the administration of justice. *Strauder* v. *West Virginia,* 100 U. S. 303, 308 (1880). Moreover, if petitioner's allegations are true, the responsible officials are subject to criminal penalties. 18 U. S. C. § 243. However, in order for petitioner's conviction to be set aside, it is not enough to show merely that there has been some unconstitutional or unlawful action at the trial level. It must be established that petitioner's conviction has resulted from the denial of federally secured rights properly asserted by him. See *Alderman* v. *United States,* 394 U. S. 165, 171–174 (1969); cf. *Jones* v. *United States,* 362 U. S. 257, 261 (1960).

The opinions in support of the majority position do not hold that if petitioner's allegations are true, he has been denied the equal protection of the laws. The Court has held in a long line of cases that a Negro defendant is denied equal protection by the systematic exclusion of Negroes from jury service. See, *e. g., Whitus* v. *Georgia,* 385 U. S. 545 (1967); *Avery* v. *Georgia,* 345 U. S. 559 (1953); *Norris* v. *Alabama,* 294 U. S. 587 (1935); *Carter* v. *Texas,* 177 U. S. 442 (1900); *Strauder* v. *West Virginia,* 100 U. S. 303 (1880). These decisions have been predicated from the beginning on the judicially noticeable fact "that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."

Strauder v. *West Virginia, supra,* at 309. See also *Gibson* v. *Mississippi,* 162 U. S. 565, 581 (1896); *Bush* v. *Kentucky,* 107 U. S. 110, 117 (1883); *Neal* v. *Delaware,* 103 U. S. 370, 386 (1881); *Ex parte Virginia,* 100 U. S. 339, 345 (1880). This presumption of prejudice derives from the fact that the defendant is a member of the excluded class, but the Court has never intimated that a defendant is the victim of unconstitutional discrimination if he does not claim that members of his own race have been excluded. See *Alexander* v. *Louisiana,* 405 U. S. 625, 633 (1972).

While the opinion of MR. JUSTICE MARSHALL refrains from relying on the Equal Protection Clause, it concludes that if petitioner's allegations are true, he has been denied due process of law. The opinion seeks to equate petitioner's position with that of a defendant who has been tried before a biased tribunal or one lacking the indicia of impartiality. It has been held that an accused is denied due process if the trier of fact is mentally incompetent, *Jordan* v. *Massachusetts,* 225 U. S. 167 (1912), has a personal interest in the outcome of the proceedings, *Tumey* v. *Ohio,* 273 U. S. 510 (1927), has been subjected to pressures making a dispassionate decision unlikely, *Irvin* v. *Dowd,* 366 U. S. 717 (1961), *Moore* v. *Dempsey* 261 U. S. 86 (1923), cf. *Turner* v. *Louisiana,* 379 U. S. 466 (1965), or has had direct personal involvement with the events underlying a criminal contempt charge. *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971); *In re Murchison,* 349 U. S. 133 (1955). This case plainly falls in none of those categories.

Although the prior cases have not required a showing that the trier of fact was actually affected by prejudice in its deliberations, in every case the circumstances were such as to create a serious "probability of unfairness." *In re Murchison,* 349 U. S., at 136. Recognizing this limitation, the Court in *Witherspoon* v. *Illinois,* 391

U. S. 510 (1968), found no denial of due process where the determination of guilt had been entrusted to a jury from which persons opposed to the death penalty had been excluded. The Court rejected as "tentative and fragmentary" scientific evidence tending to show "that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." 391 U. S., at 517. The Court went on to state,

> "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." 391 U. S., at 517–518.

See also *Fay* v. *New York,* 332 U. S. 261, 280–281 (1947). Here three members of the Court would establish such a *per se* rule without the benefit of tentative, fragmentary, or any other kind of empirical data indicating that all-white juries tend to be prejudiced against white defendants in nonracial criminal proceedings.

The opinion of MR. JUSTICE MARSHALL seeks to magnify this wholly speculative likelihood of prejudice by noting that the effect of excluding "any large and identifiable segment of the community . . . is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable," and "that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Ante,* at 503–504. I completely agree that juries should not be deprived of the insights of the various

segments of the community, for the "common-sense judgment of a jury," referred to in *Duncan* v. *Louisiana,* 391 U. S. 145, 156 (1968), is surely enriched when all voices can be heard. But we are not here concerned with the essential attributes of trial by jury. In fact, since petitioner was tried two years before this Court's decision in *Duncan,* there was no constitutional requirement that he be tried before a jury at all. *DeStefano* v. *Woods,* 392 U. S. 631 (1968). Had the State of Georgia proceeded to try petitioner before a judge, I assume the Court would not find it a denial of due process if the judge were not the embodiment of all the "qualities of human nature and varieties of human experience." I do not mean to minimize the importance of these values, but they really have very little to do with the narrow question whether petitioner was convicted by a prejudiced tribunal.

Nor do I believe that the illegality of the alleged exclusion can be viewed as tipping the scales toward finding a denial of due process. The question of a jury's bias or prejudice is totally factual in nature. If the possibility of prejudice is too remote or speculative to support a finding of unconstitutionality, a different result cannot be justified by relying on the element of illegality. The constitutional and statutory prohibition against such conduct is extraneous to the due process question, for it in no way renders the possibility of prejudice less remote or less speculative. If this were a borderline case on the facts, it might conceivably be appropriate to resolve the doubt against the State due to its complicity in the alleged unlawful discrimination. But, judging from all existing authority, this is not a close case at all.

The opinion of MR. JUSTICE WHITE concurring in the judgment, as I read it, rests on the statutory prohibition against racially exclusive juries found in 18 U. S. C. § 243. The opinion draws on dictum in *Hill* v. *Texas,* 316 U. S.

400, 404 (1942), a case involving a Negro defendant, as expressing the "better view" that § 243 invalidates the conviction of any man tried before a jury from which persons have been excluded on account of race.*

A closer look at the statute is warranted. From all indications, § 243 was intended to serve two purposes: first, to make explicit what was implicit in the Fourteenth Amendment, that persons cannot be denied the right to serve on juries because of their race; and second, to prevent racial exclusions from juries by providing criminal penalties for persons violating the statutory command. See *Ex parte Virginia,* 100 U. S. 339 (1880); *Neal* v. *Delaware,* 103 U. S. 370, 386 (1881). Insofar as the statute is declarative of rights secured by the Equal Protection Clause, it provides no authority for reaching a result that the Constitution itself does not require. No case has ever held that § 243 confers extra-constitutional rights on criminal defendants, and there is no support for the view that Congress intended to confer such rights when it enacted this legislation in 1875.

The opinion concurring in the judgment suggests that an expansive reading of § 243 is appropriate to "implement the strong statutory policy" against the exclusion

*The passage quoted from *Hill* v. *Texas, supra,* even if taken at face value, does not mandate reversal in this case. It is expressly limited to the case where "timely objection has laid bare a discrimination in the selection of grand jurors . . . ." 316 U. S., at 406. As indicated earlier, petitioner first made his allegations seven months after his trial. Moreover, assuming, *arguendo,* that there is a statutory right not to be tried before a racially exclusive jury, it is not clear to me why petitioner's failure to raise the matter in the state courts should not preclude him from raising it on a federal habeas attack. The Court has spoken of a presumption against the waiver of fundamental, constitutional rights, see, *e. g., Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938), but has never intimated that a similar presumption should apply with respect to statutory rights.

of persons from jury service on the basis of race. Under this interpretation, the statute is viewed not so much as safeguarding the rights of the white defendant, but as providing a prophylaxis against discriminatory action in all cases, regardless of any harm that might befall the accused. While Congress surely had the power to implement the policies of the Fourteenth Amendment in this manner, it chose instead to deter such violations of the Fourteenth Amendment by imposing criminal sanctions. It has been apparent, at least until recently, that such sanctions have not satisfactorily served to deter. But it is not for this Court to correct the inadequacies of a statutory enactment. Moreover, it does nothing to promote adherence to the policies of the Fourteenth Amendment to allow a criminal defendant who has made no objection at trial and who has no credible claim of personal prejudice to mount a post-conviction attack alleging that discriminatory jury selection has taken place in the past.

BARKER *v.* WINGO, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71–5255. Argued April 11, 1972—Decided June 22, 1972

Petitioner was not brought to trial for murder until more than five years after he had been arrested, during which time the prosecution obtained numerous continuances, initially for the purpose of first trying petitioner's alleged accomplice so that his testimony, if conviction resulted, would be available at petitioner's trial. Before the accomplice was finally convicted, he was tried six times. Petitioner made no objection to the continuances until three and one-half years after he was arrested. After the accomplice was finally convicted, petitioner, after further delays because of a key prosecution witness' illness, was tried and convicted. In this habeas corpus proceeding the Court of Appeals, concluding that petitioner had waived his right to a speedy trial for the period prior to his demand for trial, and in any event had not been prejudiced by the delay, affirmed the District Court's judgment against petitioner. *Held:* A defendant's constitutional right to a speedy trial cannot be established by any inflexible rule but can be determined only on an *ad hoc* balancing basis, in which the conduct of the prosecution and that of the defendant are weighed. The court should assess such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In this case the lack of any serious prejudice to petitioner and the fact, as disclosed by the record, that he did not want a speedy trial outweigh opposing considerations and compel the conclusion that petitioner was not deprived of his due process right to a speedy trial. Pp. 519–536.

442 F. 2d 1141, affirmed.

POWELL, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 536.

James E. Milliman argued the cause for petitioner *pro hac vice*. With him on the brief were *Norvie L. Lay* and *J. Chester Porter*.

Robert W. Willmott, Jr., Assistant Attorney General of Kentucky, argued the cause for respondent *pro hac vice.* With him on the brief was *Ed W. Hancock,* Attorney General.

Briefs of *amici curiae* were filed by *Solicitor General Griswold* for the United States, and by *Thomas D. Barr* for the Lawyers Committee for Civil Rights Under Law.

MR. JUSTICE POWELL delivered the opinion of the Court.

Although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution,[1] this Court has dealt with that right on infrequent occasions. See *Beavers* v. *Haubert,* 198 U. S. 77 (1905); *Pollard* v. *United States,* 352 U. S. 354 (1957); *United States* v. *Ewell,* 383 U. S. 116 (1966); *United States* v. *Marion,* 404 U. S. 307 (1971). See also *United States* v. *Provoo,* 17 F. R. D. 183 (D. Md.), aff'd, 350 U. S. 857 (1955). The Court's opinion in *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967), established that the right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States.[2] See *Smith* v. *Hooey,* 393 U. S. 374 (1969); *Dickey* v. *Florida,* 398 U. S. 30 (1970). As MR. JUSTICE BRENNAN

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[1] The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[2] "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." 386 U. S., at 223.

pointed out in his concurring opinion in *Dickey,* in none of these cases have we attempted to set out the criteria by which the speedy trial right is to be judged. 398 U. S., at 40–41. This case compels us to make such an attempt.

I

On July 20, 1958, in Christian County, Kentucky, an elderly couple was beaten to death by intruders wielding an iron tire tool. Two suspects, Silas Manning and Willie Barker, the petitioner, were arrested shortly thereafter. The grand jury indicted them on September 15. Counsel was appointed on September 17, and Barker's trial was set for October 21. The Commonwealth had a stronger case against Manning, and it believed that Barker could not be convicted unless Manning testified against him. Manning was naturally unwilling to incriminate himself. Accordingly, on October 23, the day Silas Manning was brought to trial, the Commonwealth sought and obtained the first of what was to be a series of 16 continuances of Barker's trial.[3] Barker made no objection. By first convicting Manning, the Commonwealth would remove possible problems of self-incrimination and would be able to assure his testimony against Barker.

The Commonwealth encountered more than a few difficulties in its prosecution of Manning. The first trial ended in a hung jury. A second trial resulted in a conviction, but the Kentucky Court of Appeals reversed because of the admission of evidence obtained by an illegal search. *Manning* v. *Commonwealth,* 328 S. W. 2d 421 (1959). At his third trial, Manning was again convicted, and the Court of Appeals again reversed

[3] There is no explanation in the record why, although Barker's initial trial was set for October 21, no continuance was sought until October 23, two days after the trial should have begun.

because the trial court had not granted a change of venue. *Manning* v. *Commonwealth,* 346 S. W. 2d 755 (1961). A fourth trial resulted in a hung jury. Finally, after five trials, Manning was convicted, in March 1962, of murdering one victim, and after a sixth trial, in December 1962, he was convicted of murdering the other.[4]

The Christian County Circuit Court holds three terms each year—in February, June, and September. Barker's initial trial was to take place in the September term of 1958. The first continuance postponed it until the February 1959 term. The second continuance was granted for one month only. Every term thereafter for as long as the Manning prosecutions were in process, the Commonwealth routinely moved to continue Barker's case to the next term. When the case was continued from the June 1959 term until the following September, Barker, having spent 10 months in jail, obtained his release by posting a $5,000 bond. He thereafter remained free in the community until his trial. Barker made no objection, through his counsel, to the first 11 continuances.

When on February 12, 1962, the Commonwealth moved for the twelfth time to continue the case until the following term, Barker's counsel filed a motion to dismiss the indictment. The motion to dismiss was denied two weeks later, and the Commonwealth's motion for a continuance was granted. The Commonwealth was granted further continuances in June 1962 and September 1962, to which Barker did not object.

In February 1963, the first term of court following Manning's final conviction, the Commonwealth moved to set Barker's trial for March 19. But on the day scheduled for trial, it again moved for a continuance until the June term. It gave as its reason the illness

[4] Apparently Manning chose not to appeal these final two convictions.

of the ex-sheriff who was the chief investigating officer in the case. To this continuance, Barker objected unsuccessfully.

The witness was still unable to testify in June, and the trial, which had been set for June 19, was continued again until the September term over Barker's objection. This time the court announced that the case would be dismissed for lack of prosecution if it were not tried during the next term. The final trial date was set for October 9, 1963. On that date, Barker again moved to dismiss the indictment, and this time specified that his right to a speedy trial had been violated.[5] The motion was denied; the trial commenced with Manning as the chief prosecution witness; Barker was convicted and given a life sentence.

Barker appealed his conviction to the Kentucky Court of Appeals, relying in part on his speedy trial claim. The court affirmed. *Barker* v. *Commonwealth,* 385 S. W. 2d 671 (1964). In February 1970 Barker petitioned for habeas corpus in the United States District Court for the Western District of Kentucky. Although the District Court rejected the petition without holding a hearing, the court granted petitioner leave to appeal *in forma pauperis* and a certificate of probable cause to appeal. On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court. 442 F. 2d 1141 (1971). It ruled that Barker had waived his speedy trial claim for the entire period before February 1963, the date on which the court believed he had first objected to the delay by filing a motion to dismiss. In this belief the court was mistaken, for the record re-

[5] The written motion Barker filed alleged that he had objected to every continuance since February 1959. The record does not reflect any objections until the motion to dismiss, filed in February 1962, and the objections to the continuances sought by the Commonwealth in March 1963 and June 1963.

veals that the motion was filed in February 1962. The Commonwealth so conceded at oral argument before this Court.[6] The court held further that the remaining period after the date on which Barker first raised his claim and before his trial—which it thought was only eight months but which was actually 20 months—was not unduly long. In addition, the court held that Barker had shown no resulting prejudice, and that the illness of the ex-sheriff was a valid justification for the delay. We granted Barker's petition for certiorari. 404 U. S. 1037 (1972).

II

The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system.[7] In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes.[8] It must be of little comfort to the residents of Christian County, Kentucky, to know that Barker was at large on bail for over four years while accused of a vicious

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[6] Tr. of Oral Arg. 33.

[7] Report of the President's Commission on Crime in the District of Columbia 256 (1966).

[8] In Washington, D. C., in 1968, 70.1% of the persons arrested for robbery and released prior to trial were re-arrested while on bail. Mitchell, Bail Reform and the Constitutionality of Pretrial Deten-

and brutal murder of which he was ultimately convicted. Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape.[9] Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.[10]

If an accused cannot make bail, he is generally confined, as was Barker for 10 months, in a local jail. This contributes to the overcrowding and generally deplorable state of those institutions.[11] Lengthy exposure to these conditions "has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." [12] At times the result may even be violent rioting.[13] Finally, lengthy pretrial detention is costly. The cost of maintaining a prisoner in jail varies from $3 to $9 per day, and this amounts to millions across

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tion, 55 Va. L. Rev. 1223, 1236 (1969), citing Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia 20–21 (1969).

[9] The number of these offenses has been increasing. See Annual Report of the Director of the Administrative Office of the United States Courts, 1971, p. 321.

[10] "[I]t is desirable that punishment should follow offence as closely as possible; for its impression upon the minds of men is weakened by distance, and, besides, distance adds to the uncertainty of punishment, by affording new chances of escape." J. Bentham, The Theory of Legislation 326 (Ogden ed. 1931).

[11] To Establish Justice, To Insure Domestic Tranquility, Final Report of the National Commission on the Causes and Prevention of Violence 152 (1969).

[12] Testimony of James V. Bennett, Director, Bureau of Prisons, Hearings on Federal Bail Procedures before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 88th Cong., 2d Sess., 46 (1964).

[13] *E. g.*, the "Tombs" riots in New York City in 1970. N. Y. Times, Oct. 3, 1970, p. 1, col. 8.

the Nation.[14] In addition, society loses wages which might have been earned, and it must often support families of incarcerated breadwinners.

A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not *per se* prejudice the accused's ability to defend himself.

Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.[15] As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. If, for example, the State moves for

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[14] The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice 131 (1967).

[15] "[I]n large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *United States* v. *Ewell,* 383 U. S. 116, 120 (1966).

a 60-day continuance, granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the values the right protects. It is impossible to do more than generalize about when those circumstances exist. There is nothing comparable to the point in the process when a defendant exercises or waives his right to counsel or his right to a jury trial. Thus, as we recognized in *Beavers* v. *Haubert, supra,* any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." 198 U. S., at 87.

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial,[16] but it is the only possible remedy.

III

Perhaps because the speedy trial right is so slippery, two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts ex-

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[16] MR. JUSTICE WHITE noted in his opinion for the Court in *Ewell, supra,* at 121, that overzealous application of this remedy would infringe "the societal interest in trying people accused of crime, rather than granting them immunization because of legal error. . . ."

perience in protecting the right. The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it. Recognizing this, some legislatures have enacted laws, and some courts have adopted procedural rules which more narrowly define the right.[17] The United States Court of Appeals for the Second Circuit has promulgated rules for the district courts in that Circuit establishing that the government must be ready for trial within six months of the date of arrest, except in unusual circumstances, or the charge will be dismissed.[18] This type of rule is also recommended by the American Bar Association.[19]

But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

The second suggested alternative would restrict con-

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[17] For examples, see American Bar Association Project on Standards for Criminal Justice, Speedy Trial 14–16 (Approved Draft 1968); Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 863 (1957).

[18] Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971).

[19] ABA Project, *supra*, n. 17, at 14. For an example of a proposed statutory rule, see Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1619 (1965).

sideration of the right to those cases in which the accused has demanded a speedy trial. Most States have recognized what is loosely referred to as the "demand rule," [20] although eight States reject it.[21] It is not clear, however, precisely what is meant by that term. Although every federal court of appeals that has considered the question has endorsed some kind of demand rule, some have regarded the rule within the concept of waiver,[22] whereas others have viewed it as a factor to be weighed

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[20] *E. g., Pines* v. *District Court of Woodbury County,* 233 Iowa 1284, 10 N. W. 2d 574 (1943). See generally Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 853 (1957); Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1601–1602 (1965).

[21] See *State* v. *Maldonado,* 92 Ariz. 70, 373 P. 2d 583 (*en banc*), cert. denied, 371 U. S. 928 (1962); *Hicks* v. *People,* 148 Colo. 26, 364 P. 2d 877 (1961) (*en banc*); *People* v. *Prosser,* 309 N. Y. 353, 130 N. E. 2d 891 (1955); *Zehrlaut* v. *State,* 230 Ind. 175, 102 N. E. 2d 203 (1951); *Flanary* v. *Commonwealth,* 184 Va. 204, 35 S. E. 2d 135 (1945); *Ex parte Chalfant,* 81 W. Va. 93, 93 S. E. 1032 (1917); *State* v. *Hess,* 180 Kan. 472, 304 P. 2d 474 (1956); *State* v. *Dodson,* 226 Ore. 458, 360 P. 2d 782 (1961). But see *State* v. *Vawter,* 236 Ore. 85, 386 P. 2d 915 (1963).

[22] See *United States* v. *Hill,* 310 F. 2d 601 (CA4 1962); *Bruce* v. *United States,* 351 F. 2d 318 (CA5 1965), cert. denied, 384 U. S. 921 (1966); *United States* v. *Perez,* 398 F. 2d 658 (CA7 1968), cert. denied, 393 U. S. 1080 (1969); *Pietch* v. *United States,* 110 F. 2d 817 (CA10), cert. denied, 310 U. S. 648 (1940); *Smith* v. *United States,* 118 U. S. App. D. C. 38, 331 F. 2d 784 (1964) (*en banc*). The opinion below in this case demonstrates that the Sixth Circuit takes a similar approach.

As an indication of the importance which these courts have attached to the demand rule, see *Perez, supra,* in which the court held that a defendant waived any speedy trial claim, because he knew of an indictment and made no demand for an immediate trial, even though the record gave no indication that he was represented by counsel at the time when he should have made his demand, and even though he was not informed by the court or the prosecution of his right to a speedy trial.

in assessing whether there has been a deprivation of the speedy trial right.[23] We shall refer to the former approach as the demand-waiver doctrine. The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right. This essentially was the approach the Sixth Circuit took below.

Such an approach, by presuming waiver of a fundamental right[24] from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). Courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 393 (1937), and they should "not presume acqui-

[23] Although stating that they recognize a demand rule, the approach of the Eighth and Ninth Circuits seems to be that a denial of speedy trial can be found despite an absence of a demand under some circumstances. See *Bandy* v. *United States,* 408 F. 2d 518 (CA8 1969) (a purposeful or oppressive delay may overcome a failure to demand); *Moser* v. *United States,* 381 F. 2d 363 (CA9 1967) (despite a failure to demand, the court balanced other considerations).

The Second Circuit's approach is unclear. There are cases in which a failure to demand is strictly construed as a waiver. *E. g., United States* v. *DeMasi,* 445 F. 2d 251 (1971). In other cases, the court has seemed to be willing to consider claims in which there was no demand. *E. g., United States ex rel. Solomon* v. *Mancusi,* 412 F. 2d 88, cert. denied, 396 U. S. 936 (1969). Certainly the District Courts in the Second Circuit have not regarded the demand rule as being rigid. See *United States* v. *Mann,* 291 F. Supp. 268 (SDNY 1968); *United States* v. *Dillon,* 183 F. Supp. 541 (SDNY 1960).

The First Circuit also seems to reject the more rigid approach. Compare *United States* v. *Butler,* 426 F. 2d 1275 (1970), with *Needel* v. *Scafati,* 412 F. 2d 761, cert. denied, 396 U. S. 861 (1969).

[24] See n. 2, *supra.*

escence in the loss of fundamental rights," *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 307 (1937). In *Carnley* v. *Cochran,* 369 U. S. 506 (1962), we held:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver." *Id.,* at 516.

The Court has ruled similarly with respect to waiver of other rights designed to protect the accused. See, *e. g., Miranda* v. *Arizona,* 384 U. S. 436, 475–476 (1966); *Boykin* v. *Alabama,* 395 U. S. 238 (1969).

In excepting the right to speedy trial from the rule of waiver we have applied to other fundamental rights, courts that have applied the demand-waiver rule have relied on the assumption that delay usually works for the benefit of the accused and on the absence of any readily ascertainable time in the criminal process for a defendant to be given the choice of exercising or waiving his right. But it is not necessarily true that delay benefits the defendant. There are cases in which delay appreciably harms the defendant's ability to defend himself.[25]

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[25] "If a defendant deliberately by-passes state procedure for some strategic, tactical, or other reason, a federal judge on habeas corpus may deny relief if he finds that the by-passing was the *considered* choice of the petitioner. The demand doctrine presupposes that failure to demand trial is a deliberate choice for supposed advantage on the assumption that delay always benefits the accused, but the delay does not inherently benefit the accused any more than it does the state. Consequently, a man should not be presumed to have exercised a deliberate choice because of silence or inaction that could equally mean that he is unaware of the necessity for a demand." Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1610 (1965) (footnotes omitted).

Moreover, a defendant confined to jail prior to trial is obviously disadvantaged by delay as is a defendant released on bail but unable to lead a normal life because of community suspicion and his own anxiety.

The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. A defendant has no duty to bring himself to trial; [26] the State has that duty as well as the duty of insuring that the trial is consistent with due process.[27] Moreover, for the reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.

It is also noteworthy that such a rigid view of the demand-waiver rule places defense counsel in an awkward position. Unless he demands a trial early and often, he is in danger of frustrating his client's right. If counsel is willing to tolerate some delay because he finds it reasonable and helpful in preparing his own case, he may be unable to obtain a speedy trial for his client at the end of that time. Since under the demand-waiver rule no time

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[26] As MR. CHIEF JUSTICE BURGER wrote for the Court in *Dickey* v. *Florida:*

"Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." 398 U. S. 30, 37–38 (1970) (footnote omitted).

[27] As a circuit judge, MR. JUSTICE BLACKMUN wrote:

"The government and, for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense. The right to 'a speedy . . . trial' is constitutionally guaranteed and, as such, is not to be honored only for the vigilant and the knowledgeable." *Hodges* v. *United States,* 408 F. 2d 543, 551 (CA8 1969).

runs until the demand is made, the government will have whatever time is otherwise reasonable to bring the defendant to trial after a demand has been made. Thus, if the first demand is made three months after arrest in a jurisdiction which prescribes a six-month rule, the prosecution will have a total of nine months—which may be wholly unreasonable under the circumstances. The result in practice is likely to be either an automatic, *pro forma* demand made immediately after appointment of counsel or delays which, but for the demand-waiver rule, would not be tolerated. Such a result is not consistent with the interests of defendants, society, or the Constitution.

We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.[28] This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court

[28] The American Bar Association also rejects the rigid demand-waiver rule:

"One reason for this position is that there are a number of situations, such as where the defendant is unaware of the charge or where the defendant is without counsel, in which it is unfair to require a demand . . . . Jurisdictions with a demand requirement are faced with the continuing problem of defining exceptions, a process which has not always been carried out with uniformity . . . . More important, the demand requirement is inconsistent with the public interest in prompt disposition of criminal cases. . . . [T]he trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge." ABA Project, *supra*, n. 17, at 17.

to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.

In ruling that a defendant has some responsibility to assert a speedy trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made. Such cases have involved rights which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self-incrimination, and to have the assistance of counsel. We have shown above that the right to a speedy trial is unique in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived. But the rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial. We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside.

We, therefore, reject both of the inflexible approaches—the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed

fundamental. The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.[29]

IV

A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.[30]

The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the pecu-

[29] Nothing we have said should be interpreted as disapproving a presumptive rule adopted by a court in the exercise of its supervisory powers which establishes a fixed time period within which cases must normally be brought. See n. 18, *supra*.

[30] See, *e. g.*, *United States* v. *Simmons*, 338 F. 2d 804, 807 (CA2 1964), cert. denied, 380 U. S. 983 (1965); Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 478 n. 15 (1968).

In his concurring opinion in *Dickey*, MR. JUSTICE BRENNAN identified three factors for consideration: the source of the delay, the reasons for it, and whether the delay prejudiced the interests protected by the right. 398 U. S., at 48. He included consideration of the defendant's failure to assert his right in the cause-of-delay category, and he thought the length of delay was relevant primarily to the reasons for delay and its prejudicial effects. *Id.*, n. 12. In essence, however, there is little difference between his approach and the one we adopt today. See also Note, The Right to a Speedy Trial, *supra*, for another slightly different approach.

liar circumstances of the case.[31] To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government.[32] A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in de-

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[31] For example, the First Circuit thought a delay of nine months overly long, absent a good reason, in a case that depended on eyewitness testimony. *United States* v. *Butler*, 426 F. 2d 1275, 1277 (1970).

[32] We have indicated on previous occasions that it is improper for the prosecution intentionally to delay "to gain some tactical advantage over [defendants] or to harass them." *United States* v. *Marion*, 404 U. S. 307, 325 (1971). See *Pollard* v. *United States*, 352 U. S. 354, 361 (1957).

termining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.[33] Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs.[34] The time spent in

[33] *United States* v. *Ewell,* 383 U. S., at 120; *Smith* v. *Hooey,* 393 U. S. 374, 377–378 (1969). In *Klopfer* v. *North Carolina,* 386 U. S. 213, 221–222 (1967), we indicated that a defendant awaiting trial on bond might be subjected to public scorn, deprived of employment, and chilled in the exercise of his right to speak for, associate with, and participate in unpopular political causes.

[34] See To Establish Justice, To Insure Domestic Tranquility, Final Report of the National Commission on the Causes and Prevention of Violence 152 (1969).

jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.[35] Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility. See cases cited in n. 33, *supra*.

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.[36] But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

V

The difficulty of the task of balancing these factors is illustrated by this case, which we consider to be close. It is clear that the length of delay between arrest and trial—well over five years—was extraordinary. Only

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[35] There is statistical evidence that persons who are detained between arrest and trial are more likely to receive prison sentences than those who obtain pretrial release, although other factors bear upon this correlation. See Wald, Pretrial Detention and Ultimate Freedom: A Statistical Study, 39 N. Y. U. L. Rev. 631 (1964).

[36] For an example of how the speedy trial issue should be approached, see Judge Frankel's excellent opinion in *United States* v. *Mann*, 291 F. Supp. 268 (SDNY 1968).

seven months of that period can be attributed to a strong excuse, the illness of the ex-sheriff who was in charge of the investigation. Perhaps some delay would have been permissible under ordinary circumstances, so that Manning could be utilized as a witness in Barker's trial, but more than four years was too long a period, particularly since a good part of that period was attributable to the Commonwealth's failure or inability to try Manning under circumstances that comported with due process.

Two counterbalancing factors, however, outweigh these deficiencies. The first is that prejudice was minimal. Of course, Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety. Moreover, although he was released on bond for most of the period, he did spend 10 months in jail before trial. But there is no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay. The trial transcript indicates only two very minor lapses of memory—one on the part of a prosecution witness—which were in no way significant to the outcome.

More important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial. Counsel was appointed for Barker immediately after his indictment and represented him throughout the period. No question is raised as to the competency of such counsel.[37] Despite the fact that counsel had notice of the motions for continuances,[38] the record shows no action whatever taken between October 21, 1958, and February 12, 1962, that could be construed as the assertion of the speedy trial right. On the latter date, in response to another motion for continuance, Barker moved

[37] Tr. of Oral Arg. 39.

[38] *Id.*, at 4.

to dismiss the indictment. The record does not show on what ground this motion was based, although it is clear that no alternative motion was made for an immediate trial. Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried. Counsel conceded as much at oral argument:

> "Your honor, I would concede that Willie Mae Barker probably—I don't know this for a fact—probably did not want to be tried. I don't think any man wants to be tried. And I don't consider this a liability on his behalf. I don't blame him." Tr. of Oral Arg. 39.

The probable reason for Barker's attitude was that he was gambling on Manning's acquittal. The evidence was not very strong against Manning, as the reversals and hung juries suggest, and Barker undoubtedly thought that if Manning were acquitted, he would never be tried. Counsel also conceded this:

> "Now, it's true that the reason for this delay was the Commonwealth of Kentucky's desire to secure the testimony of the accomplice, Silas Manning. And it's true that if Silas Manning were never convicted, Willie Mae Barker would never have been convicted. We concede this." *Id.*, at 15.[39]

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[39] Hindsight is, of course, 20/20, but we cannot help noting that if Barker had moved immediately and persistently for a speedy trial following indictment, and if he had been successful, he would have undoubtedly been acquitted since Manning's testimony was crucial to the Commonwealth's case. It could not have been anticipated at the outset, however, that Manning would have been tried six times over a four-year period. Thus, the decision to gamble on Manning's acquittal may have been a prudent choice at the time it was made.

That Barker was gambling on Manning's acquittal is also suggested by his failure, following the *pro forma* motion to dismiss filed in February 1962, to object to the Commonwealth's next two motions for continuances. Indeed, it was not until March 1963, after Manning's convictions were final, that Barker, having lost his gamble, began to object to further continuances. At that time, the Commonwealth's excuse was the illness of the ex-sheriff, which Barker has conceded justified the further delay.[40]

We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted *ex parte*. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, concurring.

Although the Court rejects petitioner's speedy trial claim and affirms denial of his petition for habeas corpus,

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[40] At oral argument, counsel for Barker stated:

"That was after the sheriff, the material witness, was ill; the man who had arrested the petitioner, yes. And the Sixth Circuit held that this was a sufficient reason for delay, and we don't deny this. We concede that this was sufficient for the delay from March 1963 to October, but it does not explain the delays prior to that." Tr. of Oral Arg. 19–20.

it is apparent that had Barker not so clearly acquiesced in the major delays involved in this case, the result would have been otherwise. From the Commonwealth's point of view, it is fortunate that the case was set for early trial and that postponements took place only upon formal requests to which Barker had opportunity to object.

Because the Court broadly assays the factors going into constitutional judgments under the speedy trial provision, it is appropriate to emphasize that one of the major purposes of the provision is to guard against inordinate delay between public charge and trial, which, wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States* v. *Marion,* 404 U. S. 307, 320 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty. It is also true that many defendants will believe that time is on their side and will prefer to suffer whatever disadvantages delay may entail. But, for those who desire an early trial, these personal factors should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads. A defendant desiring a speedy trial, therefore, should have it within some reasonable time; and only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if such special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would

it be necessary to consider whether there has been or would be prejudice to the defense at trial. "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States* v. *Marion, supra,* at 320.

Of course, cases will differ among themselves as to the allowable time between charge and trial so as to permit prosecution and defense adequately to prepare their case. But unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn. As the Court points out, this approach also subverts the State's own goals in seeking to enforce its criminal laws.

Syllabus

CENTRAL HARDWARE CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70–223. Argued April 18, 1972—Decided June 22, 1972

Petitioner had a rule against solicitational activities in its stores and parking lots. The parking lots are appurtenant to petitioner's free-standing stores and do not serve other retail establishments. Union organizers used petitioner's parking lots to solicit petitioner's employees to join the union, and petitioner ordered the organizers off its property. The union filed unfair labor practice charges against petitioner. The National Labor Relations Board (NLRB) held that enforcement of petitioner's no-solicitation rule, which it found was overly broad, violated § 8 (a) (1) of the National Labor Relations Act, which proscribes interference with employees' § 7 organizational rights. The NLRB concluded that the character and use of the lots distinguished the case from *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, which required a "yielding" of the employer's property rights in the context of an organizational campaign only "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels . . . ." *Id.*, at 112. Instead, the NLRB held applicable *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, where peaceful picketing by union agents on a parking lot within a shopping center was held, under the circumstances existing, to be within the protection of the First Amendment. The Court of Appeals, agreeing, ordered enforcement of the NLRB's order. *Held: Logan Valley*, decided on constitutional grounds, is not applicable to this § 7 case, which the Court of Appeals should now reconsider in the light of *Babcock*. Pp. 542–548.

439 F. 2d 1321, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 548.

Ronald L. Aylward argued the cause for petitioner. With him on the briefs was *Keith E. Mattern.*

Norton J. Come argued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General Griswold* and *Peter G. Nash*. *Bernard Dunau* argued the cause for respondent Retail Clerks Union Local 725. With him on the brief was *Carl L. Taylor*.

Briefs of *amici curiae* urging reversal were filed by *Lawrence M. Cohen, Jerry Kronenberg, Gerard C. Smetana,* and *Alan Raywid* for the American Retail Federation, and by *Phil B. Hammond* for Levitz Furniture Corp.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioner, Central Hardware Co. (Central), owns and operates two retail hardware stores in Indianapolis, Indiana. Each store is housed in a large building, containing 70,000 square feet of floor space, and housing no other retail establishments. The stores are surrounded on three sides by ample parking facilities, accommodating approximately 350 automobiles. The parking lots are owned by Central, and are maintained solely for the use of Central's customers and employees. While there are other retail establishments in the vicinity of Central's stores, these establishments are not a part of a shopping center complex, and they maintain their own separate parking lots.

Approximately a week before Central opened its stores, the Retail Clerks Union, Local 725, Retail Clerks International Association, AFL–CIO (the Union), began an organization campaign at both stores. The campaign consisted primarily of solicitation by nonemployee Union

organizers on Central's parking lots. The nonemployee organizers confronted Central's employees in the parking lots and sought to persuade them to sign cards authorizing the Union to represent them in an appropriate bargaining unit. As a part of the organization campaign, an "undercover agent for the Union" was infiltrated into the employ of Central, receiving full-time salary from both the Union and the company. This agent solicited employees to join the Union, and obtained a list of the employees of the two stores which was about 80% complete.

Central had a no-solicitation rule which it enforced against all solicitational activities in its stores and on its parking lots. A number of employees complained to Central's local management that they were being harassed by the organizers, and these complaints were forwarded to Central's corporate headquarters in St. Louis, Missouri. The St. Louis officials directed the Indianapolis management to enforce the nonemployee no-solicitation rule and keep all Union organizers off the company premises, including the parking lots. Although most of the nonemployee Union organizers had either left Indianapolis or ceased work on the Central organization campaign, the Indianapolis management had occasion to assert the nonemployee no-solicitation rule on several occasions.

One arrest was made when a field organizer for the Union was confronted by the manager of one of the stores on its parking lot, and refused to leave after being requested to do so. The field organizer asserted that he was a "customer" and insisted upon entering the store. The police were called, and when the organizer persisted in his refusal to leave, he was arrested.

Shortly after Central received complaints from its employees as to harassment by the organizers, Central filed unfair labor practice charges against the Union.

The Union subsequently filed unfair labor practice charges against Central. After an investigation, the General Counsel of the National Labor Relations Board (the Board) dismissed Central's charges against the Union, and issued a complaint against Central on the Union's charges.

The Board held that Central's nonemployee no-solicitation rule was overly broad, and that its enforcement violated § 8 (a)(1) of the National Labor Relations Act. The Board reasoned that the character and use of Central's parking lots distinguished the case from *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), and brought it within the principle of *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308 (1968). 181 N. L. R. B. 491 (1970). A divided Court of Appeals for the Eighth Circuit agreed, and ordered enforcement of the Board's order enjoining Central from enforcing any rule prohibiting nonemployee Union organizers from using its parking lots to solicit employees on behalf of the Union. 439 F. 2d 1321 (1971). We granted certiorari to consider whether the principle of *Logan Valley* is applicable to this case. 404 U. S. 1014 (1972). We conclude that it is not.

I

Section 7 of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. § 157, guarantees to employees the right "to self-organization, to form, join, or assist labor organizations." This guarantee includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves.[1] Section 8 (a)(1) of the Act, as amended, 29 U. S. C. § 158 (a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaran-

[1] See *Thomas* v. *Collins,* 323 U. S. 516, 533–534 (1945).

teed" in § 7. But organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights. See *Peyton Packing Co.*, 49 N. L. R. B. 828 (1943), enforced, 142 F. 2d 1009 (CA5), cert. denied, 323 U. S. 730 (1944).

In seeking to provide information essential to the free exercise of organization rights, union organizers have often engaged in conduct inconsistent with traditional notions of private property rights. The Board and the courts have the duty to resolve conflicts between organization rights and property rights, and to seek a proper accommodation between the two. This Court addressed the conflict which often arises between organization rights and property rights in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956). The Babcock & Wilcox Co. operated a manufacturing plant on a 100-acre tract about one mile from a community of 21,000 people. The plant buildings were enclosed within a fence, employee access being through several gates. Approximately 90% of the employees drove to work in private cars, and the company maintained a parking lot for the employees. Only employees and deliverymen normally used the parking lot. The company had a rule forbidding the distribution of literature on company property. The Board found that the company's parking lot and the walkway leading from it to the plant entrance were the only "safe and practicable" places in the vicinity of the plant for distribution of union literature, and held the company guilty of an unfair labor practice for enforcing the no-distribution rule and thereby denying union organizers limited access to company property. The Board ordered the com-

pany to rescind its no-distribution rule insofar as it related to nonemployee union representatives seeking to distribute union literature on the parking lot and walkway area.[2]

The Court of Appeals for the Fifth Circuit refused enforcement of the Board's order on the ground that the Act did not authorize the Board to impose a servitude on an employer's property where no employee was involved.[3] This Court affirmed on the ground that the availability of alternative channels of communication made the intrusion on the employer's property rights ordered by the Board unwarranted. The Court in *Babcock* stated the guiding principle for adjusting conflicts between § 7 rights and property rights:

> "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." 351 U. S., at 112.

The principle of *Babcock* is limited to this accommodation between organization rights and property rights. This principle requires a "yielding" of property rights only in the context of an organization cam-

[2] *Babcock & Wilcox Co.*, 109 N. L. R. B. 485, 486 (1954).

[3] *NLRB* v. *Babcock & Wilcox Co.*, 222 F. 2d 316 (CA5 1955).

paign. Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the "yielding" of property rights it may require is both temporary and minimal.

II

The principle applied in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308 (1968), is quite different. While it is true that *Logan Valley* involved labor picketing, the decision rests on constitutional grounds; it is not a § 7 case.

Logan Valley had its genesis in *Marsh* v. *Alabama,* 326 U. S. 501 (1946). *Marsh* involved a "company town," an economic anachronism rarely encountered today. The town was wholly owned by the Gulf Shipbuilding Corp., yet it had all of the characteristics of any other American town. Gulf Shipbuilding held title to all the land in the town, including that covered by streets and sidewalks. Gulf Shipbuilding also provided municipal services, such as sewerage service and police protection, to the residents of the town. A Jehovah's Witness undertook to distribute religious literature on a sidewalk near the post office in the "business block" of the town, and was arrested on a trespassing charge. She was subsequently convicted of the crime of trespassing, and the Alabama courts upheld the conviction on appeal. This Court reversed, holding that Alabama could not permit a corporation to assume the functions of a municipal government and at the same

time deny First Amendment rights through the application of the State's criminal trespass law.

In *Logan Valley,* over a strong dissent by Mr. Justice Black, the author of *Marsh,* the Court applied the reasoning of *Marsh* to a modern economic phenomenon, the shopping center complex. The Logan Valley Mall was a complex of retail establishments, which the Court regarded under the factual circumstances as the functional equivalent of the "community business block" of the company town in *Marsh.* The corporate owner of Logan Valley Mall obtained a state court injunction against peaceful picketing on the shopping center property, and the Pennsylvania Supreme Court affirmed the issuance of the injunction on the ground that the picketing constituted a trespass on private property. This Court reversed, holding that Pennsylvania could not "delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." 391 U. S., at 319–320.

III

The Board and the Court of Appeals held that *Logan Valley* rather than *Babcock* controlled this case. The Board asserts that the distinguishing feature between these two cases is that in *Logan Valley* the owner had "diluted his property interest by opening his property to the general public for his own economic advantage." [4] The emphasis, both in the argument on behalf of the Board and in the opinion below, is on the opening of the property "to the general public." [5]

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[4] Brief for the NLRB 20.

[5] 439 F. 2d, at 1326–1328.

This analysis misconceives the rationale of *Logan Valley*.[6] *Logan Valley* involved a large commercial shopping center which the Court found had displaced, in certain relevant respects, the functions of the normal municipal "business block." First and Fourteenth Amendment free-speech rights were deemed infringed under the facts of that case when the property owner invoked the trespass laws of the State against the pickets.

Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes. The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are "open to the public." Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments. We hold that the Board and the Court of Appeals erred in applying *Logan Valley* to this case.

The Trial Examiner concluded that no reasonable means of communication with employees were available to the nonemployee Union organizers other than solicitation in Central's parking lots. The Board adopted this conclusion. Central vigorously contends that this

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[6] For a full discussion of *Logan Valley* and the circumstances in which it is applicable, see the decision of the Court today in *Lloyd Corp.* v. *Tanner*, *post*, p. 551.

conclusion is not supported by substantial evidence in the record as a whole. The Court of Appeals did not consider this contention, because it viewed *Logan Valley* as controlling rather than *Babcock*. The determination whether on the record as a whole there is substantial evidence to support agency findings is a matter entrusted primarily to the courts of appeals. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951). Since the Court of Appeals has not yet considered this question in light of the principles of *NLRB* v. *Babcock & Wilcox Co., supra,* the judgment is vacated, and the case will be remanded to that court for such consideration.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

I agree with the Court that this case should have been considered under *NLRB* v. *Babcock & Wilcox Co.,* 351 U. S. 105 (1956). That case is, as the opinion of the Court suggests, narrower than *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308 (1968). It does not purport to interpret the National Labor Relations Act (NLRA) so as to give union members the same comprehensive rights to free expression on the private property of an employer that the First Amendment gives to all citizens on private property that is the functional equivalent of a public business district. But *Babcock* is, in another sense, even broader than *Logan Valley.* It holds that where a union has no other means at its disposal to communicate with employees other than to use the employer's property, or where the union is denied the access to employees that the employer gives antiunion forces, the union may communicate with employees on the property of the employer. Congress gave unions this right in Section 7

of the NLRA, 61 Stat. 140, 29 U. S. C. § 157. The First Amendment gives no such broad right to use private property to ordinary citizens.

The National Labor Relations Board found that petitioner permitted antiunion solicitation on its premises at the same time that it barred union solictation. 181 N. L. R. B. 491 (1970). It made no explicit finding as to whether access to the employees was reasonably available to the union outside of the petitioner's property, but suggested that it was not. Rather than deciding the case under *Babcock, supra,* which would appear to control and to provide that the union activity in the case is protected by the NLRA, the Board appears to have decided the case under *Logan Valley, supra.* The United States Court of Appeals for the Eighth Circuit affirmed on the basis of *Logan Valley* and found it unnecessary to review the Board's finding of discrimination by the employer against the union in the use of its property or to remand the case for a determination of whether it was necessary for the union to use petitioner's property to communicate with the employees. 439 F. 2d 1321 (1971).

It is obvious, then, that neither the Board nor the Court of Appeals has fully considered whether the employer's conduct was proscribed by *Babcock* even though the indications in the Board's opinion are that it was. In reaching out to decide this case under *Logan Valley,* the agency and the lower court decided a difficult constitutional issue that might well have been avoided by deciding the case under the NLRA. This was error. The principle is well established that decisions on constitutional questions should not be reached unnecessarily. See, *e. g., Dandridge* v. *Williams,* 397 U. S. 471, 476 (1970); *Rosenberg* v. *Fleuti,* 374 U. S. 449 (1963).

Since both the agency and the Court of Appeals should have first decided whether or not *Babcock* controlled the instant case before proceeding to decide it under *Logan Valley*, before this Court decides whether or not the decision below was correct under the Constitution, we should remand the case to the Board, rather than to the Court of Appeals, for a square holding as to the applicability of *Babcock* to the facts of this case. MR. JUSTICE WHITE has recently re-emphasized the point that when an agency decides a case under an incorrect legal approach, courts should not seek to predict whether the agency would have decided the case the same way under the correct approach, but should instead remand the case to the agency for further proceedings. *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249 (1972). See also *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 168 (1962).

Accordingly, I would remand this case to the Board for further proceedings without deciding the constitutional question.

LLOYD CORP., LTD. *v.* TANNER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–492. Argued April 18, 1972—Decided June 22, 1972

Respondents sought to distribute handbills in the interior mall area of petitioner's large privately owned shopping center. Petitioner had a strict no-handbilling rule. Petitioner's security guards requested respondents under threat of arrest to stop the handbilling, suggesting that they could resume their activities on the public streets and sidewalks adjacent to but outside the center, which respondents did. Respondents, claiming that petitioner's action violated their First Amendment rights, thereafter brought this action for injunctive and declaratory relief. The District Court, stressing that the center is "open to the general public" and "the functional equivalent of a public business district," and relying on *Marsh* v. *Alabama,* 326 U. S. 501, and *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308, held that petitioner's policy of prohibiting handbilling within the mall violated respondents' First Amendment rights. The Court of Appeals affirmed. *Held:* There has been no dedication of petitioner's privately owned and operated shopping center to public use so as to entitle respondents to exercise First Amendment rights therein that are unrelated to the center's operations; and petitioner's property did not lose its private character and its right to protection under the Fourteenth Amendment merely because the public is generally invited to use it for the purpose of doing business with petitioner's tenants. The facts in this case are significantly different from those in *Marsh, supra,* which involved a company town with "all the attributes" of a municipality, and *Logan Valley, supra,* which involved labor picketing designed to convey a message to patrons of a particular store, so located in the center of a large private enclave as to preclude other reasonable access to store patrons. Under the circumstances present in this case, where the handbilling was unrelated to any activity within the center and where respondents had adequate alternative means of communication, the courts below erred in holding those decisions controlling. Pp. 556–570.

446 F. 2d 545, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and STEWART, JJ., joined, *post*, p. 570.

George Black, Jr., argued the cause for petitioner. With him on the briefs were *Robert J. Miller, John H. Pickering*, and *Timothy B. Dyk*.

Carl R. Neil argued the cause for respondents. With him on the brief were *Melvin L. Wulf* and *Sanford Jay Rosen*.

Briefs of *amici curiae* urging reversal were filed by *Jerry Kronenberg, Gerard C. Smetana*, and *Alan Raywid* for the American Retail Federation, and by *Lawrence M. Cohen* and *Allen B. Gresham* for the Homart Development Co.

Roger Jon Diamond filed a brief for People's Lobby, Inc., as *amicus curiae* urging affirmance.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question reserved by the Court in *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. Relying primarily on *Marsh* v. *Alabama*, 326 U. S. 501 (1946), and *Logan Valley*, the United States District Court for the District of Oregon sustained an asserted First Amendment right to distribute handbills in petitioner's shopping center, and issued a permanent injunction restraining petitioner from interfering with such right. 308 F. Supp. 128 (1970). The Court of Appeals for the Ninth Circuit affirmed, 446 F. 2d 545 (1971). We granted certiorari to consider petitioner's contention that the decision below

violates rights of private property protected by the Fifth and Fourteenth Amendments. 404 U. S. 1037 (1972).

Lloyd Corp., Ltd. (Lloyd), owns a large, modern retail shopping center in Portland, Oregon. Lloyd Center embraces altogether about 50 acres, including some 20 acres of open and covered parking facilities which accommodate more than 1,000 automobiles. It has a perimeter of almost one and one-half miles, bounded by four public streets. It is crossed in varying degrees by several other public streets, all of which have adjacent public sidewalks. Lloyd owns all land and buildings within the Center, except these public streets and sidewalks. There are some 60 commercial tenants, including small shops and several major department stores.

The Center embodies a relatively new concept in shopping center design. The stores are all located within a single large, multi-level building complex sometimes referred to as the "Mall." Within this complex, in addition to the stores, there are parking facilities, malls, private sidewalks, stairways, escalators, gardens, an auditorium, and a skating rink. Some of the stores open directly on the outside public sidewalks, but most open on the interior privately owned malls. Some stores open on both. There are no public streets or public sidewalks within the building complex, which is enclosed and entirely covered except for the landscaped portions of some of the interior malls.

The distribution of the handbills occurred in the malls. They are a distinctive feature of the Center, serving both utilitarian and esthetic functions. Essentially, they are private, interior promenades with 10-foot sidewalks serving the stores, and with a center strip 30 feet wide in which flowers and shrubs are planted, and statuary, fountains, benches, and other amenities are located. There is no vehicular traffic on the malls. An archi-

tectural expert described the purpose of the malls as follows:

> "In order to make shopping easy and pleasant, and to help realize the goal of maximum sales [for the Center], the shops are grouped about special pedestrian ways or malls. Here the shopper is isolated from the noise, fumes, confusion and distraction which he normally finds along city streets, and a controlled, carefree environment is provided . . . ." [1]

Although the stores close at customary hours, the malls are not physically closed, as pedestrian window shopping is encouraged within reasonable hours.[2] Lloyd employs 12 security guards, who are commissioned as such by the city of Portland. The guards have police authority within the Center, wear uniforms similar to those worn by city police, and are licensed to carry handguns. They are employed by and subject to the control of Lloyd. Their duties are the customary ones, including shoplifting surveillance and general security.

At a few places within the Center, small signs are embedded in the sidewalk which state:

"NOTICE—Areas In Lloyd Center Used By The

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[1] App. 254.

[2] The manager of the Center testified:

"Q. Turning now to the general policy in operation of the Lloyd Center, it's true that the malls and walkways within the center are open 24 hours a day; is that right?

"A. Well, they aren't physically closed such as putting a gate across, no. But, they are not—when people are there after hours, they are watched. And, if it is too late at night, they are told the places are closed and they should leave.

"Q. If I wanted to walk through the center malls of Lloyd Center at 3:00 in the morning, would anyone stop me?

"A. Depending on who the officer was on duty as to what he is supposed to do. But, they would have made inquiry and followed you to see what you are doing." App. 49.

> Public Are Not Public Ways But Are For The Use Of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd."

The Center is open generally to the public, with a considerable effort being made to attract shoppers and prospective shoppers, and to create "customer motivation" as well as customer goodwill in the community. In this respect the Center pursues policies comparable to those of major stores and shopping centers across the country, although the Center affords superior facilities for these purposes. Groups and organizations are permitted, by invitation and advance arrangement, to use the auditorium and other facilities. Rent is charged for use of the auditorium except with respect to certain civic and charitable organizations, such as the Cancer Society and Boy and Girl Scouts. The Center also allows limited use of the malls by the American Legion to sell poppies for disabled veterans, and by the Salvation Army and Volunteers of America to solicit Christmas contributions. It has denied similar use to other civic and charitable organizations. Political use is also forbidden, except that presidential candidates of both parties have been allowed to speak in the auditorium.[3]

The Center had been in operation for some eight years when this litigation commenced. Throughout this period it had a policy, strictly enforced, against the distribution of handbills within the building complex and its malls. No exceptions were made with respect to handbilling, which was considered likely to annoy customers, to create litter, potentially to create disorders,

[3] The manager of the Center, explaining why presidential candidates were allowed to speak, said: "We do that for one reason and that is great public interest. It . . . brings a great many people to Lloyd Center who may shop before they leave." App. 51.

and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved.

On November 14, 1968, the respondents in this case distributed within the Center handbill invitations to a meeting of the "Resistance Community" to protest the draft and the Vietnam war. The distribution, made in several different places on the mall walkways by five young people, was quiet and orderly, and there was no littering. There was a complaint from one customer. Security guards informed the respondents that they were trespassing and would be arrested unless they stopped distributing the handbills within the Center.[4] The guards suggested that respondents distribute their literature on the public streets and sidewalks adjacent to but outside of the Center complex. Respondents left the premises as requested "to avoid arrest" and continued the handbilling outside. Subsequently this suit was instituted in the District Court, seeking declaratory and injunctive relief.

I

The District Court, emphasizing that the Center "is open to the general public," found that it is "the functional equivalent of a public business district." 308 F. Supp., at 130. That court then held that Lloyd's "rule prohibiting the distribution of handbills within the Mall violates . . . First Amendment rights." 308 F. Supp., at 131. In a *per curiam* opinion, the Court of Appeals held that it was bound by the "factual determination" as to the character of the Center, and concluded that the decisions of this Court in *Marsh* v. *Alabama,* 326 U. S. 501 (1946), and *Amalgamated Food*

[4] The city of Portland has an ordinance which makes it unlawful to trespass on private property. Portland, Ore., Police Code § 16–613.

Employees Union v. *Logan Valley Plaza,* 391 U. S. 308 (1968), compelled affirmance.[5]

Marsh involved Chickasaw, Alabama, a company town wholly owned by the Gulf Shipbuilding Corp. The opinion of the Court, by Mr. Justice Black, described Chickasaw as follows:

> "Except for [ownership by a private corporation] it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop

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[5] The Court of Appeals also relied on *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (CA2 1968).

> highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." 326 U. S., at 502–503.

A Jehovah's Witness undertook to distribute religious literature on a sidewalk near the post office and was arrested on a trespassing charge. In holding that First and Fourteenth Amendment rights were infringed, the Court emphasized that the business district was within a company-owned town, an anachronism long prevalent in some southern States and now rarely found.[6]

In *Logan Valley* the Court extended the rationale of *Marsh* to peaceful picketing of a store located in a large shopping center, known as Logan Valley Mall, near Altoona, Pennsylvania. Weis Markets, Inc. (Weis), an original tenant, had opened a supermarket in one of the larger stores and was employing a wholly nonunion staff. Within 10 days after Weis opened, members of Amalgamated Food Employees Union Local 590 (Union) began picketing Weis, carrying signs stating that it was a nonunion market and that its employees were not receiving union wages or other union benefits. The picketing, conducted by nonemployees, was carried out

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[6] In commenting on the necessity for citizens who reside in company towns to have access to information, the Court said: "Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed." 326 U. S., at 508.

almost entirely in the parcel pickup area immediately adjacent to the store and on portions of the adjoining parking lot. The picketing was peaceful, with the number of pickets varying from four to 13.

Weis and Logan Valley Plaza, Inc., sought and obtained an injunction against this picketing. The injunction required that all picketing be confined to public areas outside the shopping center. On appeal the Pennsylvania Supreme Court affirmed the issuance of the injunction, and this Court granted certiorari. In framing the question, this Court stated:

> "The case squarely presents . . . the question whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances to bar petitioners from the Weis and Logan premises." 391 U. S., at 315.

The Court noted that the answer would be clear "if the shopping center premises were not privately owned but instead constituted the business area of a municipality." *Ibid.* In the latter situation, it has often been held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely. *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Schneider* v. *State,* 308 U. S. 147 (1939); *Jamison* v. *Texas,* 318 U. S. 413 (1943).

The Court then considered *Marsh* v. *Alabama, supra,* and concluded that:

> "The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh.*" 391 U. S., at 318.

But the Court was careful not to go further and say that for all purposes and uses the privately owned streets,

sidewalks, and other areas of a shopping center are analogous to publicly owned facilities:

> "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *Alabama,* 326 U. S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." *Id.,* at 319–320.

The Court noted that the scope of its holding was limited, and expressly reserved judgment on the type of issue presented in this case:

> "The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." *Id.,* at 320 n. 9.

The Court also took specific note of the facts that the Union's picketing was "directed solely at one establishment within the shopping center," *id.,* at 321, and that the public berms and sidewalks were "from 350 to 500 feet away from the Weis store." *Id.,* at 322. This distance made it difficult "to communicate [with] patrons of Weis" and "to limit [the] effect [of

the picketing] to Weis only." *Id.*, at 322, 323.[7] *Logan Valley* was decided on the basis of this factual situation, and the facts in this case are significantly different.

II

The courts below considered the critical inquiry to be whether Lloyd Center was "the functional equivalent of a public business district."[8] This phrase was first used in *Logan Valley*, but its genesis was in *Marsh*. It is well to consider what *Marsh* actually decided. As noted above, it involved an economic anomaly of the past, "the company town." One must have seen such towns to understand that "functionally" they were no different from municipalities of comparable size. They developed primarily in the Deep South to meet economic conditions, especially those which existed following the Civil War. Impoverished States, and especially backward areas thereof, needed an influx of industry and capital. Corporations attracted to the area by natural resources and abundant labor were willing to assume the role of local government. Quite literally, towns

[7] The Court also commented on the increasing role of shopping centers and on the problem which they would present with respect to union activities if picketing were totally proscribed within shopping center areas: "Business enterprises located in downtown areas [on public streets and sidewalks] would be subject to on-the-spot public criticism for their [labor] practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores." 391 U. S., at 324–325. The concurring opinion of MR. JUSTICE DOUGLAS also emphasized the related purpose of the picketing in *Logan Valley:* "Picketing in regard to labor conditions at the Weis Supermarket is directly related to that shopping center business." 391 U. S., at 326.

[8] 308 F. Supp. 128, 130, 132 (Ore. 1970); 446 F. 2d 545, 546 (CA9 1971).

were built and operated by private capital with all of the customary services and utilities normally afforded by a municipal or state government: there were streets, sidewalks, sewers, public lighting, police and fire protection, business and residential areas, churches, postal facilities, and sometimes schools. In short, as Mr. Justice Black said, Chickasaw, Alabama, had "all the characteristics of any other American town." 326 U. S., at 502. The Court simply held that where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied where exercised in the customary manner on the town's sidewalks and streets. Indeed, as title to the entire town was held privately, there were no publicly owned streets, sidewalks, or parks where such rights could be exercised.

Logan Valley extended *Marsh* to a shopping center situation in a different context from the company town setting, but it did so only in a context where the First Amendment activity was related to the shopping center's operations. There is some language in *Logan Valley,* unnecessary to the decision, suggesting that the key focus of *Marsh* was upon the "business district," and that whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities.[9] As Mr. Justice Black's dissent in *Logan Valley* emphasized, this would be an incorrect interpretation of the Court's decision in *Marsh:* [10]

> "*Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special

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[9] *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308, 319 (1968).

[10] As Mr. Justice Black was the author of the Court's opinion in *Marsh,* his analysis of its rationale is especially meaningful.

> situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town. The particular company town involved was Chickasaw, Alabama, which, as we stated in the opinion, except for the fact that it 'is owned by the Gulf Shipbuilding Corporation . . . has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.' 326 U. S., at 502. Again toward the end of the opinion we emphasized that 'the town of Chickasaw does not function differently from any other town.' 326 U. S., at 508. I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama." 391 U. S., at 330–331.

The holding in *Logan Valley* was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks. No such expansive reading of the opinion of the Court is necessary or appropriate. The opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was "directly related in its purpose to the use to which the shopping center property was being put," 391 U. S., at 320 n. 9, and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available.

Neither of these elements is present in the case now before the Court.

A

The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used.[11] It is nevertheless argued by respondents that, since the Center is open to the public, the private owner cannot enforce a restriction against handbilling on the premises. The thrust of this argument is considerably broader than the rationale of *Logan Valley*. It requires no relationship, direct or indirect, between the purpose of the expressive activity and the business of the shopping center. The message sought to be conveyed by respondents was directed to all members of the public, not solely to patrons of Lloyd Center or of any of its operations. Respondents could have distributed these handbills on any public street, on any public sidewalk, in any public park, or in any public building in the city of Portland.

Respondents' argument, even if otherwise meritorious, misapprehends the scope of the invitation extended to the public. The invitation is to come to the Center to do business with the tenants. It is true that facilities at the Center are used for certain meetings and

[11] The injunction issued against Lloyd is comprehensive. It enjoins Lloyd (and others in active concert or participation with it) from "preventing or interfering with the distribution of non-commercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access." There is no limitation as to type of literature distributed except that it must be "non-commercial." Nor, indeed, is there any limitation in this injunction as to the number of persons participating in such activities or the frequency thereof. Irrespective of how controversial, offensive, distracting, or extensive the distributions may be, Lloyd has been ordered to allow all noncommercial handbilling which anyone desires to undertake within its private premises.

for various promotional activities. The obvious purpose, recognized widely as legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.

MR. JUSTICE WHITE, dissenting in *Logan Valley,* noted the limited scope of a shopping center's invitation to the public:

> "In no sense are any parts of the shopping center dedicated to the public for general purposes . . . . The public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot, the pickup zone, or the sidewalk except as an adjunct to shopping. No one is invited to use the parking lot as a place to park his car while he goes elsewhere to work. The driveways and lanes for auto traffic are not offered for use as general thoroughfares leading from one public street to another. Those driveways and parking spaces are not public streets and thus available for parades, public meetings, or other activities for which public streets are used." 391 U. S., at 338.

It is noteworthy that respondents' argument based on the Center's being "open to the public" would apply in varying degrees to most retail stores and service establishments across the country. They are all open to the public in the sense that customers and potential customers are invited and encouraged to enter. In terms of being open to the public, there are differences only

of degree—not of principle—between a free-standing store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping.

B

A further fact, distinguishing the present case from *Logan Valley,* is that the Union pickets in that case would have been deprived of all reasonable opportunity to convey their message to patrons of the Weis store had they been denied access to the shopping center.[12] The situation at Lloyd Center was notably different. The central building complex was surrounded by public sidewalks, totaling 66 linear blocks. All persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles. When moving to and from the privately

[12] The Court's opinion in *Logan Valley* described the obstacles resulting from the location of the Weis store in the shopping center, and its relation to public streets and sidewalks: "Petitioners' picketing was directed solely at one establishment within the shopping center. The berms surrounding the center are from 350 to 500 feet away from the Weis store. All entry onto the mall premises by customers of Weis, so far as appears, is by vehicle from the roads alongside which the berms run. Thus the placards bearing the message which petitioners seek to communicate to patrons of Weis must be read by those to whom they are directed either at a distance so great as to render them virtually indecipherable—where the Weis customers are already within the mall—or while the prospective reader is moving by car from the roads onto the mall parking areas via the entrance ways cut through the berms. In addition, the pickets are placed in some danger by being forced to walk along heavily traveled roads along which traffic moves constantly at rates of speed varying from moderate to high. Likewise, the task of distributing handbills to persons in moving automobiles is vastly greater (and more hazardous) than it would be were petitioners permitted to pass them out within the mall to pedestrians." 391 U. S., at 321–322.

owned parking lots, automobiles are required by law to come to a complete stop. Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets. Indeed, respondents moved to these public areas and continued distribution of their handbills after being requested to leave the interior malls. It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech. In ordering this accommodation the courts below erred in their interpretation of this Court's decisions in *Marsh* and *Logan Valley*.

III

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." There is the further proscription in the Fifth Amendment against the taking of "private property . . . for public use, without just compensation."

Although accommodations between the values protected by these three Amendments are sometimes nec-

essary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities. Mr. Justice Black, speaking for the Court in *Adderley* v. *Florida,* 385 U. S. 39 (1966), said:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate . . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox* v. *Louisiana,* [379 U. S.], at 554–555 and 563–564. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." 385 U. S., at 47–48.

Respondents contend, however, that the property of a large shopping center is "open to the public," serves the same purposes as a "business district" of a municipality, and therefore has been dedicated to certain types

of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh* v. *Alabama, supra,* involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State.[13] In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.

Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center. This is not to say that no differences may exist with respect to government regula-

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[13] Mr. Justice Black, dissenting in *Logan Valley,* emphasized the distinction between a privately owned shopping center and the "company town" involved in *Marsh,* which he said had assumed "*all* the attributes" of a municipality. 391 U. S., at 332. (Original emphasis.)

tion or rights of citizens arising by virtue of the size and diversity of activities carried on within a privately owned facility serving the public. There will be, for example, problems with respect to public health and safety which vary in degree and in the appropriate government response, depending upon the size and character of a shopping center, an office building, a sports arena, or other large facility serving the public for commercial purposes. We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.

We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to vacate the injunction.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, dissenting.

Donald Tanner, Betsy Wheeler, and Susan Roberts (respondents) brought this action for a declaratory judgment that they have the right under the First and Fourteenth Amendments to the United States Constitution to distribute handbills in a shopping center owned by petitioner and an injunction to enforce that right.

Relying primarily on our very recent decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308 (1968), the United States District Court for the District of Oregon granted the relief requested. 308 F. Supp. 128 (1970). The United States Court of Appeals for the Ninth Circuit affirmed. 446 F. 2d 545 (1971). Today, this Court reverses the judgment of the Court of Appeals and attempts to distinguish this case from *Logan Valley.* In my view, the distinction that the Court sees between the cases does not exist. As I read the opinion of the Court, it is an attack not only on the rationale of *Logan Valley,* but also on this Court's longstanding decision in *Marsh* v. *Alabama,* 326 U. S. 501 (1946). Accordingly, I dissent.

I

Lloyd Center is a large, modern retail shopping center in Portland, Oregon. Sprawling over 50 acres of land, the Center offers to shoppers more than 60 commercial businesses and professional offices. It also affords more than 850,000 square feet of open and covered offstreet parking space—enough to accommodate more than 1,000 vehicles. Bounded by four public streets, Lloyd Center has a perimeter of almost one and one-half miles. Four public streets running east-west and one running north-south traverse the Center, and at least six other public streets run partly into or around it. All of these streets have adjacent sidewalks. These streets and sidewalks are the only parts of the Center that are not privately owned.

The principal portion of the Center is occupied by a shopping area called the "Mall." Covering approximately 25 acres of land and having a perimeter of four-fifths of a mile, the Mall, in the words of the District Court, "is a multi-level complex of buildings, parking facilities, sub-malls, sidewalks, stairways, elevators, es-

calators, bridges, and gardens, and contains a skating rink, statues, murals, benches, directories, information booths, and other facilities designed to attract visitors and make them comfortable." 308 F. Supp., at 129. No public streets cross the Mall, but some stores face those streets that form the perimeter, and it is possible to enter those stores from public sidewalks. Other stores are located in the interior of the Mall, and can only be reached by using privately owned walkways.

On November 14, 1968, respondents entered the Mall and distributed handbills inviting the public to a meeting to protest the draft and the Vietnam war. The distribution was peaceful, nondisruptive, and litter-free. Security guards employed by the Center approached respondents, indicated that the Center did not permit handbilling in the Mall, suggested that they distribute their materials on the public sidewalks and streets, and informed them that they could be arrested if they persisted in handbilling within the privately owned portions of the Center. These guards wore uniforms that were virtually identical to those worn by regular Portland police and they possessed full police authority. Believing that they would be arrested if they did not leave the Mall, respondents departed and subsequently filed this lawsuit.[1]

A. The question presented by this case is whether one of the incidents of petitioner's private ownership of the Lloyd Center is the power to exclude certain

[1] There is some conflict in the testimony as to precisely what the guards told respondents with respect to the likelihood that they would be arrested if they did not leave the Mall. The Agreed Facts in the Pretrial Order states that the guards said that respondents *could* be arrested if they refused to leave. The District Court found that the guards caused respondents to believe that they would be arrested and that this was the reason that they left the Mall. The Court of Appeals affirmed this finding and it is supported by the record.

forms of speech from its property. In other words, we must decide whether ownership of the Center gives petitioner unfettered discretion to determine whether or not it will be used as a public forum.

This Court held in *Marsh* v. *Alabama, supra,* that even though property is privately owned, under some circumstances it may be treated as though it were publicly held, at least for purposes of the First Amendment. In *Marsh,* a member of the Jehovah's Witnesses religious sect was arrested and convicted of violating Alabama's criminal trespass statute when she undertook to distribute religious literature in the downtown shopping area of a privately owned town without permission of the owner. The Court reasoned that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.,* at 506. Noting that the stifling effect produced by any ban on free expression in a community's central business district was the same whether the ban was imposed by public or private owners, the Court concluded that:

> "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights.' . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not suffi-

> cient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute." (Footnotes and citations omitted.) *Id.*, at 509.

We relied heavily on *Marsh* in deciding *Logan Valley, supra.* In *Logan Valley*, a shopping center in its formative stages contained a supermarket and department store. The supermarket employed a staff composed of only nonunion employees. Members of Amalgamated Food Employees Union, Local 590, began to picket the market with signs stating that the market's employees were not receiving union wages or union benefits. The picketing was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto. 391 U. S., at 311. The supermarket sought and obtained an injunction from a Pennsylvania state court prohibiting the union members from trespassing upon the parking areas or in the store, the effect of which was to prohibit picketing and handbilling on any part of the private property and to relegate the union members to carrying signs on the publicly owned earthen berms that surrounded the shopping center.[2] Finding that the shopping center was the functional equivalent of the business district involved in *Marsh*, we could see "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally re-

[2] *Logan Valley* involved both picketing and handbilling, since the effect of the state court injunction was to ban both forms of expression. 391 U. S., at 322–323 and n. 12. We made it clear in *Logan Valley* that while there were obvious differences between picketing and handbilling, both involved a modicum of a burden on property. We held that neither could be barred from a shopping center that was the functional equivalent of a public business district. *Id.*, at 315–316.

quired, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership." *Id.,* at 319. Thus, we held that the union activity was constitutionally protected.

B. In the instant case the District Court found that "the Mall is the functional equivalent of a public business district" within the meaning of *Marsh* and *Logan Valley.* The Court of Appeals specifically affirmed this finding, and it is overwhelmingly supported by the record.

The Lloyd Center is similar to Logan Valley Plaza in several respects: both are bordered by public roads, and the entrances of both lead directly into the public roads; both contain large parking areas and privately owned walkways leading from store to store; and the general public has unrestricted access to both. The principal differences between the two centers are that the Lloyd Center is larger than Logan Valley, that Lloyd Center contains more commercial facilities, that Lloyd Center contains a range of professional and nonprofessional services that were not found in Logan Valley, and that Lloyd Center is much more intertwined with public streets than Logan Valley. Also, as in *Marsh, supra,* Lloyd's private police are given full police power by the city of Portland, even though they are hired, fired, controlled, and paid by the owners of the Center. This was not true in *Logan Valley.*

In 1954, when Lloyd's owners first acquired land for the Center, the city of Portland vacated about eight acres of public streets for their use. The ordinance accomplishing the vacation sets forth the city's view of the Center's function:

> "WHEREAS the Council finds that the reason for these vacations is for general building purposes to

> be used in the development of a *general retail business district* and the development of an adequate parking area to support said district; . . . the Council . . . finds that in order to develop a large retail unit such as contemplated by Lloyd Corporation, Ltd., it is necessary to vacate the streets above mentioned . . . ." (Emphasis added.) Ordinance No. 101288, Nov. 10, 1954, App. 202.

The 1954 ordinance also indicates that the city of Portland was aware that as Lloyd Center developed, it would be necessary for the city to build new streets and to take other steps to control the traffic flow that the Center would engender. App. 202, 208–209. In 1958, an emergency ordinance was passed giving the Lloyd Center an extension of time to meet various conditions on which the 1954 vacations were made. The city council viewed the projected Center as offering an "opportunity for much needed employment" and concluded that the emergency ordinance was "necessary for the immediate preservation of the public health, peace and safety of the city of Portland." Ordinance No. 107641, March 20, 1958, App. 196.

In sum, the Lloyd Center is an integral part of the Portland community. From its inception, the city viewed it as a "business district" of the city and depended on it to supply much-needed employment opportunities. To insure the success of the Center, the city carefully integrated it into the pattern of streets already established and planned future development of streets around the Center. It is plain, therefore, that Lloyd Center is the equivalent of a public "business district" within the meaning of *Marsh* and *Logan Valley*. In fact, the Lloyd Center is much more analogous to the company town in *Marsh* than was the Logan Valley Plaza.

Petitioner agrees with our decision in *Logan Valley* that it is proper for courts to treat shopping centers

differently from other privately owned property, like private residences. The Brief for Petitioner states at pages 9–10 that

> "[a] shopping center, which falls somewhere between the extremes of a company town and a private residence, is neither absolutely subject to the control of the owner nor is it absolutely open to all those wishing to engage in speech activities. . . .
>
> . . . . . .
>
> "Each case requires an appropriate resolution of the conflicting interests of shopping center owners and those seeking to engage in speech activities on shopping center premises."

Petitioner contends that our decision in *Logan Valley* struck the appropriate balance between First Amendment and private property interests. The argument is made, however, that this case should be distinguished from *Logan Valley*, and this is the argument that the Court accepts.

II

As I have pointed out above, Lloyd Center is even more clearly the equivalent of a public business district than was Logan Valley Plaza. The First Amendment activity in both *Logan Valley* and the instant case was peaceful and nondisruptive; and both cases involve traditionally acceptable modes of speech. Why then should there be a different result here? The Court's answer is that the speech in this case was directed at topics of general interest—the Vietnam war and the draft—whereas the speech in Logan Valley was directed to the activities of a store in the shopping center, and that this factual difference is of constitutional dimensions. I cannot agree.

A. It is true that in *Logan Valley* we explicitly left open the question whether "property rights could, con-

sistently with the First Amendment, justify a bar on picketing [or handbilling] which was not . . . directly related in its purpose to the use to which the shopping center property was being put." 391 U. S., at 320 n. 9. But, I believe that the Court errs in concluding that this issue must be faced in the instant case.

The District Court observed that Lloyd Center invites schools to hold football rallies, presidential candidates to give speeches, and service organizations to hold Veterans Day ceremonies on its premises. The court also observed that the Center permits the Salvation Army, the Volunteers of America, and the American Legion to solicit funds in the Mall. Thus, the court concluded that the Center was already open to First Amendment activities, and that respondents could not constitutionally be excluded from distributing leaflets solely because Lloyd Center was not enamored of the form or substance of their speech. The Court of Appeals affirmed, taking the position that it was not extending either *Logan Valley* or *Marsh*. In other words, the District Court found that Lloyd Center had deliberately chosen to open its private property to a broad range of expression and that having done so it could not constitutionally exclude respondents, and the Court of Appeals affirmed this finding.

Petitioner apparently concedes that if the lower courts are correct, respondents should prevail. Brief for Petitioner 19. This concession is, in fact, mandated by our decision in *Logan Valley,* in which we specifically held that members of the public may exercise their First Amendment rights on the premises of a shopping center that is the functional equivalent of a business district if their activity is "generally consonant with the use to which the property is actually put." 391 U. S., at 320. If the property of Lloyd Center is generally open to First Amendment activity, respondents cannot be excluded.

On Veterans Day, Lloyd Center allows organizations to parade through the Center with flags, drummers, and color guard units and to have a speaker deliver an address on the meaning of Veterans Day and the valor of American soldiers. Presidential candidates have been permitted to speak without restriction on the issues of the day, which presumably include war and peace. The American Legion is annually given permission to sell poppies in the Mall because Lloyd Center believes that "veterans . . . deserves [*sic*] some comfort and support by the people of the United States." [3] In light of these facts, I perceive no basis for depriving respondents of the opportunity to distribute leaflets inviting patrons of the Center to attend a meeting in which different points of view would be expressed from those held by the organizations and persons privileged to use Lloyd Center as a forum for parading their ideas and symbols.

I believe that the lower courts correctly held that respondents' activities were directly related in purpose to the use to which the shopping center was being put. In my view, therefore, this case presents no occasion to consider whether or not *Logan Valley* should be extended. But, the Court takes a different view and concludes that Lloyd Center was never opened to First Amendment activity. Even if I could agree with the Court on this point, I would not reach a different result in this case.

B. If respondents had distributed handbills complaining about one or more stores in Lloyd Center or about

[3] App. 62 (testimony of R. Horn, manager of Lloyd Center). It is widely known that the American Legion is a Veteran's organization. See 1 Encyclopedia of Associations 997 (7th ed. 1972). It is also common knowledge that the poppy is the symbol sold by the Legion to finance various of its activities. At times the proceeds from selling poppies were used to finance lobbying and other activities directed at increasing the military capacity of the United States. R. Jones, A History of the American Legion 330–332 (1946).

the Center itself, petitioner concedes that our decision in *Logan Valley* would insulate that conduct from proscription by the Center.[4] I cannot see any logical reason to treat differently speech that is related to subjects other than the Center and its member stores.

We must remember that it is a balance that we are striking—a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property. When the competing interests are fairly weighed, the balance can only be struck in favor of speech.

Members of the Portland community are able to see doctors, dentists, lawyers, bankers, travel agents, and persons offering countless other services in Lloyd Center. They can buy almost anything that they want or need there. For many Portland citizens, Lloyd Center will so completely satisfy their wants that they will have no reason to go elsewhere for goods or services. If speech is to reach these people, it must reach them in Lloyd Center. The Center itself recognizes this. For example, in 1964 its director of public relations offered candidates for President and Vice President the use of the center for political speeches, boasting "that our convenient location and setting would provide the largest audience [the candidates] could attract in Oregon." App. 187.

For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other

[4] The record indicates that when unions have picketed inside the Mall, Lloyd Center has voiced no objections. App. 108 (testimony of R. Horn, manager of Lloyd Center). It is apparent that petitioner has no difficulty in accepting our decision in *Logan Valley* and in complying with it.

free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent.[5] And this is why respondents have a tremendous need to express themselves within Lloyd Center.

Petitioner's interests, on the other hand, pale in comparison. For example, petitioner urges that respondents' First Amendment activity would disturb the Center's customers. It is undisputed that some patrons will be disturbed by any First Amendment activity that goes on, regardless of its object. But, there is no evidence to

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[5] It is evident from the Court's opinion that the majority fails to grasp the essence of our decision in *Logan Valley*. The Court notes that there is a difference between a free-standing store and one located in a shopping center, and between small stores and extremely large ones, but suggests that because the difference is "of degree—not of principle" it is unimportant. This flies directly in the face of *Logan Valley*, where we said that as private property expands to the point where it becomes, in reality, the business district of a community, the rights of the owners to proscribe speech on the part of those invited to use the property diminish. When the Court states that this was broad language that was somehow unnecessary to our decision, it betrays its misunderstanding of the holding.

As Mr. Justice Black and MR. JUSTICE WHITE both pointed out in dissent in *Logan Valley*, there was really only one issue before the Court—*i. e.*, whether the Logan Valley Plaza was prevented by the Fourteenth Amendment from inhibiting speech even though it was private property. The critical issue was whether the private property had sufficient "public" qualities to warrant a holding that the Fourteenth Amendment reached it. We answered this question in the affirmative, and the answer was the pivotal factor in our decision. Every member of the Court was acutely aware that we were dealing with degrees, not absolutes. But we found that degrees of difference can be of constitutional dimension. While any differences between the instant case and *Logan Valley* are immaterial in my view, such differences as there are make this a clearer case of illegal state action.

indicate that speech directed to topics unrelated to the shopping center would be more likely to impair the motivation of customers to buy than speech directed to the uses to which the Center is put, which petitioner concedes is constitutionally protected under *Logan Valley*. On the contrary, common sense would indicate that speech that is critical of a shopping center or one or more of its stores is more likely to deter consumers from purchasing goods or services than speech on any other subject. Moreover, petitioner acknowledges that respondents have a constitutional right to "leaflet" on any subject on public streets and sidewalks within Lloyd Center. It is difficult for me to understand why leafletting in the Mall would be so much more disturbing to the Center's customers.

I also find patently frivolous petitioner's argument that if handbilling in the Mall is permitted, Lloyd Center would face inordinate difficulties in removing litter from its premises. The District Court found that respondents' activities were litter-free. Assuming, *arguendo*, that if respondents had been permitted to continue their activities, litter might have resulted, I think that it is immediately apparent that even if respondents confined their activites to the public streets and sidewalks of the Center as Lloyd's private police suggested, litter would have been a problem as the recipients of the handbills carried them to the shopping and parking areas. Petitioner concedes that it would have had to remove this litter. There is no evidence that the amount of litter would have substantially increased if respondents distributed the leaflets within the Mall. But, even assuming that the litter might have increased, that is not a sufficient reason for barring First Amendment activity. See, *e. g., Schneider* v. *State*, 308 U. S. 147 (1939). If petitioner is truly concerned about litter, it should accept a previous suggestion by this Court and prosecute those

who throw handbills away, not those who use them for communicative purposes.[6] *Id.*, at 162.

In sum, the balance plainly must be struck in favor of speech.

C. Petitioner's other grounds for denying respondents access to the Mall can be dealt with quickly. The assertion is made that petitioner had the right to regulate the manner in which First Amendment activity took place on its property, and that because the public streets and sidewalks inside the Center offered sufficient access to the public, it was permissible to deny respondents use of the Mall. The District Court found that certain stores in the Center could only be reached by using the private walkways of the Mall. Those persons who drove into the Center, parked in the privately owned parking lots, and who entered the stores accessible only through the Mall could not be safely reached from the public streets and sidewalks. Hence, the District Court properly found that the Mall was the only place where respondents had reasonable access to all of Lloyd Center's patrons.[7] 308 F. Supp., at 131. At one point in this

[6] Since petitioner's security guards have full police power, they can enforce state laws against littering, just as they have enforced laws against loitering in the past. App. 45 (testimony of R. Horn, manager of Lloyd Center).

[7] The Court implies that it is willing to reverse both lower courts and hold that their findings that alternative forums for leafletting in Lloyd Center were either not as effective as the Mall or dangerous are clearly erroneous. I too have read the record in this case and I find no warrant for such a holding. The record plainly shows that it was impossible to reach many of the shoppers in the Center without using the Mall unless respondents were willing to approach cars as they were leaving the center. The District Court and the Court of Appeals took the view that requiring respondents to run from the sidewalk, to knock on car windows, to ask that the windows be rolled down so that a handbill could be distributed, to offer the handbill, run back to the sidewalk, and to repeat this gesture for every automobile leaving Lloyd Center involved hazards not only to

litigation, petitioner also attempted to assert that it was entitled to bar respondents' distribution of leaflets on the ground that the leaflets violated the Selective Service laws. The District Court found that this contention was without merit. 308 F. Supp., at 132–133. It seems that petitioner has abandoned the contention in this Court. In any event, it is meritless for the reasons given by the District Court.

III

In his dissenting opinion in *Logan Valley*, 391 U. S., at 339, MR. JUSTICE WHITE said that the rationale of that case would require affirmance of a case like the instant one. MR. JUSTICE WHITE, at that time, was convinced that our decision in *Logan Valley*, incorrect though he thought it to be, required that all peaceful and nondisruptive speech be permitted on private property that was the functional equivalent of a public business district.

As stated above, I believe that the earlier view of MR. JUSTICE WHITE is the correct one, that there is no legitimate way of following *Logan Valley* and not applying it to this case. But, one may suspect from reading the opinion of the Court that it is *Logan Valley* itself that the Court finds bothersome. The vote in *Logan Valley* was 6–3, and that decision is only four years old. But, I am aware that the composition of this Court has radically changed in four years. The fact remains that *Logan Valley* is binding unless and until it is overruled. There is no valid distinction between that case and this one, and, therefore, the results in both cases should be the same.

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respondents but also to other pedestrians and automobile passengers. Having never seen Lloyd Center, except in photographs contained in the record, and having absolutely no idea of the amount of traffic entering or leaving the Center, the Court cavalierly overturns the careful findings of facts below. This, in my opinion, exceeds even the most expansive view of the proper appellate function of this Court.

While the majority is obviously troubled by the rationale of *Logan Valley*, it is interesting that none of the participants in this litigation have experienced any similar difficulty. Lloyd Corp. urges that *Logan Valley* was correctly decided, that it struck a balance that the First Amendment required us to strike, and that it has fully complied with *Logan Valley* with respect to labor activity. The American Retail Federation urges in its Brief as *amicus curiae* that a balance must be struck between the property interests of shopping center owners and the First Amendment interests of shopping center users. It does not urge that *Logan Valley* was incorrectly decided in any way.

It is true that Lloyd Corp. and the American Retail Federation ask the Court to distinguish this case from *Logan Valley*, but what is more important is that they recognize that when massive areas of private property are opened to the public, the First Amendment may come into play. They would like, of course, to limit the impact of speech on their private property, but whether or not they can do so consistently with the First Amendment is a question that this Court must resolve.

We noted in *Logan Valley* that the large-scale movement of this country's population from the cities to the suburbs has been accompanied by the growth of suburban shopping centers. In response to this phenomenon, cities like Portland are providing for large-scale shopping areas within the city. It is obvious that privately owned shopping areas could prove to be greatly advantageous to cities. They are totally self-sufficient, needing no financial support from local government; and if, as here, they truly are the functional equivalent of a public business area, the city reaps the advantages of having such an area without paying for them. Some of the advantages are an increased tax base, a drawing attraction for residents, and a stimulus to further growth.

It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible unless we adhere to *Marsh* v. *Alabama* and continue to hold that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it," 326 U. S., at 506.

When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality. Accordingly, I would affirm the decision of the Court of Appeals.

Reporter's Note

The next page is purposely numbered 901. The numbers between 586 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM JUNE 12 THROUGH JUNE 21, 1972

JUNE 12, 1972

Affirmed on Appeal

No. 71–1396. DANFORTH, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* PREISLER ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 341 F. Supp. 1158.

Reversed on Appeal

No. 71–5443. HARVEY *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. Motion for leave to proceed *in forma pauperis* granted. Judgment reversed. *Brooks* v. *Tennessee,* 406 U. S. 605. Reported below: 225 Tenn. 316, 468 S. W. 2d 731.

Certiorari Granted—Reversed and Remanded. (See No. 71–1180, *ante,* p. 197, and No. 71–6425, *ante,* p. 203.)

Certiorari Granted—Vacated and Remanded. (See also No. 71–784, *ante,* p. 191.)

No. 70–5024. FARRELL *v.* STOVALL ET AL. Sup. Ct. Wis. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Humphrey* v. *Cady,* 405 U. S. 504, and *Jackson* v. *Indiana,* 406 U. S. 715.

Miscellaneous Orders

No. A–1270 (71–1345). CRISMON *v.* UNITED STATES. C. A. 8th Cir. Petitioner's second application for bail pending decision on his petition for writ of certiorari, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. A–1208 (No. 70–105). HANRAHAN *v.* DOE ET AL.; and

No. A–1208 (No. 70–106). HEFFERNAN, GUARDIAN *v.* DOE ET AL. Appeals from D. C. N. D. Ill. Application of appellees for vacation of stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would vacate the stay.

No. 71–703. UNITED STATES *v.* FIRST NATIONAL BANCORPORATION, INC. Appeal from D. C. Colo. [Probable jurisdiction noted, 405 U. S. 915.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Counsel for appellees also allotted 15 additional minutes for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of the motion.

No. A–1248 (71–1476). GAFFNEY *v.* CUMMINGS ET AL. Appeal from D. C. Conn. Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted. MR. JUSTICE STEWART would deny the application. Reported below: 341 F. Supp. 139.

MR. JUSTICE DOUGLAS, dissenting.

Appellant seeks to stay the judgment of a three-judge Federal District Court, which held unconstitutional Connecticut's plan for apportioning its state legislature. 341 F. Supp. 139. The plan was adopted in September 1971, and was only in the preliminary stages of implementation when it was struck down as violative of the Equal Protection Clause on March 30, 1972. An appeal from that decision has been docketed in this Court. *Gaffney* v. *Cummings,* No. 71–1476.

We denied a motion for expedited consideration of that appeal on May 22, 1972. 406 U. S. 942. Appellant promptly moved the lower court for a stay of its

March 30 decision, and when that stay was denied on May 26, 1972, appellant came here.

Earlier this Term, in another reapportionment case, MR. JUSTICE POWELL, in an in-chambers opinion, articulated the considerations involved in our review of applications for a stay of lower court judgments:

> "A lower court judgment, entered by a tribunal that was closer to the facts . . . , is entitled to a presumption of validity. Any party seeking a stay of that judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment pending appeal will lead to irreparable harm." *Graves* v. *Barnes,* 404 U. S. 1201, 1203.

"Irreparable harm," of course, inheres in any challenge to legislative apportionment. If the court below erred, the fall election will be held under an improper order, one which will doubtless affect the composition of the next state legislature. But this type of "irreparable injury" affects both sides equally, for if the court below was correct, staying its order will cause irreparable harm of precisely the same dimension.

There is "irreparable injury" in a different sense if the court's order striking down a state apportionment is handed down so near the upcoming election that it is administratively impractical to implement an orderly election. Here, there is no serious claim that irreparable injury, in this sense, would result if a stay is not granted. The court below found as fact that there is ample time before the fall election to implement the plan submitted by the Special Master on May 26, 1972, or any proposed substitute which the State or appellant might submit within a reasonable time.[1] In-

[1] The legislature has recently acted to remove whatever procedural roadblocks there might be to implementation of the Master's plan

deed, appellant concedes that the question of which plan can be most easily implemented is a "non-issue." [2]

Thus, the issue determinative of the stay application is the probable correctness of the decision below, and, in my view, appellant has not met his burden "of showing that the decision below was erroneous."

In *Reynolds* v. *Sims,* 377 U. S. 533, 577, we said "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." Moreover, a State may not be heard to argue that a population variance is justified because it is *de minimis.* "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. . . . Unless population variances among . . . districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Kirkpatrick* v. *Preisler,* 394 U. S. 526, 530–531.[3]

A comparison of the population variances in this case with those disapproved in *Kirkpatrick, supra,* is striking. In *Kirkpatrick,* the average variation from the ideal district was only 1.6%. Here, assembly districts in the state plan exhibited an average variation of 1.9%. In *Kirkpatrick,* the ratio of the largest to the smallest district was only 1.06 to 1. Here, the ratio of the largest to the smallest assembly district is 1.082

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or any other which the court below might adopt. Public Act 220, May 16, 1972. The District Court indicated that the legislature will shortly submit a plan of its own for the court's consideration. 341 F. Supp. 139, 150.

[2] Appellant's Reply Memorandum 4. See also Appellant's Motion for Stay of Judgment 8.

[3] It is irrelevant to this comparison that *Kirkpatrick,* 394 U. S. 526, involved congressional rather than state legislative redistricting. In either case, the burden is on the State to demonstrate a valid justification for any population variance, no matter how small.

to 1. In *Kirkpatrick,* 70% of the districts were within plus or minus 1.88% of the ideal population figure. Here, only 51.65% of the assembly districts are within 2.0% of the ideal. In *Kirkpatrick,* the total variance [4] was 5.97%. Here, the total variance of the assembly redistricting is 7.83%.

It is true, of course, that "the extent to which equality may practicably be achieved may differ from State to State . . . ," *Kirkpatrick, supra,* at 530. Thus, a State may be able to justify certain variations. Here, however, only two justifications are offered, and neither appears to have particular merit.

It is primarily argued that the variations are justified by a legitimate state interest in achieving "a partisan balancing of strength in each house." The District Court explained the concept as follows:

> "The partisan balancing of strength in each house, termed by intervening defendant [appellant in this Court] a 'fair political balance' and by plaintiffs [appellees herein] 'political gerrymandering' was obtained by so adjusting the census areas utilized as building blocks into the structuring of Senate and House districts that, on the basis of the vote for all the Senate candidates of each party in the elections of 1966, 1968 and 1970, whichever party carried the state should carry a majority of Senate seats proportional to the statewide party majority, and likewise in the House, based on the party vote for all the House candidates of each party in the same three elections.
>
> "In one or more House and one or more Senate districts some accommodation was also made in

[4] The "total variance" in an apportionment plan is derived by adding together the percentage variation from the ideal of the two districts which are respectively the most overpopulated and underpopulated.

> the interest of retaining in office a particular incumbent." 341 F. Supp. 139, 147.

This Court has never decided whether political gerrymandering or "fair political balance" is *per se* unconstitutional, irrespective of population variances. See, *e. g.*, *Wells* v. *Rockefeller,* 394 U. S. 542, 544. But we have said, in no uncertain terms, that gerrymandering is not a justification where population variances do result. In *Kirkpatrick,* for example, we even rejected the State's attempt to justify the population variances there present on the ground that the variations were necessary to *avoid* gerrymandering.

> "[A]n argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities." 394 U. S., at 534.

Thus, whether or not Connecticut may gerrymander its legislature if population equality is preserved, it may not do so when population disparities result.

An additional consideration urged to justify the discrepancies is the State's interest in preserving town lines. But any weight this factor would ordinarily have is rendered insignificant by the fact that the State's own plan cuts across 47 towns to create assembly districts, and 23 towns to create senate districts. See *Whitcomb* v. *Chavis,* 403 U. S. 124, 162 n. 42.

Appellant has one final argument. Attempting to litigate the merits of the Special Master's plan, he argues that implementation of that plan would exceed the equity power of the federal court under our recent decision in *Sixty-seventh Minnesota State Senate* v. *Beens,* 406 U. S. 187. But the merits of the Special Master's plan are not before this Court. Indeed, in

denying the stay below, the District Court obligated itself to "set down for hearing with all reasonable dispatch the plan submitted by the Special Master and any other plans submitted." Whatever appellant's objections to the Master's plan might be, he should first air them in the District Court which stands ready to hear them.

Additionally, even were the Special Master's plan at issue, appellant's objections would not be well taken. This is not a case in which the size of a state house is "slashed" in half, as in *Minnesota State Senate, supra.* Here, the District Court merely reduced the size of Connecticut's house from 151 members to 144, in order that the number of house districts be an even multiple of the 36 senate districts.[5] A house of such size is expressly contemplated by the Connecticut Constitution.[6] The District Court's action is simply a "minor variation," allowing senate and house districts to be drawn with congruent boundaries, that is well within the remedial powers of an equity court.[7]

I dissent from the Court's order granting this stay.

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[5] Minor variations for this purpose were approved in the *Minnesota State Senate* case. 406 U. S. 187, and cases cited *id.*, at 198 n. 10.

[6] Article III, § 4, of the Connecticut Constitution provides that "The house of representatives shall consist of not less than one hundred twenty-five and not more than two hundred twenty-five members . . . ."

[7] Appellant also objects to the extent to which the Master's plan dishonors town boundaries. It is undisputed, however, that town boundaries cannot be preserved intact in all cases under any constitutional plan. The Master's plan, drawn with the preservation of as many town lines as possible as an express consideration (though a subordinate one to the goal of population equality), cuts across only 60 towns in creating assembly districts, and 30 towns in creating senate districts. These figures compare favorably with those in the State's plan, *supra,* at 906.

No. 71–6129. McDONNELL *v.* WOLFF, WARDEN, ET AL.; and

No. 71–6479. WILLIAMS *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–6362. DAYE ET AL. *v.* LARKINS, JUDGE, ET AL.; and

No. 71–6480. TILLI *v.* DAVIS ET AL. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 71–1031. TONASKET *v.* WASHINGTON ET AL. Appeal from Sup. Ct. Wash. Probable jurisdiction noted. Reported below: 79 Wash. 2d 607, 488 P. 2d 281.

No. 71–1069. ASSOCIATED ENTERPRISES, INC., ET AL. *v.* TOLTEC WATERSHED IMPROVEMENT DISTRICT. Appeal from Sup. Ct. Wyo. Probable jurisdiction noted. Reported below: 490 P. 2d 1069.

No. 70–279. UNITED STATES ET AL. *v.* FLORIDA EAST COAST RAILWAY CO. ET AL. Appeal from D. C. M. D. Fla. Probable jurisdiction noted. MR. JUSTICE POWELL took no part in the consideration or decision of this matter. Reported below: 322 F. Supp. 725.

No. 71–1222. SUGARMAN, ADMINISTRATOR, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, ET AL. *v.* DOUGALL ET AL. Appeal from D. C. S. D. N. Y. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 339 F. Supp. 906.

Certiorari Granted

No. 71–1304. BRADLEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. Reported below: 455 F. 2d 1181.

No. 71–1255. UNITED STATES *v.* ASH. C. A. D. C. Cir. Certiorari granted. Application of respondent for release on bail, presented to THE CHIEF JUSTICE and by him referred to the Court, denied without prejudice to renewed application to the District Court. See 18 U. S. C. § 3148. Reported below: 149 U. S. App. D. C. 1, 461 F. 2d 92.

No. 71–6060. TACON *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 107 Ariz. 353, 488 P. 2d 973.

No. 71–6516. BRADEN *v.* 30TH JUDICIAL CIRCUIT COURT OF KENTUCKY. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 454 F. 2d 145.

Certiorari Denied

No. 70–352. LAWRENCE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 3d 273, 481 P. 2d 212.

No. 70–5101. PATLER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 211 Va. 448, 177 S. E. 2d 618.

No. 70–5109. TOWNES *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 461 S. W. 2d 761.

No. 71–970. AGNELLINO *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 59 N. J. 434, 283 A. 2d 533.

No. 71–1212. GEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 849.

No. 71–1218. HOLMES ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 249.

No. 71–1115. FARRELL ET AL. *v.* MASSACHUSETTS;

No. 71–1251. LOCAL FINANCE CORP. *v.* MASSACHUSETTS;

No. 71–1253. WOODCOCK *v.* MASSACHUSETTS;

No. 71–1254. LIBERTY LOAN CORP. *v.* MASSACHUSETTS; and

No. 71–6428. HANLEY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 275 N. E. 2d 33.

No. 71–1228. WALKER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1205.

No. 71–1230. PEPSI-COLA BOTTLING CO. OF MIAMI, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 824.

No. 71–1252. KAMBER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 918.

No. 71–1257. MOORE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 2d 569.

No. 71–1259. CENTRAL MACHINE & TOOL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied.

No. 71–1268. BROWN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 293.

No. 71–1270. MCKEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 456 F. 2d 1049.

No. 71–1272. DEFONT ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 453 F. 2d 1239.

No. 71–1273. FRIED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1274. WAINWRIGHT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 448 F. 2d 984.

No. 71–1275. COBB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 405.

No. 71–1277. GRIMES ET AL. *v.* UNITED STATES; and No. 71–1296. GUINN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 29.

No. 71–1292. ALEXANDER *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 10th Cir. Certiorari denied. Reported below: 451 F. 2d 1185.

No. 71–1308. PRITCHARD, AKA O'ROARKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 1036.

No. 71–1335. ANSELMO ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 260 La. 306, 256 So. 2d 98.

No. 71–1348. SOBEL, DBA SCRIPT SHOP EAST *v.* CITY OF LACY-LAKEVIEW, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–1350. CHAMBERS ET AL. *v.* NATIONWIDE MUTUAL INSURANCE CO. Sup. Ct. Va. Certiorari denied.

No. 71–1354. WESTINGHOUSE ELECTRIC CORP. *v.* TITANIUM METALS CORPORATION OF AMERICA. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 515.

No. 71–1395. CAROLLO *v.* S. S. KRESGE CO., DBA K-MART. C. A. 4th Cir. Certiorari denied. Reported below: 456 F. 2d 306.

No. 71–1374. GELLIS *v.* CITY OF SAVANNAH, GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–1414. BEAUDRY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 53 Wis. 148, 191 N. W. 2d 842.

No. 71–1448. ENSO-GUTZEIT O/Y ET AL. *v.* SIDEREWICZ. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 1094.

No. 71–5370. HALL *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 249 So. 2d 59.

No. 71–6035. FUSARO *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 18 Cal. App. 3d 877, 96 Cal. Rptr. 368.

No. 71–6071. PAYNE *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 71–6251. CANNITO ET AL. *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 542.

No. 71–6258. FARESE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–6285. AVENDANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 975.

No. 71–6291. CHILDS *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 2d 541.

No. 71–6336. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–6426. DEBRUHL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6427. YOUNG *v.* REED, CHAIRMAN, BOARD OF PAROLE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–6443. CLARK *v.* JOHNSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–6446. REED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–6458. GRENE *v.* CHOATE, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied.

No. 71–6462. SMITH *v.* RODGERS, JAIL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied.

No. 71–6475. WILLIAMS *v.* CLARK, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–6477. MASHEIOFF *v.* AMERICAN EXPORT LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–6478. CULBERSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1219.

No. 71–6482. HARRIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6483. LOGAN *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–6484. GANCI *v.* HENDERSON, PRISON SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6488. JOHNSON *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 490 P. 2d 704.

No. 71–6493. MCGURRIN *v.* SHOVLIN, HOSPITAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 455 F. 2d 1278.

No. 71–6498. DIGGS *v.* EARLY. Super. Ct. D. C. Certiorari denied.

No. 71–6499. RUIZ-JUAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1015.

No. 71–6515. PACE *v.* WELSH. C. A. 1st Cir. Certiorari denied.

No. 70–5013. JOHNSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 45 Ill. 2d 283, 259 N. E. 2d 57.

No. 71–1122. BENEFICIAL FINANCE CO. ET AL. *v.* MASSACHUSETTS; and

No. 71–1241. HOUSEHOLD FINANCE CORP. ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: —— Mass. ——, 275 N. E. 2d 33.

No. 71–1215. TIGERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 456 F. 2d 54.

No. 71–1224. MCGEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 460 F. 2d 1287.

No. 71–1258. DEMANGONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 456 F. 2d 807.

No. 71–1271. SCHNEIDER *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 345.

No. 71–1334. TWENTIETH CENTURY-FOX FILM CORP. *v.* DESNY. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1341. BEHR ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1346. UNITED MINE WORKERS OF AMERICA *v.* RIVERTON COAL CO. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 1035.

No. 71–1362. JOHNSON *v.* COMMITTEE ON EXAMINATIONS & ADMISSIONS OF THE SUPREME COURT OF ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1384. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE *v.* BAKER ET AL., TRUSTEES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 811.

No. 71–6158. FOGGY *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 107 Ariz. 307, 486 P. 2d 789.

No. 71–6502. YOUNG *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 679.

No. 71–1266. GETTELMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–6514. RAYSOR ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 257 S. C. 265, 185 S. E. 2d 529.

No. 71–1078. MOITY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted.

No. 71–1365. RANGER INSURANCE CO. *v.* CULBERSON, EXECUTRIX, ET AL. C. A. 5th Cir. Motion of respondent Culberson for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 454 F. 2d 857.

No. 71–1412. EYMAN, WARDEN *v.* HART. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 458 F. 2d 334.

No. 71–1462. SOLO CUP CO. *v.* ILLINOIS TOOL WORKS, INC. C. A. 7th Cir. Motion of Sweetheart Plastics, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 461 F. 2d 265.

Rehearing Denied

No. 70–78. AFFILIATED UTE CITIZENS OF UTAH ET AL. *v.* UNITED STATES ET AL., 406 U. S. 128. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 71–962. KELLEY ET AL. *v.* TEXAS STATE BOARD OF MEDICAL EXAMINERS, 405 U. S. 1073. Petition for rehearing denied.

JUNE 13, 1972

Dismissal Under Rule 60

No. 71–1372. BENNETT ET AL. *v.* GRAVELLE ET AL. C. A. 4th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 451 F. 2d 1011.

JUNE 19, 1972

Appeals Dismissed

No. 71–1085. CALIFORNIA *v.* KAPLAN. Appeal from Sup. Ct. Cal. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed, it appearing that the judgment below rests upon an adequate state ground. Reported below: 6 Cal. 3d 150, 491 P. 2d 1.

No. 71–1400. UNITED AIR LINES, INC. *v.* PORTERFIELD, TAX COMMISSIONER OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 28 Ohio St. 2d 97, 276 N. E. 2d 629.

No. 71–1477. DICKENS ET UX. *v.* ERNESTO ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 30 N. Y. 2d 61, 281 N. E. 2d 153.

No. 71–5400. HICKMAN *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

Vacated and Remanded on Appeal

No. 71–5723. McAllister *v.* Virginia. Appeal from Sup. Ct. Va. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Argersinger* v. *Hamlin, Sheriff, ante,* p. 25. Mr. Justice Douglas would reverse judgment of lower court.

Affirmed on Appeal

No. 71–1435. State Department of Health and Rehabilitative Services of Florida et al. *v.* Zarate et al. Appeal from D. C. S. D. Fla. Motion of appellees Herman and Pola Sheydwasser for leave to proceed *in forma pauperis* granted. Judgment affirmed. Mr. Justice White is of the opinion that probable jurisdiction should be noted.

Certiorari Granted—Vacated and Remanded

No. 70–5052. Kammerer *v.* Washington et al. Sup. Ct. Wash. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Argersinger* v. *Hamlin, Sheriff, ante,* p. 25.

No. 70–5053. Fox *v.* City of Bellevue et al. Sup. Ct. Wash. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Argersinger* v. *Hamlin, Sheriff, ante,* p. 25.

No. 71–5722. Wright *v.* Town of Wood. Sup. Ct. S. D. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Argersinger* v. *Hamlin, Sheriff, ante,* p. 25. Mr. Justice Douglas would grant certiorari and reverse the judgment of the lower court. Reported below: 85 S. D. 669, 189 N. W. 2d 447.

No. 71–6445. JONES *v.* UNITED STATES. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. On representation of the Solicitor General set forth in his Memorandum for the United States, filed May 25, 1972, judgment is vacated and case remanded for reconsideration in light of position presently asserted by the Government. Reported below: 456 F. 2d 627.

Certiorari Granted—Reversed and Remanded. (See No. 71–1309, *ante,* p. 366.)

Miscellaneous Orders

No. 71–1592. AUERBACH ET AL. *v.* MANDEL, GOVERNOR OF MARYLAND, ET AL. Appeal from D. C. Md. Motion to expedite denied.

No. 71–6534. FERRE *v.* BRANTLEY, WARDEN; and
No. 71–6541. MCCRAY *v.* MARYLAND. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–6573. GERARDI *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 71–1369. OSWALD, CORRECTION COMMISSIONER, ET AL. *v.* RODRIGUEZ ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 456 F. 2d 79.

No. 71–1398. WARNER, SECRETARY OF THE NAVY *v.* FLEMINGS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for argument with No. 71–6314 [*Gosa* v. *Mayden, Warden*], *infra.* Reported below: 458 F. 2d 544.

No. 71–6314. GOSA *v.* MAYDEN, WARDEN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for argument with No. 71–1398 [*Warner, Secretary of the Navy* v. *Flemings*], *supra*. Reported below: 450 F. 2d 753.

Certiorari Denied. (See also No. 71–5400, *supra*.)

No. 71–1206. DEPUGH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 452 F. 2d 915.

No. 71–1260. SCHOOL TOWN OF SPEEDWAY ET AL. *v.* DILLIN, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: See 332 F. Supp. 655.

No. 71–1290. BINDER *v.* UNITED STATES;

No. 71–1307. SAMUELS *v.* UNITED STATES; and

No. 71–6519. BLAUNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 805.

No. 71–1295. WENGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 308.

No. 71–1299. KARNEGES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–1366. MARINO ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 38 App. Div. 2d 688 and 689, 326 N. Y. S. 2d 551 and 552.

No. 71–1367. ROCKWELL-STANDARD CORP. *v.* SCAIFE CO. Sup. Ct. Pa. Certiorari denied. Reported below: 446 Pa. 280, 285 A. 2d 451.

No. 71–1379. WATTS *v.* TEAGLE ET AL. Ct. App. Ga. Certiorari denied. Reported below: 124 Ga. App. 726, 185 S. E. 2d 803.

No. 71–1375. CITY OF HICKORY HILLS *v.* VILLAGE OF BRIDGEVIEW ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 1 Ill. App. 3d 931, 274 N. E. 2d 925.

No. 71–1385. SPAGAT ET AL. *v.* MAHIN, DIRECTOR OF REVENUE OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 50 Ill. 2d 183, 277 N. E. 2d 834.

No. 71–1388. GRIVETTI ET AL. *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS; and

No. 71–1389. PARTEE ET AL. *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 50 Ill. 2d 156, 277 N. E. 2d 881.

No. 71–1415. ROSS *v.* TAIT. Sup. Ct. Mich. Certiorari denied.

No. 71–1420. TEPERICH *v.* NORTH JUDSON-SAN PIERRE HIGH SCHOOL BUILDING CORP. ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 275 N. E. 2d 814.

No. 71–1466. GORSALITZ *v.* OLIN MATHIESON CHEMICAL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 180.

No. 71–5611. WALSH ET AL. *v.* PICARD, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 446 F. 2d 1209.

No. 71–6074. RAY *v.* BRIERLEY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 71–6167. HATTON *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 228 Ga. 378, 185 S. E. 2d 388.

No. 71–6190. TROXELL *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–6169. HAWKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 212 Va. 632, 186 S. E. 2d 38.

No. 71–6281. BEISHIR ET AL. *v.* SWENSON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 71–6284. ANDREWS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 12 N. C. 421, 184 S. E. 2d 69.

No. 71–6394. TALBOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 454 F. 2d 1111.

No. 71–6454. REVEL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–6465. DELUZIO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 454 F. 2d 711.

No. 71–6474. ERWING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–6494. ALKES *v.* UNITED STATES BOARD OF PAROLE ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–6526. UPSHER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–6530. LOVISI *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 71–6531. SIRES *v.* PINNOCK. Sup. Ct. Wash. Certiorari denied.

No. 71–6533. PLOTT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 71–6542. LEMON *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied.

No. 71–6545. SWEENEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 71–6548. SPINELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–6559. MCREYNOLDS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 71–6560. MAYBERRY *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied.

No. 71–6561. LAIETTA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 68, 281 N. E. 2d 157.

No. 71–6562. LAFAY *v.* FRITZ, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 297.

No. 71–6563. HACKER *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–6577. DOCKERY *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 71–6578. PILLIS ET AL. *v.* GOVERNOR OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–6581. LOPEZ *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 53 Wis. 2d 662, 193 N. W. 2d 874.

No. 71–6590. MOORE *v.* POWELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 71–6591. CARUSO *v.* NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–6597. JUNIOR *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 47 Ala. App. 518, 257 So. 2d 844.

No. 71–6593. BUTLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6595. STOKES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 71–6599. SPILLERS *v.* NORTHERN ASSURANCE COMPANY OF AMERICA ET AL. Sup. Ct. La. Certiorari denied. Reported below: 260 La. 288, 255 So. 2d 772.

No. 71–6600. IN RE WAYLAND. Sup. Ct. Okla. Certiorari denied.

No. 71–6602. STELL *v.* BENJAMIN. C. A. D. C. Cir. Certiorari denied.

No. 71–6605. LIVINGSTON *v.* MOBIL OIL CORP. Ct. App. N. Y. Certiorari denied.

No. 71–6608. ABRAHAM *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 70–50. CONSOLIDATED CITY OF JACKSONVILLE ET AL. *v.* WOOLEY. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 433 F. 2d 980.

No. 71–898. NORTHERN CALIFORNIA COLLECTION SERVICE, INC., OF SACRAMENTO *v.* RANDONE ET AL. Sup. Ct. Cal. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 5 Cal. 3d 536, 488 P. 2d 13.

No. 70–5304. BELL *v.* KENTUCKY. Cir. Ct. Ky., Fayette County. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1262. HERSCOVITZ *v.* BOARD OF COMMISSIONERS OF THE UTAH STATE BAR. Sup. Ct. Utah. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–143. STEVENS ET AL. *v.* WATSON. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 16 Cal. App. 3d 629, 94 Cal. Rptr. 190.

No. 71–1337. JOHNSON ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 212 Va. 579, 186 S. E. 2d 53.

No. 71–1352. MULVANEY ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 60 N. J. 139, 286 A. 2d 512.

No. 71–1370. HACKETT ET AL. *v.* GENERAL HOST CORP. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 618.

No. 71–1406. HOWARD ET AL. *v.* ADAMS COUNTY BOARD OF SUPERVISORS ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 455.

No. 71–1424. FITZGERALD *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (SOUTHERN PACIFIC CO., REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1460. HAMILTON, ADMINISTRATRIX *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6455. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6100. BRIDGES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 471 S. W. 2d 838.

No. 71–6112. MILLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 731.

No. 71–6538. HUCKABAY *v.* WOODMANSEE, JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 1389.

No. 71–6553. SPAIN *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6616. DIXON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 287 A. 2d 89.

No. 71–1219. SCENIC HUDSON PRESERVATION CONFERENCE ET AL. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 71–1220. CITY OF NEW YORK *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 71–1221. SIERRA CLUB ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 2d Cir. Motion to dispense with printing the Federal Power Commission opinion in No. 71–1219 to conform with Rule 39 of the Rules of this Court granted. Certiorari denied. Reported below: 453 F. 2d 463.

MR. JUSTICE DOUGLAS, dissenting.

These petitions should be granted to consider whether the Federal Power Commission complied with its obligations under §§ 101 and 102 of the National Environ-

mental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. §§ 4331 and 4332, in granting a license to Consolidated Edison Company of New York, Inc., for the construction of a pumped storage power project on Storm King Mountain on the Hudson River.

Under § 101 of the Act federal agencies are instructed to take environmental consequences into account in their decisionmaking.[1] That mandate was aimed partly at eliminating the excuse which had often been offered by bureaucrats that their statutory authority did not authorize consideration of such factors in their policy decisions. See *Udall* v. *FPC*, 387 U. S. 428.[2] More impor-

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[1] Section 101 of the National Environmental Policy Act, 83 Stat. 852, 42 U. S. C. § 4331, provides in pertinent part:

"(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

"(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

"(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

"(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

"(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice."

[2] In that case we held that the grant of authority to this Commission to alienate federal water resources does not turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. We said: "The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the 'public interest,' including . . . the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife." 387 U. S., at 450.

The Commission's attitude in that case reappeared in the present

tantly, § 101 was meant as an affirmative duty "to *consider* environmental issues just as they consider other matters within their mandates." *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 146 U. S. App. D. C. 33, 36, 449 F. 2d 1109, 1112.

Section 102 [3] requires that administrators incorporate

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case: "Implicit in the reasoning of the Commission and the Examiner is the assumption that this project must be built and that it must be built now." 387 U. S., at 448.

[3] Section 102 of the National Environmental Policy Act, 42 U. S. C. § 4332, provides in pertinent part:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

. . . . . .

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on——

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by

certain procedures into their operating routines in order (1) to increase the likelihood that environmental consequences of agency action will not be unforeseen and (2) to insure that if a project is approved, an environmentally acceptable alternative will be chosen. Section 102 (2)(C) requires a detailed statement in connection with actions significantly affecting the quality of the human environment, specifying the environmental impact of the proposed action and alternatives. Section 102 (2)(D) places bureaus under an affirmative duty to study and develop alternatives where there are unresolved conflicts concerning the alternative uses of available resources.

This case poses issues under both sections. In 1964 the Consolidated Edison Company of New York (Con Ed) proposed to the Commission that it be allowed to construct a reservoir atop Storm King Mountain along with a hydroelectric generating plant to be driven by water falling from the reservoir. During the daytime hours when energy demand is high the plant would be operational, but during the evening hours when part of Con Ed's existing facilities are normally idle, power from one of its existing plants would be used to pump water from the Hudson River to the reservoir. In 1965 the Commission approved the project but the Court of Appeals for the Second Circuit in a suit brought by conservationists and local residents set aside the order and remanded for more detailed consideration of various environmental aspects of the project. *Scenic Hudson Preservation Conference* v. *FPC*, 354 F. 2d 608 (CA2).

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section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

"(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources . . . ."

After more hearings had been completed but before the Commission acted, the National Environmental Policy Act of 1969 became effective. Although it has been conceded that the Act's requirements were applicable in these proceedings, no further hearings were held; and no environmental impact statement was drafted. The Commission approved the project and attempted to satisfy its procedural duties under § 102 by specifying certain environmental impact forecasts in its final opinion.

The Court of Appeals affirmed, over the dissent of Judge Oakes, who thought that the Commission had not discharged its obligations under NEPA. 453 F. 2d 463. The majority held that under § 101 the ultimate balance of energy and environmental values was the responsibility of the Commission, and courts could upset only decisions not supported by "substantial evidence." It also held, with respect to the procedural requirements of § 102, that the Commission's hearings and consultation with other agencies satisfied the command that a "systematic, interdisciplinary approach" be utilized.[4] It also found that the Commission's final opinion which contained its environmental findings would, under the circumstances, suffice as an environmental impact statement. A petition for rehearing *en banc* was denied by an equally divided court, with Judge Timbers dissenting in a short opinion which expressed doubt as to the validity of the majority's reliance on the "substantial evidence" test, *id.*, at 494.

I believe the Court of Appeals gave the Act too restrictive a meaning. As to the Commission's duty to take environmental impact into account, Judge Oakes, in his dissenting opinion, made a strong case for the view that the Commission (a) misjudged the risk that project construction might work irreparable injury to one of

[4] NEPA, § 102 (2)(A).

three vital water supply systems serving New York City; (b) underestimated the extent of additional air pollution which would be generated by nighttime burning of fossil fuels in New York City in order to generate the power needed to pump the river water to the reservoir; and (c) generally undervalued environmental considerations while overvaluing engineering and economic considerations. Although value judgments are inevitable and even though the Commission's balancing of environmental costs with other factors may be entitled to some deference, I share Judge Timbers' doubts that under § 101 the balance struck by an agency unskilled in environmental matters should be reviewed only through the lens of the "substantial evidence" test. Cf. *Citizens To Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 413 ("If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems"). But see *Calvert Cliffs', supra*, at 39, 449 F. 2d, at 1115.

I also am not satisfied that the procedural obligations under § 102 were honored. First, the Commission did not draft the impact statement required by § 102 (2)(C). Thus, when the Commissioners deliberated the fate of Storm King Mountain, they did not have before them a coherent study addressed to the environmental consequences of the project and alternatives to it. Another panel of the Second Circuit has recently ruled that the impact statement must be written *before* action is taken. *Greene County Planning Board* v. *FPC*, 455 F. 2d 412 (CA2). Administrators cannot attempt to comply with the Act by calling their final opinion their impact statement. True, here the hearings had been completed after the Act became effective. Yet the Commission could have deferred decision until its own § 102 statement was prepared.

Second, the Commission's final opinion suggests that its consideration of environmental issues is required only when private citizens bring such problems to the agency's attention. For example, in many passages of its opinion the Commission states that particular objections to the project had been rejected for lack of evidence in the administrative record.[5] This approach—symptomatic of the phenomenon of bureaucratic "industry-mindedness"—wrongly assumed that a presumption of validity supported the Con Ed proposal and that environmental groups had a burden of proof to overcome.

Similarly, the Commission limited its inquiry primarily to those program alternatives which had been submitted by the conservationists opposing the Con Ed project. The agency did not generate its own alternatives, although Congress charged each federal agency to represent not only the public interest in general but also under NEPA to pay particular attention to the environmental ramifications of its actions. Whether or not conservationists appear to register dissent, the Commission is told in § 102 (2)(D) to "study, develop, and

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[5] For example, see Judge Oakes' dissent below, 453 F. 2d 463, 482. Scenic Hudson's Petition A47. See also the opinion of the Federal Power Commission, No. 584, *Consolidated Edison Company of New York, Inc., Project 2338*, 44 F. C. C. 350: "There has been no showing that a combination nuclear-gas turbine alternative offers any advantages or indeed is even reasonably equivalent to Cornwall." *Id.*, at 377. "None of the interveners presented any evidence on alternative hydroelectric sites." *Id.*, at 379. "The record is uncontradicted, and we find, that there is no feasible hydroelectric alternative to Cornwall." *Ibid.* "No party to this proceeding has suggested any other plan or project for improving or developing the waterway . . . ." *Id.*, at 388. And see *id.*, at 409 n. 25, stating in part that "[t]here is no evidence concerning the condition of the Aqueduct's lining. Its structural integrity is unknown to the City or any of its witnesses."

describe appropriate alternatives to recommended courses of action . . . ." The agency is directed to apply its own expertise and imagination in exploring less drastic alternatives. And, one alternative, which went completely overlooked by the Commission, as Judge Oakes noted below, is not to build any project at all. Whether that option is realistic we do not know. Informing the public and Congress on that score is the function of the impact statement. In short, the Act requires that bureaucrats not only listen to protests, but also avoid projects that have imprudent environmental impacts. There is no burden of proof for the objector to overcome.

Finally, the Commission's opinion is too imprecise to provide any helpful insight for Congress, the Council on Environmental Quality, or the public into what value judgments it made. We know that the Commission rejected alternatives with less deleterious environmental consequences on the ground that they were "more" costly and "less" reliable. But we have no reasonably precise notion of how much reliability and money were gained at the expense of the destruction of Storm King Mountain. Whether or not courts may review the Commission's ultimate balance of these competing considerations, the fact remains that Congress and the public are entitled to know those judgments. One function of the § 102 statement is certainly to make explicit the priorities of the agencies. That purpose is not served where all that is basically told is that the preferred alternative is cheaper and more reliable, though involving adverse implications for the surrounding ecology.

If this kind of impact statement is tolerated, then the mandate of NEPA becomes only a ritual and like the peppercorn a mere symbol that has no vital meaning. The decision below is, in other words, the beginning of the demise of the mandate of NEPA.

I would grant these petitions.

No. 71–1280. B. FORMAN CO., INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL and MR. JUSTICE POWELL are of the opinion that certiorari should be granted. Reported below: 453 F. 2d 1144.

No. 71–1392. COUNTY BOARD OF EDUCATION OF FAYETTE COUNTY, TENNESSEE *v.* WALKER ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 455 F. 2d 199.

No. 71–1457. MONSANTO CO. *v.* ROHM & HAAS CO. C. A. 3d Cir. Motion of American Patent Law Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 456 F. 2d 592.

Rehearing Denied

No. 71–1196. COREY ET AL. *v.* STATE SAVINGS & LOAN ASSN. ET AL., 406 U. S. 920; and

No. 71–5172. DUKES *v.* WARDEN, 406 U. S. 250. Petitions for rehearing denied.

No. 71–5845. COLEMAN *v.* CRAMER, 406 U. S. 910. Motion for leave to file petition for rehearing denied.

JUNE 21, 1972

Dismissal Under Rule 60

No. 71–5217. JERNIGAN *v.* ECONOMY EXTERMINATING CO., INC., ET AL. Appeal from D. C. N. D. Ga. dismissed under Rule 60 of the Rules of this Court. Reported below: 327 F. Supp. 24.

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