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WILLIAMS v. FLORIDA: END OF A THEORY

PART II

O. JOHN ROGGE*

[In the initial part of this two-part work, which appeared in Issue 3 of Volume 16, the author presented his thesis that the Supreme Court, in its recent decision in WILLIAMS v. FLORIDA, has unleashed itself from incorporation doctrines with regard to constitutional considerations of due process. Mr. Rogge discussed both the incorporation and selective incorporation theories from their genesis to present status on the Burger Court. The author then analyzed the historical development of the notion of due process from the time of the Magna Carta to present day; and suggested that the Court, now unshackled from the selective incorporation theory, will apply case by case due process protection to rights nowhere specifically mentioned in the constitution. In this concluding part, Mr. Rogge discusses the possibility of such application in various areas of common concern.] — (Editor's Note.)

I. CURRENT AND COMING APPLICATIONS

A. Obscenity.

Ironically enough, it may be in the first amendment area, where the Court has most firmly insisted upon its selective incorporation doctrine, that the Court will make its first retreat from that doctrine and, of course, from the incorporation theory as well. But as Justice Douglas remarked in joining in the Court's opinion in Gideon v. Wainwright:1 "Yet, happily, all constitutional questions are always open."2

State obscenity cases may provide the occasions for the Court's first rulings that the states have somewhat more leeway under the due process clause of the fourteenth amendment than the federal government has under "the sweeping command [of the first amendment that] Congress shall make no law . . . abridging the freedom of speech, or of the press."3 If this proves to be so, one's mind will turn to the

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2. Id. at 346.

(607)
Court’s opinion in *Malloy v. Hogan*, a fifth amendment case, wherein Justice Brennan stated emphatically that all of the provisions of the first amendment were as fully applicable to the states as to the federal government:

*Gitlow v. New York* . . . initiated a series of decisions which today hold immune from state invasion every First Amendment protection for the cherished rights of the mind and spirit — the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.

. . . .

[T]he guarantees of the First Amendment, . . . the prohibition of unreasonable searches and seizures of the Fourth Amendment . . . and the right to counsel guaranteed by the Sixth Amendment . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. . . .

Justice Brennan’s statement in *Malloy* was the result of a long line of cases which developed from a misreading of a dictum of the

5. *Id.* at 5, 10. In *Abington School Dist. v. Schempp*, 374 U.S. 203, 215 (1963), Justice Clark wrote for the Court:

First, this Court has decisively settled that the First Amendment’s mandate that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” has been made wholly applicable to the States by the Fourteenth Amendment . . .

6. *E.g.*, *Poulos v. New Hampshire*, 345 U.S. 395, 396-97 (1953) (“the conclusion depends upon consideration of the principles of the First Amendment secured against state abridgment by the Fourteenth”); *Zorach v. Clauson*, 343 U.S. 306, 309 (1952) (“the First Amendment, which [by reason of the Fourteenth Amendment] prohibits the states from establishing religion or prohibiting its free exercise”); *McCollum v. Board of Educ.*, 333 U.S. 203, 210 (1948) (“the First Amendment [made applicable to the States by the Fourteenth]”); *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947) (“the First Amendment, as made applicable to the states by the Fourteenth”); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (“the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment”); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (“in weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake”; “it is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case”); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (“the First Amendment, which the Fourteenth makes applicable to the states”); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 593 (1940) (“the First Amendment, and the Fourteenth through its absorption of the First”, overruled in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“the fundamental concept of liberty embodied in that Amendment [fourteenth] embraces the liberties guaranteed by the First Amendment”); *Schneider v. Irvington*, 308 U.S. 147, 160 (1939) (“the freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state”); United States v. *Caroline Fords. Co.*, 304 U.S. 144, 152 n.4 (1938) (“there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth”). *See also* *Kunz v. New York*, 340 U.S.
Court in *Gitlow v. New York*, for the Court in *Gitlow* never said that the due process clause of the fourteenth amendment made the first amendment applicable to the states. Justice Holmes, in a dissenting opinion in *Gitlow* in which Justice Brandeis joined, emphasized this fact:

The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.\(^\text{8}\)

In like manner, Chief Justice Hughes was consistently careful not to say that the due process clause of the fourteenth amendment made the first amendment applicable to the states;\(^\text{9}\) so were Justices Cardozo and Sutherland.\(^\text{10}\) However, their discriminating language apparently went generally unnoted.

Unfortunately the language in the *Gitlow* case lent itself to being misunderstood. Persons could read into it whatever they wanted to see there. A similar thing happened to Justice Holmes' language in *Schenck v. United States*\(^\text{11}\) about shouting "fire" in a crowded theatre, although with more justification than in the instance of the language in the *Gitlow* case. Just as those who wanted restrictions on speech cited Holmes' hypothetical case as a prime illustration for their argu-

\(^{290, \text{293 (1951)}}("\text{the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights}").\(^{7}\)

\(^{7}\) 268 U.S. 652 (1925).

\(^{8}\) Id. at 672.

\(^{9}\) See, e.g., his opinions for the Court in Stromberg v. California, 283 U.S. 359, 368 (1931); Near v. Minnesota, 283 U.S. 697, 707 (1931); and especially De Jonge v. Oregon, 299 U.S. 353, 364 (1937):

Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. ... The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. ... The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions — principles which the Fourteenth Amendment embodies in the general terms of its due process clause.

\(^{10}\) Justice Cardozo in the Court's opinion in *Palko v. Connecticut*, 302 U.S. 319, 324 (1937), stated:

[T]he due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress ... or the like freedom of the press.

In the Court's opinion in *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936), Justice Sutherland wrote:

While ... [the first amendment] is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.

\(^{11}\) 249 U.S. 47 (1919).
ment,\(^{12}\) so those who wanted the first amendment applicable to the
states cited the *Gitlow* case as so saying. Now, at least in state
obscenity cases, the Court may go back to what Chief Justice Hughes
and Justices Holmes and Brandeis actually said.

Before *Gitlow*, the Court in *Patterson v. Colorado*\(^ {10}\) let stand a
contempt conviction for the publication of a cartoon and certain
articles which dealt with the Supreme Court of Colorado. In that
case, Justice Holmes speaking for the Court said: “We leave undecided
the question whether there is to be found in the Fourteenth Amend-
ment a prohibition similar to that in the First.”\(^ {14}\) Still later he and
Justice Brandeis joined in the Court’s opinion in *Prudential Insur-
ance Co. v. Cheek*,\(^ {16}\) which stated:

[N]either the Fourteenth Amendment nor any other provision
of the Constitution of the United States imposes upon the States
any restrictions about “freedom of speech” or the “liberty of
silence.” . . .\(^ {16}\)

With reference to the change in views of Justices Holmes and
Brandeis in the 3 years between the *Prudential Insurance Co.* decision
and their dissent in the *Gitlow* case, Justice Jackson, in his dissenting
opinion in *Beauharnais v. Illinois*\(^ {17}\) commented:

However, these two Justices, who made the only original contri-
bution to legal thought on the difficult problems bound up in these
Amendments, soon reversed and took the view that the Fourteenth
Amendment did impose some restrictions upon the States. But
it was not premised upon the First Amendment nor upon any
theory that it was incorporated in the Fourteenth.\(^ {18}\)

In *Beauharnais*, the Court sustained the validity of an Illinois
group libel law. Justice Jackson, although dissenting, vigorously re-
jected the incorporation theory:

The history of criminal libel in America convinces me that the
Fourteenth Amendment did not “incorporate” the First, that the
powers of Congress and of the States over this subject are not

\(^{12}\) What Justice Holmes actually said in the *Schenck* case was this: “The most
stringent protection of free speech would not protect a man in falsely shouting fire in
a theatre and causing a panic.” *Id.* at 52. This is not speech. Shouting fire under
such circumstances is as much an act as firing a gun or lighting a fire. It is the same
as if by a shout one intentionally detonated an infernal machine. This is criminal
conduct; not speech.

\(^{13}\) 205 U.S. 454 (1907).

\(^{14}\) *Id.* at 462.

\(^{15}\) 259 U.S. 530 (1922).

\(^{16}\) *Id.* at 543.

\(^{17}\) 343 U.S. 250 (1952).

\(^{18}\) *Id.* at 291.
of the same dimensions, and that because Congress probably could
not enact this law it does not follow that the States may not.\footnote{19}

He set forth with some emphasis the quoted language from the Holmes
and Brandeis dissent in the \textit{Gillow} case, and prefaced it with this com-
ment: “What they wrote, with care and circumspection, I accept as the
wise and historically correct view of the Fourteenth Amendment.”\footnote{20}

In the writer’s view, the Court has taken three wrong turns under
the first amendment. The first two of these were the creation of the
sedition and obscenity exceptions. The third was the use of the due
process clause of the fourteenth amendment in order to make the first
amendment as fully applicable to the states as to the federal govern-
ment. If the Court now retreats from using the same yardstick for
state as for federal action, at least in the area of obscenity,\footnote{21} it will
begin to correct its incorporation errors.

The framers of the first amendment intended to accomplish a
double purpose: they “sought,” in the words of Professor Zechariah
Chafee, “to preserve the fruits of the old victory abolishing the censor-
ship, and to achieve a new victory abolishing sedition prosecutions.”\footnote{22}
There were no exceptions to this amendment.\footnote{23}

Despite the first amendment’s unqualified prohibitions, the United
States Supreme Court imported two exceptions thereto: One for
sedition; and another for obscenity. The Court sanctioned the sedition
exception in \textit{Schenck v. United States},\footnote{24} where Justice Holmes in
writing the Court’s opinion announced his clear and present danger
test. The Court established the obscenity exception in \textit{Roth v. United
States} and \textit{Alberts v. California},\footnote{25} decided together, where Justice
Brennan in the Court’s opinion determined that material was obscene
when it dealt with sex in a manner appealing to “prurient interest,”
whatever that may mean. Thus there are currently two exceptions to
the first amendment, while the writer feels that there should be none.
On the Court only Justices Black and Douglas are of the view that
there are no exceptions to the first amendment.

In \textit{Roth} and \textit{Alberts} the Court sustained the validity of federal,
as well as state, obscenity legislation. Thus the Court became, in the
prophetically apprehensive phrase of Justice Jackson during the course

\footnote{19} Id. at 288.
\footnote{20} Id. at 291.
\footnote{21} For a fuller statement of the writer’s views, see Rogge, “[T]he High Court
\footnote{22} Z. Chafee, \textit{Free Speech in the United States} 22 (1941).
\footnote{23} See O. Rogge, \textit{The First and the Fifth} 12–34 (1960); Rogge, \textit{Congress
\footnote{24} 249 U.S. 47 (1919).
\footnote{25} 354 U.S. 476 (1957), \textit{aff’d} 237 F.2d 796 (2d Cir. 1956), \textit{as well as 138 Cal.
of the argument on Edmund Wilson's *Memoirs of Hecate County* nearly a decade before *Roth*, "the High Court of Obscenity." The federal government and the Court, as well as the states and their political subdivisions, were now all in the business of protecting us from obscenity.

In *Manual Enterprises, Inc. v. Day*, a federal case involving three periodicals admittedly published for, and sexually arousing to, homosexuals, Justice Harlan added to the prurient interest test the requirement of patent offensiveness:

Obscenity under the federal statute thus requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under § 1461.

Justice Stewart in his concurring opinion in *Jacobellis v. Ohio*, where the Court lifted an Ohio ban on the French film *The Lovers (Les Amants)*, expressed the view that the obscenity exception to the first amendment was limited to hard-core pornography. He confessed to an inability to describe hard-core pornography, but added that he knew it when he saw it. Other judges have not been certain of knowing hard-core pornography when they saw it.

In the case of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, involving a book popularly known as *Fanny Hill*, Justice Brennan, in an opinion in which Chief Justice Warren and Justice Fortas joined, described the three elements that had to coalesce in order to make an item obscene. In one paragraph he wrote:

We defined obscenity in *Roth* in the following terms: "[W]ether to the average person, applying contemporary community standards, the dominant theme of the material taken as a

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26. 17 U.S.L.W. 3119 (1948). There the Court, evenly divided, Justice Frankfurter not sitting, affirmed an obscenity holding. Doubleday & Co. v. New York, 335 U.S. 848 (1948), aff'g 297 N.Y. 687, 77 N.E.2d 6, 79 N.Y.S.2d (mem.) (1947), aff'g 272 App. Div. 799, 71 N.Y.S.2d 736 (1st Dep't) (mem.). Justice Jackson in colloquy said: "Does your argument mean that we would have to take every obscenity case and decide the constitutional issues on the merits of the literary work? It seems to me that would mean that we would become the High Court of Obscenity." 17 U.S.L.W. 3119 (1948).
28. Id. at 486.
30. In Haldeman v. United States, 340 F.2d 59, 62 n.6 (10th Cir. 1965), where the Tenth Circuit reversed a conviction for sending allegedly obscene booklets through the mail, Circuit Judge John C. Pickett in a footnote to the court's opinion, after quoting Justice Stewart's statement, continued: The writer of this opinion has also felt that he would "know it when he saw it" but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters.
whole appeals to prurient interest.’’ 354 U.S. at 489. Under this
definition, as elaborated in subsequent cases, three elements must
coalesce: it must be established that (a) the dominant theme of
the material taken as a whole appeals to a prurient interest in sex;
(b) the material is patently offensive because it affronts con-
temporary community standards relating to the description or
representation of sexual matters; and (c) the material is utterly
without redeeming social value.32

Then in Redrup v. New York,33 decided with Gent v. Arkansas
and Austin v. Kentucky, the Court in a per curiam opinion seemed to
tie together the various loose ends of its obscenity decisions. The
Court first pointed out that none of the state statutes involved was
designed specifically for the protection of the young; and that in none of
the cases was there evidence of pandering:

In none of the cases was there a claim that the statute in
question reflected a specific and limited state concern for juveniles.
See Prince v. Massachusetts, 321 U.S. 158; cf. Butler v. Michi-
gan, 352 U.S. 380. In none was there any suggestion of an
assault upon individual privacy by publication in a manner so
obtrusive as to make it impossible for an unwilling individual to
Public Utilities Comm’n v. Pollak, 343 U.S. 451. And in none
was there evidence of the sort of “pandering” which the Court
found significant in Ginsburg v. United States, 383 U.S. 463.34

Thereafter the Court made the significant observation that the
three ingredients for obscenity spelled out in Justice Brennan’s opinion
in Fanny Hill, in which Chief Justice Warren and Justice Fortas
joined, added up to a concept which was “not dissimilar” from Justice
Stewart’s concept of hard-core pornography:

Two members of the Court [Justices Black and Douglas]
adhered to the view that a State is utterly without power to
suppress, control or punish the distribution of any writings or
pictures upon the ground of their obscenity. A third [Justice
Stewart] has held to the opinion that a State’s power in this
area is narrowly limited to a distinct and clearly identifiable class
of material. Others [Chief Justice Warren and Justices Brennan
and Fortas] have subscribed to a not dissimilar standard, hold-
ing that a State may not constitutionally inhibit the distribution
of literary material as obscene unless “(a) the dominant theme
of the material taken as a whole appeals to a prurient interest in
sex; (b) the material is patently offensive because it affronts
contemporary community standards relating to the description or

32. 383 U.S. at 418.
33. 386 U.S. 767 (1967).
34. Id. at 769.
representation of sexual matters; and (c) the material is utterly without redeeming social value,” emphasizing that the “three elements must coalesce,” and that no such material can “be proscribed unless it is found to be utterly without redeeming social value.” 


Another Justice [White] has not viewed the “social value” element as an independent factor in the judgment of obscenity. _Id._ at 460–62, (dissenting opinion).88

Redrup became the password, as it were, for the reversal of obscenity convictions. Since Redrup the Court, in more than two dozen per curiam decisions, upset obscenity judgments simply by citing _Redrup_.89 In _Hoyt v. Minnesota_,90 decided on the last day of the

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85. Id. at 770–71.

Thus, there have been twenty-nine cases at recent terms in which the Court in per curiam decisions reversed obscenity holdings; all but two of them on _Redrup_. As is their wont in such cases, the Justices even in the Court's per curiam rulings have gone every which way.

In one of the four federal cases, _Aday v. United States_, there was also as wide a divergence of views between trial and reviewing courts as has probably ever occurred: A federal district judge imposed sentences aggregating forty years in prison, and fines aggregating $69,000; the Federal Supreme Court, without briefs and without argument, reversed per curiam. The Justices themselves voted four different ways. Five Justices joined in the per curiam reversal, citing _Redrup_. They were Justices Black, Douglas, Stewart, White, and Fortas. Justice Harlan concurred in the reversal on the basis of the reasoning in his opinions in _Roth_, and Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), _reversing_ 289 F.2d 455 (D.C. Cir. 1961). Chief Justice Warren and Justice Brennan wanted to vacate the judgment and remand in the _Hoyt_ case. Justice Clark wanted to affirm.

term in June 1970, Justice Blackmun in a dissenting opinion in which Chief Justice Burger and Justice Harlan joined, expressed agreement with Justice Harlan that the first amendment's prohibitions placed a greater restriction on federal power than the fourteenth amendment's due process clause placed on state power. If to Chief Justice Burger and Justices Harlan and Blackmun there are now added Justice White, who dissented in Fanny Hill on the ground that the social value element was not an independent factor in the judgment of obscenity, and Justice Stewart, who agrees with Justice Harlan that Justice Black's incorporation theory is historically incorrect, then at the 1970-1971 and future terms of the Court there may be an increasing number of state obscenity judgments that will be affirmed.

Even after Redrup, the Court let some obscenity judgments stand either by granting certiorari and affirming or by denying review.38


Anyone who tries to make rhyme or reason out of the Court's obscenity rulings can begin with this comment by Justice Harlan in his dissent in Bloss v. Dykema, 398 U.S. 278, 278 (1970):

I am at a loss to understand how these materials can be deemed to qualify for Redrup treatment when only a short time ago the Court declined to accord that treatment to the materials involved in Spicer. . . .

In all of these cases but two, Derrington v. Portland, and Spicer v. New York, Justice Douglas would have granted review. In many of them he would have gone further and reversed. In the case of the film Un Chant d'Amour, Justices Black, Stewart and Fortas voted with him for reversal. In the case of the French-born sculptor, Marcel Fort, living in Miami, Justices Douglas and Black joined in Justice Stewart's dissenting opinion.

In four cases, Wenzler v. Pitchess, G.I. Distributors, Inc. v. New York, Ratner v. California, and Bray v. California, Justice Douglas would have reversed on the basis of Redrup. In one, Wenzler v. Pitchess, Justices Black and Stewart joined him, and in two more, Rainer v. California, and Bray v. California, Justice Black joined him. In addition, in two cases, Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968), and Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968), where the Court per curiam granted review, and reversed and remanded in obscenity contests, Justices Black and Douglas reversed once more, and in one of the three obscenity cases at which the Court heard argument at its 1967-1968 term, Ginsberg v. New York, 390 U.S. 629 (1968), Justices Douglas and Black indicated
This list can be expected to grow at the 1970–1971 and future terms of the Court. It is a fact that there were more obscenity cases on the Court’s 1969–1970 docket, the first year of the Burger Court, than there were on the Court’s 1968–1969 docket, the last year of the Warren Court; and there are already forty-seven cases on the Court’s 1970–1971 docket, more than at any preceding term.39

The writer wishes to add that, although he concedes that under the due process clause of the fourteenth amendment and the tenth amendment, the states have some power over obscenity,40 whereas under the first amendment the federal government has none, he is of the further view that the states are unwise to use their power. Suppression is not the solution for the obscenity problem. This does not mean that nudists, for instance, may stage a nudist parade on Fifth Avenue, New York City, or on any street of that or any other city.

a willingness to reverse on the basis of Redrup. Thus, if one includes Redrup and the two cases decided with it, Justice Douglas at recent terms would have used Redrup to reverse a total of thirty-four obscenity judgments; and Justice Black the same number. However, one might add to this startling fact the consideration that these two Justices have consistently taken the position that there is no obscenity exception to the first amendment, one realizes the extent to which Redrup has become the password for reversing findings of obscenity. Along with Redrup becoming the password for reversals in obscenity contests, the concept of hard core pornography became the test for judging obscenity.


The Second Circuit in United States v. A Motion Picture Film Entitled “I Am Curious — Yellow”, 404 F.2d 196 (2d Cir. 1968), by a two to one vote held the named film (which is on the Court’s 1970–1971 docket in no less than four cases) to be constitutionally protected.

In P.B.I.C., Inc. v. Byrne, 313 F. Supp. 757 (D. Mass. 1970), a three-judge federal district court enjoined the defendant and his agents from prosecuting Hair, but the injunction was not to issue for a week. The Federal Supreme Court first extended the stay through May 22, 1970, 397 U.S. 1082 (1970), but on that date by an equally divided Court denied a further stay. 398 U.S. 916 (1970). Chief Justice Burger and Justices Black, Harlan and Stewart would have granted the stay.


To turn over to the states whatever governmental power there is over obscenity will accord with our federal governmental structure; for under it, the prosecution of offenses, as the Court has more than once pointed out, is primarily the concern of the states. For example, in the Court’s opinion in Knapp v. Schweitzer, 357 U.S. 371, 375 (1958), Justice Frankfurter wrote:

Except insofar as penal remedies may be provided by Congress under the explicit authority to ‘make all Laws which shall be necessary and proper for carrying into Execution’ the other powers granted by Art. I, § 8, the bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States.

Or again, in the Court’s opinion in Rochin v. California, 342 U.S. 165, 168 (1952), this same Justice said:

In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to
They may not. Or, as Justice John D. Voelker (author, under the pen name of Robert Traver, of Anatomy of a Murder), put it in People v. Hildabridle, where the Michigan Supreme Court reversed the convictions of some nudists on the ground that there had been an illegal search and seizure, nudists may not "boldly" stage a "nude missionary" parade on the main street of Battle Creek, Michigan. If individuals engage in conduct, other than speech which violates applicable provisions of statute or common law, they should be prosecuted for such conduct. But they should not be prosecuted under obscenity laws. This was the approach of Justice Fortescue in Rex v. Curl more than two centuries ago in what was really the first reported decision in England sustaining a conviction for obscenity. There the defendant, Edmund Curl, bookseller, printer and pirate of literature, was convicted in the king's bench for publishing an "obscene libel." However, Justice Fortescue expressed a doubt which represents the writer's view: "To make it indictable there should be a breach of the peace, or something tending to it, of which there is nothing in this case."

The writer's position with respect to state power over obscenity is that under the due process clause of the fourteenth amendment there should be no obscenity legislation as to adults, and only carefully drawn minimal legislation for the protection of youth. Adults

Congress only as an appropriate means of carrying into execution its limited grant of legislative powers.

Or yet again, in the Court's opinion in Jerome v. United States, 318 U.S. 101, 104-05 (1942), Justice Douglas stated:

Since there is no common law offense against the United States, . . . the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. . . .

Justice Frankfurter in his concurring opinion in Malinski v. New York, 324 U.S. 401, 412-13 (1945), commented:

Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice to the States. Justice Stanley Reed in his dissenting opinion in Pennsylvania v. Nelson, 350 U.S. 497, 519 (1956), in which Justices Harold H. Burton and Sherman Minton joined, relied upon this fact. He quoted a section of the federal criminal code which provides: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." Then he observed: "That declaration springs from the federal character of our Nation. It recognizes the fact that maintenance of order and fairness rests primarily with the States." Id. at 519 (quoting 18 U.S.C. § 3231, 1964).

The Federal Court of Appeals for the Fifth Circuit, in sustaining a claim of the privilege against self-incrimination before a subcommittee of the Kefauver Committee in Marcello v. United States, 196 F.2d 437 (5th Cir. 1952), although the claim was really based upon a fear of state rather than federal prosecution, adhered to this point: "It must be remembered also that, in our federal system, the administration of criminal justice rests preponderantly with the states."

41. Id. at 443. 353 Mich. 562, 584, 590, 92 N.W.2d 6, 15, 18 (1958).


have the due process right to read, see, or hear whatever they like. The author's preference aside, however, whatever constitutional power there is over obscenity resides in the states under the tenth amendment and not in the federal government.

B. Juries: Grand and Petit.

Although the Court may make its first retreat from its incorporation doctrines in the obscenity area, it may make its most noticeable retreat in the area of jury trials in criminal cases. Such a case may arise in various ways. It may arise when a state discards the requirement of unanimity. In two such cases the Court has granted review.\(^4^4\) It may arise where a juvenile is adjudged a delinquent without a jury trial. Likewise, in two such cases the Court has granted review.\(^4^5\) It may arise where a convicted defendant is committed as insane without a jury trial.\(^4^6\) It may arise where there is a contempt sentence without a jury trial.\(^4^7\) It may arise on the question of the retroactivity of *Baldwin v. New York*.\(^4^8\) In two such cases the Court denied review,\(^4^9\) but Federal District Judge John M. Cannella of the Southern District of New York in the case of one John Butler\(^5^0\) applied *Baldwin* retroactively. Also, it may arise if New York were now to provide for a jury of three, or even two. Thus at the current term the Court will have another opportunity to reexamine its selective incorporation doctrine.

*Williams v. Florida*, although correctly decided if the Court casts aside its selective incorporation doctrine, nevertheless adds another historical inaccuracy to Justice Black's incorrect incorporation theory when it purports to "hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' . . ."\(^5^1\)


50. N.Y. Times, Dec. 1, 1970, at 1, col. 1; at 52, cols. 4-7.

Now, the number twelve may be an historical accident, and have it in "no significance except to mystics." Yet to the framers of the sixth amendment, trial by jury meant a trial by twelve persons. As Professor Austin W. Scott wrote:

At the beginning of the thirteenth century twelve was indeed the usual but not the invariable number. But by the middle of the fourteenth century the requirement of twelve had probably become definitely fixed. Indeed this number finally came to be regarded with something like superstitious reverence.

Or as the Court itself ruled in Thompson v. Utah, in an opinion by the first Justice Harlan, "the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less." Even though the first Justice Harlan was himself historically incorrect in tracing the number twelve to the Magna Charta's provisions for a judgment by one's peers, he was not wrong by much more than a century, for from the middle of the fourteenth century on, trial by jury meant a trial by twelve persons.

Nothing is to be gained by distorting history. Trial by jury of the sixth amendment means a trial by twelve persons. To overrule Baldwin v. New York along with Duncan v. Louisiana, and place Williams v. Florida, on the ground that the sixth amendment's provision for trial by jury in criminal cases is not applicable as such to the states, will let the Court put its rulings on state procedure whether in criminal or civil cases where they belong, under the due process clause of the fourteenth amendment. The Court held long ago in

54. 170 U.S. 343 (1898).
59. Comparably Justice Harlan in a footnote to his opinion concurring in the result in Dutton v. Evans, 400 U.S. 74 (1970), a case involving confrontation and hearsay questions, wrote:

Reliance on the Due Process Clauses would also have the virtue of subjecting rules of evidence to constitutional scrutiny in civil and criminal trials alike. It is exceedingly rare for the common law to make admissibility of evidence turn on whether the proceeding is civil or criminal in nature. See 1 Wigmore, supra, § 4, at 16-17. This feature of our jurisprudence is a further indication that the Confrontation Clause, which applies only to criminal prosecutions, was never intended as a constitutional standard for testing rules of evidence.

Id. at 97 n.4.
Hurtado v. California,60 that the fourteenth amendment's due process clause did not require the states to proceed by way of an indictment by a grand jury. So far as jury trials in civil cases are concerned, no one today will seriously contend that the seventh amendment's provision for such trials where the value in controversy exceeds $20.00 is applicable to the states. Likewise, whether a state should provide jury trials in criminal cases should be determined, not under the sixth amendment's provision for jury trials in all criminal prosecutions, but under the due process clause of the fourteenth amendment. Hurtado and Thompson v. Utah61 as well as Williams v. Florida62 should continue to stand; Duncan v. Louisiana63 and Baldwin v. New York64 should not, unless the Court determines that the due process clause of the fourteenth amendment requires it.

C. Confessions.

In some areas, such as that of jury trials in state criminal cases, the abandonment by the Court of its incorporation doctrines will be the main factor in changes that occur in constitutional law. In other areas, such as those of confessions and double jeopardy, this factor will be but one with others.

After Miranda v. Arizona,65 all confessions whether in state or federal criminal cases will be suppressed if they are taken from persons in custody who have not been advised of their privilege against self-incrimination and their right to counsel, either retained or appointed. In Miranda, Chief Justice Warren in the Court's opinion relied on Bram v. United States,66 in which Justice White tied the inadmissibility of a challenged confession to the fifth amendment's right of silence:

In criminal trials, in the courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment, . . . commanding that no person "shall be compelled in any criminal case to be a witness against himself."67

The challenged material consisted of certain answers which a triple-murder suspect gave to an interrogator.

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61. 170 U.S. 343 (1898).
66. 168 U.S. 532 (1897).
67. Id. at 542.
Professor Wigmore was harshly critical of Justice White's opinion. At one point he stated that *Bram* "reached the height of absurdity in misapplication of the law," 68 and at another, called the identification of the exclusion of coerced confessions with the fifth amendment's right of silence as "erroneous, both in history, principle, and practice." 69 One can suggest, on the contrary, that the exclusion of challenged confessions and the fifth amendment's right of silence are but two sides of the same coin.

Long before *Miranda*, the United States Supreme Court invalidated many repudiated confessions in two classes of cases: One for the federal courts, and the other in state cases. In federal trials the *McNabb-Mallory* rule governed after the decisions in *McNabb v. United States* 70 and *Mallory v. United States*. 71 In state court trials, in a long line of cases which began with *Brown v. Mississippi*, 72 the Court suppressed confessions which it found to be involuntary on the ground that they violated the due process clause of the fourteenth amendment.

An important element in the federal *McNabb-Mallory* rule was the failure to take those in custody before a committing authority without unnecessary delay. *McNabb* involved three members of a clan of Tennessee mountaineers who were charged with the murder of an officer of the Federal Alcoholic Tax Unit. Two of them were questioned for a number of hours over a period of two days. During this period all three gave confessions. *Mallory* involved a nineteen year old youth who was charged with rape in the District of Columbia. He was taken into custody between two and two-thirty in the afternoon, subjected to a polygraph (lie-detector) test beginning a little after eight in the evening, and alleged to have confessed by nine-thirty. In both cases the defendants repudiated their confessions. The Supreme Court held the confessions to be invalid because they were obtained as a result of persistent questioning plus a failure to take the prisoners before a United States Commissioner or other committing authority without unnecessary delay. In between the two decisions came the Federal Rules of Criminal Procedure, promulgated in 1946, which in rule 5(a) requires that an arrested person be taken before the nearest available committing authority "without unnecessary delay." 73

In state cases when the Court invalidated confessions it did so

68. 3 J. Wigmore, Evidence § 821 n.2 (3d ed. 1940).
69. 8 J. Wigmore, Evidence § 2266 (3d ed. 1940).
70. 318 U.S. 332 (1943).
72. 297 U.S. 278 (1936).
on their involuntariness. However, by involuntary the Court meant almost any confession which it regarded as unfairly obtained. As Chief Justice Warren explained in the Court's opinion in *Blackburn v. Alabama:*74

Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.75

The two lines of excluded confession cases gradually merged; and in *Miranda* the Court rested both lines on the fifth amendment's privilege against self-incrimination. Shortly before *Miranda* Justice Brennan in the Court's opinion in *Malloy v. Hogan,*76 after a reference to the "marked shift to the federal standard in state cases," continued with this comment:

The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay.77

The week after *Miranda,* Chief Justice Warren in the Court's opinion in *Davis v. North Carolina,*78 where the Court threw out a confession in a state case without the help of *Miranda,* tied the two lines of excluded confession cases together:

The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions — a standard grounded in the policies of the privilege against self-incrimination. *Malloy v. Hogan,* . . .79

On the same day in *Johnson v. New Jersey,*80 the Court ruled that *Miranda* is to be applied prospectively and thus its "guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966."81 Nevertheless, the Court continued to throw out confessions even in cases tried before *Miranda* where on a considera-

75. Id. at 207.
76. 378 U.S. 1 (1964).
77. Id. at 7.
79. Id. at 740.
81. Id. at 734.
tion of the "totality of the circumstances" it regarded the confessions as involuntary.82

However, the Omnibus Crime Control and Safe Streets Act of 196684 sought to modify Miranda as well as Mallory v. United States85 by adding a new section to title 18.86 With reference to Miranda, the new section 3501 (b) provides:

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

With reference to Mallory, section 3501 (c) permits up to six hours, and sometimes even longer before taking a person in custody before a committing authority. It provides:

[I]f such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

The minority of members of the Senate Judiciary Committee, Joseph D. Tydings, Thomas J. Dodd, Philip A. Hart, Edward V.

Long, Edward M. Kennedy, Quentin N. Burdick and Hiram L. Fong, felt that section 3501(a) and (b) was "squarely in conflict" with Miranda and that these provisions "will almost certainly be held unconstitutional." 87 They further thought that section 3501(c) was "obviously intended to repeal" Mallory, and "would leave the "without unnecessary delay" provision of rule 5(a) of the Federal Rules of Criminal Procedure as a rule without a remedy." 88

But the ways of members of the Bar are such that counsel for the defendants in United States v. White 89 contended that section 3501 expanded the Miranda protections. The Second Circuit was not persuaded.

Whatever may be the course of the Court's decisions under section 3501, there probably would have been changes without it under Chief Justice Burger in the Court's treatment of confessions in state criminal cases. The Court will continue to invalidate involuntary confessions in state cases as violative of the due process clause of the fourteenth amendment. However, the Burger Court would probably have required somewhat more in the way of the totality of the circumstances than the Warren Court did. Section 3501(a) and (b) may accentuate this process.

Also, if the Court retreats from its incorporation doctrines, there may arise cases where on the totality of the circumstances it regards confessions as voluntary and still throws them out in federal cases if the confessors were in custody for more than six hours contrary to section 3501(c) without being taken before an available committing authority 90 and yet permits such confessions in state cases. 91 Section 3501(c), if it is held to be constitutional, will be conducive to such a divergence.

The writer wishes to add that in his view any confession which a defendant repudiates in court should for that reason alone be inadmissible in evidence. Then we shall fulfill the spirit of our accusatorial method as well as its implicit promise. Moreover, such a course will make for stronger, not weaker, law enforcement. The Warren Court approached this position, but did not quite reach it. Miranda gave further substance to the critical yet prophetic comment of Justice White in his dissenting opinion in Escobedo v. Illinois:

The decision is thus another major step in the direction of the goal which the Court seemingly has in mind — to bar from

88. Id. at 2216.
evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not.\textsuperscript{92}

Or as he put it in his dissenting opinion in \textit{Miranda}, in which Justices Harlan and Stewart joined, the Court's result in that case "adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not."\textsuperscript{93} This is as it should be.

If a defendant wants to stand up, with his lawyer beside him, and plead guilty, well and good. That is one thing. A large majority of defendants do just this anyway. That is how prosecutors rack up such high percentages of convictions year after year. But if a defendant pleads not guilty, the prosecutor ought to be bound to prove his case from sources other than the defendant's own mouth. Then we shall truly have an accusatorial system.\textsuperscript{94} However, even the Warren Court did not reach the writer's position; and the Burger Court may move still further away from it, especially under the prodding of section 3501.

\textit{D. Double Jeopardy.}

Before selective incorporation set in, there were various differences in result in the area of double jeopardy in the Supreme Court's decisions in state and federal cases.\textsuperscript{95} \textit{Palko v. Connecticut},\textsuperscript{96} itself represents two of these differences.

In \textit{Palko} the Court sustained a state statute which gave the state the right to appeal in criminal cases. But in federal trials, a defendant's acquittal is final and non-appealable. As the Court stated in \textit{Green v. United States}\textsuperscript{97} through Justice Black:

Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. . . \textsuperscript{98}

\textsuperscript{92} 378 U.S. 478, 495 (1964).
\textsuperscript{93} 384 U.S. at 538.
\textsuperscript{96} 302 U.S. 319 (1937).
\textsuperscript{97} 355 U.S. 184 (1957).
\textsuperscript{98} \textit{Id.} at 188; \textit{accord.} Fong Foo v. United States, 369 U.S. 141, 143 (1962), \textit{rev'd} 286 F.2d 556 (1st Cir. 1961); \textit{see also} Peters v. Hobby, 349 U.S. 331, 344-45 (1955); United States v. Ball, 163 U.S. 662, 671 (1896); \textit{cf.} Kepner v. United States, 195 U.S. 100 (1904); United States v. Sanges, 144 U.S. 310 (1892). In \textit{Fong Foo v. United States}, the Court sustained a federal district judge's direction of an acquittal even though the First Circuit "thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation." 369 U.S. at 143.
Again, in Palko the Court not only upheld a state statute which gave the state an appeal, but also permitted the prosecution to appeal a conviction of second degree murder and on retrial secure a conviction of first degree murder.\textsuperscript{99} But in Green, involving, chronologically, an indictment for first degree murder, a conviction for second degree murder, a successful appeal, retrial and conviction for first degree murder, the Court reversed the second conviction.\textsuperscript{100} The two cases are converse as well as opposite.

A third double jeopardy question involves the applicability of collateral estoppel to criminal cases. In Hoag v. New Jersey,\textsuperscript{101} involving a robbery, five victims, four indictments and two trials, and Ciucci v. Illinois,\textsuperscript{102} involving a murder, four victims, four indictments and three trials, the Court upheld multiple state prosecutions of the same acts. The decision in one case was five to four and in the other five to three. Justice Brennan did not take part in the New Jersey case. In Hoag v. New Jersey, Justice Harlan in the Court's opinion commented with reference to collateral estoppel: "Although the rule was originally developed in connection with civil litigation, it has been widely employed in criminal cases in both state and federal courts."\textsuperscript{103}

\textsuperscript{99} In an earlier case, Brantley v. Georgia, 217 U.S. 284 (1910), where the defendant, who was convicted of manslaughter under an indictment for murder, obtained a reversal, the Court sustained a murder conviction on a retrial. However, the defendant based his writ of error, not on the due process clause of the fourteenth amendment, but on the double jeopardy provision of the fifth.

\textsuperscript{100} But cf. Stroud v. United States, 251 U.S. 15 (1919); Trono v. United States, 199 U.S. 521 (1905).

\textsuperscript{101} 356 U.S. 464 (1958); accord, Huffman v. Smith, 34 Wash. 2d 914, 210 P.2d 805 (1949).

\textsuperscript{102} 356 U.S. 571 (1958). In People v. Golson, 32 Ill. 2d 398, 207 N.E.2d 68 (1965), the court held that defendants who were convicted of murder of one of two postal inspectors killed in the course of a single mail theft were denied fundamental fairness by a subsequent trial (on a charge of murdering the other inspector) that was sought by the prosecution solely to obtain an increased penalty.

\textsuperscript{103} 356 U.S. at 470-71. Justice Harlan thus described this aspect of judicial finality:

A common statement of the rule of collateral estoppel is that "where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." \textit{Restatement, Judgments} § 68(1). As an aspect of the broader doctrine of \textit{res judicata}, collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation. \textit{See Developments in the Law — Res Judicata}, 65 \textit{Harv. L. Rev.} 818, 820.

\textit{Id.} at 470.


The federal courts have also applied the doctrine of collateral estoppel to prosecutions for perjury concerning controverted issues which constituted the basis of the alleged offenses. Yawn v. United States, 244 F.2d 235 (5th Cir. 1957); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1955); Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944); Allen v. United States, 194 F. 664 (4th Cir. 1912);
Then in the next paragraph he went on to say: "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held."104 But as Justice Stewart pointed out in the Court's opinion in the recent case of Ashe v. Swenson,105 "collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in United States v. Oppenheimer, 242 U.S. 85."106

In all three situations the Court today reaches the same result in state as in federal cases; for in Benton v. Maryland,107 overruling Palko v. Connecticut,108 the Court held that the due process clause of the fourteenth amendment made the fifth amendment's guarantee against double jeopardy applicable to the states, and in Ashe v. Swenson,109 a state case, the Court held with reference to collateral estoppel that "this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy."110

A fifth double jeopardy question arises when the government seeks to try a defendant again after a jury has once been selected and sworn and then discharged on the government's motion without the defendant's consent. In Brock v. North Carolina,111 the Court permitted a state court in a criminal case to withdraw a juror and declare a mistrial on the motion of the prosecution and over the objection of the defendant, and at a later time to try him again. But in Downum v. United States,112 a federal case, the Court by a five to four vote reached the opposite result. There a jury was selected and sworn in the morning and told to return at two o'clock. When the jury returned, the prosecution asked that it be discharged because the government's key witness on two of the counts in the indictment was not present. The trial court granted this motion over the defendant's


104. 356 U.S. at 471.
106. Id. at 443.
110. Id. at 445.
111. 344 U.S. 424 (1953).
objection. The Court held that a second trial constituted double jeopardy, saying through Justice Douglas:

We resolve any doubt "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion. . . ."

The sixth double jeopardy question arises in multiple prosecutions of the same deviant behavior. This question arises not only when the same deviant behavior violates different statutory provisions of the same jurisdiction, but also when it violates statutes of different jurisdictions. On the federal level, the Attorney General in 1959 in a memorandum to the United States Attorneys announced a government policy against duplicative federal-state prosecutions. The next year in Petite v. United States, the Court on the motion of the Solicitor General vacated a judgment of conviction in a second federal prosecution for the same criminal conduct. The Solicitor General made his motion on the ground:

[T]hat several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.

Then in Maraker v. United States, the Solicitor General and the Court agreed that after an acquittal on a conspiracy charge the defendants were not to be prosecuted for the substantive offenses which constituted the overt acts alleged in the conspiracy case.

Earlier the Court by a six to three vote in Abbate v. United States sustained a federal prosecution of the same acts on which there had been a state court conviction; and by a five to four vote in Bartkus v. Illinois, a later state prosecution of the same acts on which there had been a federal court acquittal.

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113. 372 U.S. at 738.
116. Id. at 530.
117. 370 U.S. 723 (1962); accord, United States v. Lanza, 260 U.S. 377 (1922); see Grant, The Lanza Rule of Successive Prosecutions, 32 Colum. L. Rev. 1309 (1932); Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 U.C.L.A. L. Rev. 1 (1956).
118. 359 U.S. 121 (1959). But in People v. Lo Cicero, 14 N.Y.2d 374, 200 N.E.2d 622, 251 N.Y.S.2d 953 (1964), the court, by giving a liberal construction to a state statutory provision, held that a federal court acquittal barred a state prosecution based on the same act.
119. 359 U.S. 121 (1959). But in People v. Lo Cicero, 14 N.Y.2d 374, 200 N.E.2d 622, 251 N.Y.S.2d 953 (1964), the court, by giving a liberal construction to a state statutory provision, held that a federal court acquittal barred a state prosecution based on the same act.
In Waller v. Florida, 397 U.S. 387 (1970), the Court held that a municipal court trial for a violation of municipal ordinances barred a state court trial based on the same acts.
Justice Black would have decided all of these cases on the constitutional basis of double jeopardy. Justices Douglas and Brennan voted with him in Maraker and Petite; Chief Justice Warren and Justice Douglas in Abbate and Bartkus; and Justice Douglas in Hoag. In Ciucci he stood alone on the double jeopardy ground. In Bartkus, Justice Brennan also thought that double jeopardy was dispositive, but on the ground "that this particular state trial was in actuality a second federal prosecution . . ."[120] In Abbate, after delivering the Court's opinion, he said in an additional concurring opinion:

However, whatever the case under the Fourteenth Amendment as to successive state prosecutions, Hoag v. New Jersey, supra, or under the Fifth Amendment as to consecutive federal sentences imposed upon one trial, e.g., Gore v. United States, supra, I think it clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests . . .[121]

What constitutes the same offense is another double jeopardy question. The Court discussed this question in Ashe v. Swenson,[122] which involved a robbery by three or four masked men of six men engaged in a poker game and a theft of the car of one of the victims of the robbery. Justices Brennan, Douglas and Marshall were of the opinion that this constituted "one criminal episode."[123]

Further double jeopardy questions arise when there is a greater sentence on a retrial than on the previous trial. This question arose in North Carolina v. Pearce.[124] There the Court held not only that Benton v. Maryland[125] was to be applied retroactively, but also:

[T]hat the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense, [and further] . . .

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120. 359 U.S. at 168.
121. 359 U.S. at 197. In Gore v. United States, 357 U.S. 386 (1958), involving a narcotics indictment in six counts based on two sales, the Court sustained a conviction on all six counts. Justices Black and Douglas dissented on the double jeopardy ground. But in Ladner v. United States, 358 U.S. 169 (1958), the Court held that a single discharge of a shotgun even if it wounded two federal officers constituted but a single violation of the applicable federal statute; and in Bell v. United States, 349 U.S. 81 (1955), it was held that the transportation of two women on the same trip in interstate commerce for the purpose of prostitution was only a single offense.
123. Id. at 449.
[T]hat whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.  

By a curious inverse twist, the Court at its 1970–1971 Term in Odom v. United States, was to consider whether North Carolina v. Pearce, a state case, is to be applied retroactively to a sentence in a federal case, but it then dismissed the writ as improvidently granted.

If the Court retreats from its incorporation doctrines the results in these three cases, Benton v. Maryland, Ashe v. Swenson, and North Carolina v. Pearce, should continue to stand on due process grounds. However, in other parts of the double jeopardy area the results in state cases may not always be the same as in federal cases, based in part on the Court’s retreat from its incorporation doctrines, and in part on the differences in approach of the new members of the Court, Chief Justice Burger and Justice Blackmun. Chief Justice Burger in his dissent in Ashe v. Swenson characterized Justice Brennan’s concept of one criminal episode somewhat disparagingly as “one frolic.”

E. Compulsory Testimony Acts.

The new Organized Crime Control Act of 1970 raises the question of the constitutionality under the fifth amendment privilege against self-incrimination of a federal compulsory testimony (immunity) act which protects a witness only against the use of his testimony and its fruits and not from prosecution for offenses which his testimony reveals. A recent case, Piccirillo v. New York, suggests the question of the constitutionality of such an act on a state level under the due process clause of the fourteenth amendment.

Compulsory testimony acts present two questions: must they be broad enough to include immunity from prosecution; and need they protect against the danger of prosecution by another jurisdiction. The broad type of immunity is sometimes referred to as transactional immunity, and the narrower type, as use immunity.

Compulsory testimony acts have a long history. They go back almost to the time of the establishment of the privilege against self-

126. Id. at 718–19, 726.
127. 399 U.S. 904 (1970), granting cert. to 403 F.2d 45 (5th Cir. 1968).
129. 397 U.S. at 468.
131. 39 U.S.L.W. 4162 (U.S., Jan. 25, 1971). The Court ended up dismissing the writ as improvidently granted. Justice Douglas in a footnote to a dissenting opinion, in which Justice Marshall concurred, wrote: “The present case is not complicated by the question whether state immunity must extend immunity against federal prosecution.” Id. at 4169 n.
132. See id. at 4162.
incrimination. Perhaps the earliest such act dates from 1697 in the Colony of Connecticut. This act related to witnesses. They were called upon to give testimony under oath "always provided that no person required to give testimonie as aforesaid shall be punished for what he doth confess against himselfe when under oath." This was but a short time after the right to remain silent had been extended to witnesses as distinguished from defendants.

The first federal act was in 1857. The circumstance which led to its enactment was the refusal of a correspondent of the New York Times, James W. Simonton, to disclose to a select committee of the House of Representatives the names of the members of the House who had indicated to him that their votes were for sale with reference to certain measures then pending before Congress. Simonton had written a letter to The Times on the subject of congressional corruption, which The Times had published over his initials. The Times had also commented on the subject editorially. These items had led to the appointment of the special committee which had sought Simonton's testimony. The result of his refusal to divulge names was the act of 1857. It provided among other things, that a person had to testify but he was not to be held to answer criminally in any court of justice, or "subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify," and his statements were not to "be competent testimony in any criminal proceeding against such witness in any court of justice."

This act was soon abused. Deviants, including at least two who had already been indicted, arranged to give testimony before a con-

133. 3 Colonial Records of Connecticut *296 (1689-1706). See also an act of 1703, id. at *409-10, and one of 1711, 4 id. at *154.
134. For instances as to witnesses, see Rex v. Reading, 7 How. St. Tr. 259, 296 (1679); Rex v. Whitebread, 7 How. St. Tr. 311, 361 (1679); Rex v. Langhorn, 7 How. St. Tr. 417, 435 (1679); Rex v. Castlemaine, 7 How. St. Tr. 1067, 1096 (1680); Rex v. Stafford, 7 How. St. Tr. 1293, 1314 (1680); Rex v. Plunket, 8 How. St. Tr. 447, 480-81 (1681); Rex v. Rosewell, 10 How. St. Tr. 147, 169 (1684); Rex v. Oates, 10 How. St. Tr. 1079, 1098-1100, 1123 (1685).

In England the practice of granting a pardon in order to obtain testimony probably originated even a little earlier than the Connecticut act. See Rex v. Reading, 7 How. St. Tr. 259, 296 (1679); Rex v. Earl of Shaftesbury, 8 How. St. Tr. 759, 817 (1681). In the next century Lord Chief Justice Camden commented in Entick v. Carrington, 19 How. St. Tr. 1030, 1074 (1765):

Nay, if the vengeance of the government requires a production of the author, it is hardly possible for him to escape the impecunishment of the printer who is sure to seal his own pardon by his discovery.

In Queen v. Boyes, 121 Eng. Rep. 730 (Q.B. 1861), the Queen's Bench held that a pardon took away the right of silence, and this in spite of the fact that under the Act of Settlement of 1700, 12 & 13 Wm. 3, c. 2, § 3, the pardon was not pleadable to an impeachment by the House of Commons.

138. Id.
gressional investigating committee, and in this way obtained immunity.\(^\text{139}\) The two who were indicted had the indictment against them dismissed. The indictment was for the embezzlement of some $2,000,000 of Indian trust bonds from the Interior Department.

Congress accordingly amended the act of 1857 in 1862 by eliminating the prohibition against prosecution but leaving that against the subsequent use of testimony given.\(^\text{140}\) It was this immunity provision, section 859 of the Revised Statutes, which was again amended in August 1954 to become the new federal immunity act of that year.\(^\text{141}\)

In 1868, Congress adopted companion legislation to the act of 1857 as amended. The occasion this time was the decision by Vice Chancellor Sir William Page Wood in United States v. McRae,\(^\text{142}\) affirmed on this point on appeal in an opinion by Lord Chancellor Chelmsford,\(^\text{143}\) that the United States in a suit in equity in England against a Confederate agent could not compel him to make discovery because this might expose him to a forfeiture in this country.\(^\text{144}\) It was this case which the government did not cite and everyone else overlooked in United States v. Murdock.\(^\text{145}\) The decision on appeal in the McRae case was in December 1867. The next month a bill was introduced in Congress,\(^\text{146}\) and passed in February, which provided that “[n]o discovery, or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property. . . .”\(^\text{147}\) This provision became Rev. Stat. § 860.

At first there was little activity under these statutes. Several federal courts of first instance held that the latter statute took away one's right of silence,\(^\text{148}\) but the question did not reach the Supreme Court until the case of Counselman v. Hitchcock,\(^\text{149}\) decided almost a quarter of a century after the passage of the act of 1868. In the


\(^{142}\) Cong. Globe, 40th Cong., 2d Sess. 845 (1868).

\(^{143}\) Cong. Globe, 40th Cong., 2d Sess. 1334 (1868). In Boyd v. United States, 116 U.S. 616, 632 (1886), Justice Bradley stated that the act of 1868 was passed to alleviate the search and seizure provisions in the revenue acts of 1863 and 1867, but he in no way documented his statement.


\(^{145}\) 142 U.S. 547 (1892).
meantime, there had occurred the expansion of the railroads, their unfair and discriminatory rates and practices, and the passage by Congress, in 1887, of the Interstate Commerce Act.\(^{150}\) This act contained two limited immunity provisions,\(^{151}\) but the *Counselman* case did not arise under these immunity provisions; it arose under Rev. Stat. § 860. A grand jury in Illinois was inquiring whether certain shipments of grain had been carried for less than the published and legal tariff rate. The defendant claimed his right of silence, and the Supreme Court sustained him on the ground that the immunity provided by Rev. Stat. § 860 was not broad enough: it did not include immunity from prosecution. The next year Congress amended the Interstate Commerce Act by providing that a person subpoenaed under the provisions of that act had to testify but was not to "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify. . ."\(^{152}\) Three years later, the Supreme Court sustained the constitutionality of this act in *Brown v. Walker*.\(^{153}\)

This act became known as the Compulsory Testimony Act of 1893,\(^{154}\) and was sometimes specifically referred to in future immunity provisions.\(^{155}\) The case of *Brown v. Walker*, with some exceptions, became the basis for such provisions. The exceptions included the Bankruptcy Act of 1898, an act of 1917 prohibiting the manufacture or sale of liquor in Alaska, the Federal Food, Drug, and Cosmetic Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Internal Security Act of 1950.\(^{156}\) These acts for some reason used the old form of immunity provision, and forbade only the subsequent use of the testimony or statement obtained. The provision in the Bankruptcy Act of 1898 came before the Supreme Court and was of course held not to take away an individual's right of silence.\(^{157}\) Never-

\(^{151}\) Section 9 [24 Stat. 382 (1887), 49 U.S.C. § 9 (1964)], and Section 12 [24 Stat. 383, as amended, 26 Stat. 743, 744 (1891)] ("but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding").  
\(^{153}\) 156 U.S. 591 (1896).  
\(^{154}\) See, e.g., Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, 30, § 202(g); Shapiro v. United States, 335 U.S. 1, 3 n.2 (1948).  
theless, the provision was not only retained but even further restricted, in 1938, to "except such testimony as may be given" by the bankrupt "in the hearing upon objections to his discharge."\footnote{158}

In the meantime, both Rev. Stat. §§ 859 and 860 continued on the books. In 1910, Congress repealed section 860\footnote{159} on the ground that after the Counselman\footnote{160} decision it had "become a shield to the criminal and an obstruction to justice."\footnote{161} But for some reason Congress overlooked section 859.

With the Securities Act of 1933 came a new refinement. The careful drafters of that act provided that in order to get immunity a person first had to claim his privilege.\footnote{162} Between the time of the Securities Act of 1933 and the enactment of the Organized Crime Control Act of 1970, Congress enacted more than three dozen regulatory measures which contained immunity provisions, most of which were in the refined form of immunity provision in the Securities Act of 1933.\footnote{163} The drafters of the Securities Act of 1933 proved to be foresighted on behalf of the government, for in \textit{United States v. Monia},\footnote{164} the Court held that under the older form a witness got

\footnotesize{159. Act of May 7, 1910, ch. 216, 36 Stat. 352 (1910).}
\footnotesize{160. Counselman v. Hitchcock, 142 U.S. 547 (1892).}
\footnotesize{161. H.R. Res. No. 266, 61st Cong., 2d Sess. 1 (1910).}
\footnotesize{162. 48 Stat. 86 (1933), 15 U.S.C. § 77v(c) (1964).}
immunity even though he had not made any claim to his right of silence. Thus before the Organized Crime Control Act of 1970, Congress passed more than half a hundred acts containing immunity provisions, most of which conferred transactional immunity.\textsuperscript{165}

As to the second question, whether compulsory testimony acts must protect against the danger of prosecution by another jurisdiction, the early law, in the writer's view, was to the effect that a federal compulsory testimony act had to protect against the danger, not only of federal, but also state prosecution. Two Federal Supreme Court cases so held. In one case, \textit{United States v. Saline Bank},\textsuperscript{166} the opinion was by Chief Justice Marshall and in the other, \textit{Ballman v. Fagin},\textsuperscript{167} was by Justice Holmes. The former case involved a creditors' bill for discovery and other relief and a plea that the discovery would subject the defendants to penalties under a Virginia statute which prohibited unincorporated banks. The Court sustained the plea: "The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it."\textsuperscript{168} In the latter case, a claim of privilege included reliance on an Ohio statute which made it a crime to operate a "bucket shop." The Court ruled for the accused: "According to \textit{United States v. Saline Bank} . . . he was exonerated from disclosures which would have exposed him to the penalties of the state law."\textsuperscript{169}

But in \textit{United States v. Murdock},\textsuperscript{170} the Court said:

The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. . . .\textsuperscript{171}

The case may be explained upon the ground that there was no real danger of state prosecution. The defendant in each of two federal income tax returns had deducted $12,000 which he claimed to have

\textsuperscript{165} For a fuller account, see O. Rogge, \textit{The First And The Fifth} 204-28 (1960); Rogge, \textit{Compelling the Testimony of Political Deviants}, 53 Mich. L. Rev. 375, 375-88 (1957).
\textsuperscript{166} 26 U.S. (1 Pet.) 100 (1828).
\textsuperscript{167} 200 U.S. 186 (1906).
\textsuperscript{168} 26 U.S. (1 Pet.) 100, 104 (1828).
\textsuperscript{169} 200 U.S. at 195 (1906). This statement has been called a dictum, \textit{United States v. Murdock}, 290 U.S. 389, 396 (1933); Meltzer, \textit{Required Records, the McCarran Act, and the Privilege Against Self-Incrimination}, 18 U. Chi. L. Rev. 687, 688 n.11 (1951); and apparently a dictum, \textit{United States v. Di Carlo}, 102 F. Supp. 597, 604 (N.D. Ohio 1952). But it is submitted that it is one of the alternative grounds of decision.
\textsuperscript{170} 284 U.S. 141, 149 (1931). In \textit{United States ex rel. Vajtauer v. Commissioner of Immigration}, 273 U.S. 103 (1927), the Court, after holding that a claim of privilege had not been made in that case, went on to say that this conclusion rendered it unnecessary "to consider the extent to which the Fifth Amendment guarantees immunity from self-incrimination under state statutes. . . ." \textit{Id.} at 113.
\textsuperscript{171} 284 U.S. at 149.
paid to others. A revenue agent wanted him to name the recipients. He declined and claimed his privilege. That there was no real danger of state prosecution is indicated in this language of the Court:

The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients.\textsuperscript{172}

However, in \textit{Knapp v. Schweitzer},\textsuperscript{173} the Court said, again by way of dictum in the writer's view, that a state compulsory testimony act was valid even if it did "expose the potential witness to prosecution under federal law";\textsuperscript{174} and in \textit{Mills v. Louisiana},\textsuperscript{175} following the dictum in \textit{Knapp v. Schweitzer}, finally so held.

But in \textit{Murphy v. Waterfront Commission},\textsuperscript{176} the Court, overruling \textit{Feldman v. United States},\textsuperscript{177} held state-compelled testimony and its fruits inadmissible in a federal prosecution. In doing so, the Court corrected the reasoning in \textit{United States v. Murdock}\textsuperscript{178} as well as \textit{Knapp v. Schweitzer}\textsuperscript{179} and \textit{Mills v. Louisiana}.\textsuperscript{180}

Nevertheless, in the Organized Crime Control Act of 1970, Congress, on a misreading — in the writer's view — of \textit{Murphy v. Waterfront Commission},\textsuperscript{181} enacted a compulsory testimony act which gives only use immunity, and repealed the many compulsory testimony acts which conferred transactional immunity. In granting only use immunity, Congress added sections 6001 through 6005 to title 18. Section 6002 provides:

\textbf{[B]ut no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.}\textsuperscript{182}

\textsuperscript{172} \textit{Id.}
\textsuperscript{173} 357 U.S. 371 (1958).
\textsuperscript{174} \textit{Id.} at 379.
\textsuperscript{176} 378 U.S. 52 (1964).
\textsuperscript{177} 322 U.S. 487 (1944).
\textsuperscript{178} 284 U.S. 141 (1931).
\textsuperscript{179} 357 U.S. 371 (1958).
\textsuperscript{180} 360 U.S. 230 (1959).
\textsuperscript{181} 378 U.S. 52 (1964).
This provision flies squarely in the face of *Counselman v. Hitchcock*, and the dissenters on the House Judiciary Committee, Congressman John Conyers, Jr., Abner J. Mikva, and William F. Ryan, so expressed their doubts: "Moreover, we question whether due regard has been given the constitutional protection of the fifth amendment in the fashioning of this title." Federal District Judge Constance Baker Motley of the Southern District of New York went further: In a case involving Joanne Kinoy, the twenty-one year old daughter of Arthur Kinoy, a Rutgers University law professor who has represented political deviants, she ruled this provision to be unconstitutional on the ground that it failed to provide sufficient protection against self-incrimination. In her thirty-four page decision, she declared that the privilege against self-incrimination must be given a liberal construction "if we are to keep faith with the patriots who fought for inclusion of the Bill of Rights in the Constitution."

Congress apparently felt that *Murphy v. Waterfront Commission* overruled *Counselman v. Hitchcock*. However, if the Court retreats from its selective incorporation doctrine, under which it held that the fifth amendment privilege against self-incrimination was as fully applicable to the states as to the federal government, it can continue to follow both cases. It can hold under *Counselman* and *Murphy* that federal compulsory testimony acts in order to comply with the fifth amendment privilege against self-incrimination must confer transactional immunity not only as to federal but also as to state prosecutions. It can hold under *Murphy* that state compulsory testimony acts, in order to comply with the due process clause of the fourteenth amendment, must grant transactional immunity as to state prosecutions, but need give only use immunity as to federal prosecutions.

**F. Capital Punishment.**

If the Court unties the due process clause of the fourteenth amendment from its incorporation doctrines, it will then feel freer to apply this clause as well as the due process clause of the fifth amendment to do right judgment. Illustrative instances abound. As good a beginning example as any is that of capital punishment. If the world survives, and we continue our course as a maturing society, capital

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183. 142 U.S. 547 (1892).
187. 142 U.S. 547 (1892).
188. The writer forecast such a result over a decade ago. *See O. Rogge, The First And The Fifth 261 (1960).*
punishment will one day violate the due process clauses of the fifth amendment in the case of federal action and of the fourteenth amendment in the case of state action. The writer made this suggestion some years ago.\(^{189}\)

Recently the National Commission on Reform of Federal Criminal Laws, a twelve-member group headed by former Governor Edmund G. Brown, Democrat of California, recommended that capital punishment be abolished.\(^{190}\) Also recently, the Central Committee of the World Council of Churches called upon the nations of the world to abolish capital punishment on the ground that it constituted a violation of the "sanctity of life."\(^{191}\)

But Congress, rather than restricting, has been extending capital punishment. After the assassination of President John F. Kennedy, Congress extended capital punishment to one who murders the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States\(^{192}\)
as well as to one who kidnaps such an individual and death results, or who conspires to kill or kidnap such an individual and death results.\(^{193}\) In the Organized Crime Control Act of 1970, Congress further extended the death penalty to those who intentionally misuse explosives, if death results.\(^{194}\)

The dissenters on the House Judiciary Committee, Congressmen Conyers, Mikva and Ryan, seriously questioned the extension of the death penalty, and concluded: "Laws born of the passion of the moment rarely merit the approval of time."\(^{195}\) Congressmen Robert W. Kastenmeier and Don Edwards as well as David W. Dennis also dissented from the extension of capital punishment. Congressmen Kastenmeier and Edwards quoted the concluding paragraphs of an article by former Justice Arthur J. Goldberg and Professor Alan M. Dershowitz, and continued: "We would add that Congress ought to be in the vanguard of the abolishment movement. Let us not turn back the clock."\(^{196}\)


\(^{190}\) N.Y. Times, Jan. 8, 1971, at 1, cols. 6-7; at 15, cols. 2-4.


\(^{193}\) Id.


\(^{195}\) U.S. Code Cong. & Ad. News at 4789.

\(^{196}\) Id. at 4771.
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In that article, former Justice Arthur J. Goldberg and Professor Alan M. Dershowitz expressed the belief that "the death penalty is now unconstitutional under the principles of the eighth amendment adumbrated by the Supreme Court."197 In Trop v. Dulles,198 Chief Justice Warren, who announced the judgment of the Court, in an opinion in which Justices Black, Douglas, and Whittaker joined commented that the eighth "[A]mendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."199

The writer has an historical difficulty with this approach: historically capital punishment has been part of our way of life, and was such at the time of the drafting of the Federal Bill of Rights. Even remembering that it is a constitution we are expounding will not soften this fact.

It is true that in construing a constitution one is engaged in an effort to make the document as timeless as possible. As Chief Justice Marshall emphasized in McCulloch v. Maryland:200 "[W]e must never forget, that it is a constitution we are expounding. . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."201 Or as he added in the Court's opinion in Cohens v. Virginia:202 "[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it."203 Or as the Court elaborated in Weems v. United States:204

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule

199. Id. at 101.
201. Id. at 407, 415.
203. Id. at 387.
204. 217 U.S. 549 (1910).
a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.\textsuperscript{205}

Nevertheless, to give a specific constitutional provision a meaning contrary to the one which it had when it was adopted is indeed to make the Court into a continuing constitutional convention. The role which former Justice Goldberg and Professor Dershowitz seek to give to the eighth amendment is better suited to the due process clauses.

Beginning with United States v. Jackson,\textsuperscript{206} the Court has reversed various death sentences in cases to come before it: In Jackson on the ground that a provision of the Federal Kidnapping Act allowing only a jury to impose the death penalty was unconstitutional; in Witherspoon v. Illinois,\textsuperscript{207} because a state law allowing the prosecution to exclude jurors with conscientious scruples against capital punishment from a penalty jury was unconstitutional; in Bumper v. North Carolina,\textsuperscript{208} on a search and seizure point; in Boulden v. Holman,\textsuperscript{209} on the exclusion of scrupled jurors; in Boykin v. Alabama,\textsuperscript{210} on the ground that the record did not disclose that the defendant voluntarily and understandingly pleaded guilty; and in Maxwell v. Bishop,\textsuperscript{211} on the exclusion of scrupled jurors. In addition, there has not been an official execution in the United States for more than three years, since June 2, 1967, in Colorado.\textsuperscript{212}

However, death sentences continue to be imposed; and over 500 prisoners are on death row.\textsuperscript{213} Three capital cases are on the Court's 1970-1971 docket,\textsuperscript{214} in two of which it has already granted certiorari. But it is probably too soon to expect that the Court will dispose of any of these cases on the basis that capital punishment violates due process.

\textsuperscript{205} Id. at 373.
\textsuperscript{206} 390 U.S. 570 (1968).
\textsuperscript{207} 391 U.S. 510 (1968).
\textsuperscript{208} 391 U.S. 543 (1968).
\textsuperscript{210} 395 U.S. 238 (1969).
\textsuperscript{211} 398 U.S. 262 (1970). The Court of Criminal Appeals of Alabama in the case of one Samuel Brown ruled that the State's removal of its electric chair from one prison to another "atrophied the death penalty." See N.Y. Times, Jan. 28, 1971, at 18, cols. 4-5. In December, 1970, two weeks before leaving office, Governor Winthrop Rockefeller of Arkansas commuted the death sentences of all fifteen men awaiting execution in Arkansas to life imprisonment. He announced his action at a news conference in which he urged other governors to follow his example "so that as a people we may hasten the elimination of barbarism as a tool of American justice." N.Y. Times, Dec. 30, 1970, at 26, col. 1.
\textsuperscript{212} Goldberg & Dershowitz, supra note 197, at 1773 n.1 (1970).
\textsuperscript{213} Id. d.
especially in view of the recent extensions that Congress has made of the death penalty.

G. Capital Punishment for Rape.

In *Rudolph v. Alabama* and *Snider v. Cunningham*, the Court denied certiorari where capital punishment had been imposed for rape; but Justice Goldberg in a dissent in which Justices Douglas and Brennan joined stated that he would grant certiorari "to consider whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life." He pointed to "the trend both in this country and throughout the world against punishing rape by death." He raised the question of the constitutionality of "the taking of human life to protect a value other than human life." He asked whether the permissible aims of punishment could "be achieved as effectively by punishing rape less severely than by death."

In a recent case, *Ralph v. Warden*, the Fourth Circuit held that a death penalty for rape in which the victim's life was neither taken nor endangered violated the eighth amendment, saying "[i]nfrequent imposition of the death penalty for rape not only indicates that it is excessive, but it also suggests that it is meted out arbitrarily."

Although the writer, of course, agrees with the court's result, he feels that the decision should have rested on the due process clause rather than on the eighth amendment.

Counsel for such defendants will continue to raise the point that capital punishment for rape violates the fourteenth amendment's due process clause. If their clients are black, they will also rely on the companion equal protection clause, for white defendants have rarely been executed for rape.

H. Whipping Posts.

Whenever there are such ways of punishment, although old, even ancient, which have become obsolete, but which have not been changed}

217. Id. at 891.
218. Id.
219. Id.
220. Id.
222. Id. at 2331; cf. Calhoun v. State, 85 Tex. Cr. 496, 214 S.W. 335 (1919). But in Moorer v. MacDougall, 245 S.C. 633, 638, 142 S.E.2d 46, 49 (1965), the court answered the argument that a death sentence in a rape case constituted cruel and inhuman punishment unless life was either taken or endangered with this per curiam sentence: "We do not agree with this contention." Id. at 49.
by the legislative or the executive branches of the government, lawyers for defendants should ask the courts to invalidate such ways as violative of due process. Capital punishment is but one of a number of such obsolete ways. Corporal punishment is another. One of the fifty states, Delaware, still has whipping posts and in a recent case, State v. Cannon, the Supreme Court of Delaware was as unable to outlaw the imposition of lashes as a form of punishment as were Lord Chief Justice Ellenborough and his brother justices in the preceding century in Ashford v. Thornton with reference to trial by battle as a mode of proof. The Delaware court reasoned that whipping as a form of punishment in that state went back to colonial times; and that if this practice was to be ended, the legislature had to do it:

Whipping as a penalty for crime in Delaware goes far back in history. The first recorded instance was in 1656 under the Dutch. Thenceforward, the imposition of lashes as a punishment for crime was of common occurrence under the rule of the English...

In 1719, by act of Assembly, the imposition of lashes as punishment for crime was authorized.

Furthermore, it certainly is not without significance that the abolition of whipping as a punishment for crime in those States of the Union which in the past provided for it, has uniformly been accomplished by legislative action.

Accordingly, we are of the opinion that the Eighth and Fourteenth Amendments to the Federal Constitution do not invalidate the statutes of the State of Delaware imposing the punishment of whipping for certain crimes.

If such obsolete ways are not corrected on a state level, lawyers for defendants should seek relief in the federal courts under the due process clause of the fourteenth amendment.

I. Prison Treatment.

One place where obsolete ways abound is in our prisons. The federal courts, after some hesitation about interfering with prison...
administration, finally gave relief. In *Jackson v. Bishop*,\(^{226}\) for instance, the Eighth Circuit in an opinion by Circuit Judge, now Justice, Blackmun ordered injunctive relief

restraining the Superintendent of the Arkansas State Penitentiary and all personnel of the penitentiary system from inflicting corporal punishment, including the use of the strap, as a disciplinary measure.\(^{227}\)

Although the court rested its opinion on the ground that the due process clause of the fourteenth amendment made the eighth amendment applicable to the states, the court also looked back at the fundamental fairness case-by-case application of the due process clause in language which Justice Harlan, but not Justice Black, would have approved:

> With these principles and guidelines before us, we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court in the *Carey* and *Lee* cases.\(^{228}\)

In *Wright v. McMann*,\(^{229}\) the Second Circuit, reversing the court below, held that allegations in a complaint under the Civil Rights Act about conditions in a solitary confinement cell at Clinton State Prison in New York stated a cause of action by reason of the eighth and fourteenth amendments.

We are of the view that civilized standards of humane decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold of winter in northern New York State and to be deprived of the basic elements of hygiene such as soap and toilet paper. The subhuman conditions alleged by Wright to exist in the "strip cell" at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency.\(^{230}\)

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226. 404 F.2d 571 (8th Cir. 1968).
227. *Id.* at 581.
228. *Id.* at 579.
230. *Id.* at 526. When the case returned to the court below, District Judge James T. Foley, after a trial of seven days and a record of 1566 pages plus exhibits, ruled in favor of Wright, and of another prisoner by the name of Mosher, and awarded damages to Wright, who demanded them. *Wright v. McMann*, Civ. No. 66-Cv-77 (N.D.N.Y. 1970); *Mosher v. LaValle*, Civ. No. 67-CV-174 (N.D.N.Y. 1970).
A number of recent cases are to like effect. In one of these, Sostre v. Rockefeller, District Judge Constance Baker Motley enjoined the defendant prison officials from returning the plaintiff prisoner to punitive segregation for charges previously preferred against him, awarded the plaintiff punitive as well as compensatory damages, and further enjoined the defendant prison officials from placing plaintiff in punitive segregation or subjecting him to any other punishment as a result of which he loses accrued good time credit or is unable to earn good time credit, without:

1) Giving him, in advance a hearing, a written copy of any charges made against him, citing the written rule or regulation which it is charged he has violated;

2) Granting him a recorded hearing before a disinterested official where he will be entitled to cross-examine his accusers and to call witnesses on his own behalf;

3) Granting him the right to retain counsel or to appoint a counsel substitute;

4) Giving him, in writing, the decision of the hearing officer in which is briefly set forth the evidence upon which it is based, the reasons for the decision, and the legal basis for the punishment imposed.

In another recent case, Gilmore v. Lynch, a federal three-judge court in California held that state prison regulations limiting law books in prison libraries to federal and state constitutions, certain codes, a law dictionary, a work on state criminal procedure, a digest, and certain rules of court, but excluding state and federal reports and annotated codes, were invalid as denying prisoners reasonable access to the courts.

Also recently the Legal Aid Society in New York City brought a suit in the federal court on behalf of all prisoners of the Manhattan

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House of Detention (known as the Tombs) to shut down the overcrowded facility “until such time as it can be made safe, sanitary, and decent for its inmates."235

The courts have begun to give relief in areas of prison treatment other than those of physical abuse or restrictions of access to counsel or to the courts. In Jackson v. Godwin,236 a black prisoner claimed that state prison rules and regulations deprived him of the equal protection of the law by denying him the right to receive negro newspapers and magazines because he was a negro, while permitting white inmates to receive white newspapers and magazines. He made specific reference to a negro newspaper, the Pittsburgh Courier and to national magazines such as Ebony and Sepia. The Fifth Circuit held that he was deprived not only of his fourteenth amendment right to equal protection, but also to his first amendment freedoms (on the assumption, of course, that the due process clause of the fourteenth amendment made the first amendment fully applicable to the states). Senior Circuit Judge Albert P. Tuttle wrote for the court:

It is also clear that the prison officials have not met the heavy burden of justifying either the resulting racial discrimination or the resulting curtailment of petitioner's First Amendment freedoms and denial of the equal enjoyment of rights and privileges afforded other, and white, prisoners.237

District Judge Raymond J. Pettine took this case as one of his starting points in Palmigiano v. Travisono238 in issuing a temporary restraining order on first amendment grounds against certain forms of censorship of the mail of inmates awaiting trial. He issued his temporary restraining order pending a hearing before a three-judge court, and held:

Both oral and written communications are included within the First Amendment guarantee of freedom of speech. The free speech clause of the First Amendment is broad enough to comprehend the right to correspond with others. In addition, correspondence sent to public officials to protest injustices or seek to redress alleged grievances is protected under the clause of the First Amendment which guarantees the right to petition for redress of grievances.239

236. 400 F.2d 529 (5th Cir. 1968).
237. Id. at 535.
Probably inspired in part by Judge Pettine's decision, the two imprisoned brothers and Roman Catholic priests, Philip and Daniel Berrigan brought a class action in the federal district court in Hartford, Connecticut, on behalf of themselves and other federally held prisoners, seeking the right to preach, teach and write freely under the first amendment.240

In the case of state prisoners, recent decisions in this field rely on the eighth amendment as made applicable to the states by the due process clause of the fourteenth amendment. In the writer's view, the due process clause by itself is able to do the job. In the case of federal prisoners, of course, the courts will rely on the eighth amendment.

I. Imprisonment for Debt.

Another ancient but obsolete practice is imprisonment for debt. Over three decades ago at a session of the Maine legislature in 1939, a woman member, the late Senator Gail Laughlin of Portland, a prominent woman suffrage leader, stamped her foot on the floor and exclaimed: "I thought that imprisonment for debt went out with the writings of Charles Dickens."241 But imprisonment for debt is still with us, and has been with us for seven centuries.

Perhaps the earliest of the English statutes relating to imprisonment for debt is the Statute of Marlborough,242 enacted in 1267, which provided:

That if Bailiffs, which ought to make account to their Lords, do withdraw themselves, and have no Lands nor Tenements whereby they may be distrained; then they shall be attached by their Bodies, so that the Sheriff, in whose Bailiwick they found, shall cause them to come to make their account.243

The reigns of Edward I (1277–1307) and Edward III (1327–1377) witnessed gradual expansions on the Statute of Marlborough.244

In earlier times, abuses inflicted by creditors and the connivings of sheriffs added to the woes of debtors. Moreover, the courts showed little sympathy, if Justice Hyde's dictum in Manby v. Scott245 accurately portrays the judiciary's sentiments:

243. Id.
244. See, e.g., Statute of Westminster the Second, 1285, 13 Edw. 1, Stat. 1, c. 11 (repealed); Statute of Merchants, also known as the Statute of Acton Burnel, 1285, 13 Edw. 1, Stat. 3, c. 1 (repealed); Statute of Purveyors, 1350, 25 Edw. 3, Stat. 5, c. 17 (repealed).
If a man be taken in execution and lie in prison for debt, neither the plaintiff at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink or clothes . . .; but he must live on his own, or on the charity of others, and if no man will relieve him, let him die in the name of God, says the law . . . and so say I. 246

But today imprisonment for a civil debt is as anachronistic as lopping off a hand for theft or, under the Assize of Northampton (1176), 247 a hand and a foot for forgery or arson. Nevertheless, many states still have legislation on the books providing for imprisonment for debt. 248 The Constitution of the State of California makes provision by way of exceptions for imprisonment for debt in civil actions involving fraud and wilful tort:

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil action for torts, except in cases of wilful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace. 249

246. Id. at 786.


Imprisonment for debt. (a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions applicable to imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State. (b) Any person arrested or imprisoned in any State on a writ of execution or other process issued from any court of the United States in a civil action shall have the same jail privileges and be governed by the same regulations as persons confined in like cases on process issued from the courts of such State. The same requirements governing discharge as are applicable in such State shall apply. Any proceedings for discharge shall be conducted before a United States commissioner for the judicial district wherein the defendant is held.

See also Fed. R. Civ. P. 64:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other correspondent or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Section 479 of the Code of Civil Procedure provides the instances in which a defendant may be arrested on mesne process; section 682(3) provides that if the writ of execution be against the person of the judgment debtor, it must require such officer to arrest such debtor and commit him to the jail of the county until he pay the judgment with interest, or be discharged according to law;

and section 715 deals with arrest on supplementary proceedings.251 Lawyers for defendants facing body execution, if they have not obtained relief on a state level should seek relief in the federal courts under the due process clause of the fourteenth amendment. Recently in Desmond v. Hachey,252 consolidated class actions brought by certain judgment debtors, the Pine Tree Legal Assistance, Inc., obtained an opinion from a federal three-judge district court that a section of the Maine Debtor Disclosure Law,253 which permits the arrest and incarceration, without a hearing, of a judgment debtor who has failed to obey a subpoena for his appearance and examination at a disclosure hearing, violates the due process clause of the fourteenth amendment. The court in its opinion noted:

During the last three years the two disclosure commissioners who are defendants in this proceeding issued a total of 966 disclosure subpoenas and 470 capiases to incarcerate, of which 367 were for failure of the debtor to appear and 103 for his failure to obtain the benefit of the poor debtor oath. A total of 179 debtors spent 1,754 days in debtors' prison pursuant to capiases to incarcerate in the two counties involved in this litigation.254

In Gotthilf v. Sills,255 some creditors obtained a New York court order providing that execution be issued against the person of the defendant without notice to him. The order for body execution was under a default judgment in a civil action. The order was obtained pursuant to section 764 of the New York Civil Practice Act (CPA),256 which provides for body execution in the discretion of the court "where

250. CAL. CIV. PRO. § 479 (West 1954).
251. Section 861 of the California Code of Civil Procedure, CAL. GEN. LAWS ANN. § 861 (Deering 1931), exempted females from civil arrest in actions in justices' courts, but this section was repealed in 1933. For a case holding a woman subject to civil arrest, see Burlingame v. Traeger, 101 Cal. App. 365, 281 P. 1051 (1929).
254. 315 F. Supp. at 331 n.6.
256. N.Y. CIV. PRAC. ACT § 764 (Thompson 1939).
the plaintiff's right to arrest the defendant depends upon the nature of the action." 257

On September 1, 1963, the Civil Practice Act was superseded by a new Civil Practice Law and Rules (CPLR), 258 and the cross-references table from the Civil Practice Act to the Civil Practice Law and Rules indicates that section 764 has been omitted. However, one is also instructed therein to compare sections 6101 and 6111 of the Civil Practice Law and Rules, and section 6111 provides for body arrest as a "provisional remedy," whatever that may mean within the framework of the new section, "in the discretion of the court, without notice, before or after service of summons and at any time before or after judgment." 259 Apparently, the framers of the new Civil Practice Law and Rules intended to eliminate body execution. But they did not succeed, and in New York, a judgment debtor could still be jailed merely because he owes a civil debt.

The debtor in Gotthilf petitioned the Federal Supreme Court for certiorari on the sole ground that section 764 of the New York Civil Practice Act, as applied to enforce collection of a debt, violated the due process clause of the fourteenth amendment. Although certiorari was granted, 260 the Court thereafter dismissed the writ as improvidently granted on the ground that the petitioner had not exhausted his state court remedies. 261 The petitioner then attempted to exhaust his state court remedies, found himself foreclosed, and again petitioned the Supreme Court on the same ground. This time the Court denied certiorari. 262 In 1964, New York limited arrest after judgment to the ne exeat situations in CPLR 6101(2). 263

257. Id. By section 826 of the New York Civil Practice Act, N.Y. CIV. PRAC. ACT §§ 1–1578 (Thompson 1939), such arrest may occur in nine instances:
1. To recover a fine or penalty.
2. To recover damages for personal injury.
3. To recover damages for an injury to property, including the wrongful taking, detention or conversion of personal property.
4. To recover damages for misconduct or neglect in office, or in a professional employment.
5. To recover damages for fraud or deceit.
6. To recover a chattel where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff. . . .
7. To recover for money received . . . [as a result of embezzlement or fraudulent misapplication by a public official or other fiduciary].
8. To recover . . . [public funds converted by the defendant].
9. In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in . . . incurring the liability, or that, since the making of the contract . . . he has removed or disposed of his property with intent to defraud. . . .

K. Alimony Jails.

Alimony jails should now be as obsolete as debtors' prisons. Attorneys for husbands who are in danger of incarceration for failing to make alimony payments should argue that such incarceration would be violative of the due process clause of the fourteenth amendment. Let the attorneys for wives seize the available assets and earnings of their clients' husbands, but not their bodies. Courts should be asked to reexamine the concept of contempt of court and to exclude from this concept those cases where the alleged contempt consists of a failure to comply with an order to pay money.

Imprisonment for failure to make alimony payments is even more prevalent than imprisonment for debt. Indeed, while provisions for body execution are decreasing, those aimed at jailing a delinquent husband have been increasing. For instance, in abolishing imprisonment for debt, Maryland not only made an exception for alimony decrees, but, on two occasions, enlarged it. It was originally provided that a decree "for alimony, shall not constitute a debt within the meaning of this section." In 1950, this exception was enlarged by equating an agreement for support or alimony which is approved by a court of competent jurisdiction with a court decree. A 1962 amendment included support of an illegitimate child or children.

New York and California have alimony jails. Prior to September 1, 1963, a husband in default on alimony payments could be jailed under section 1172 of the New York Civil Practice Act. Since that time the same result is reached under section 245 of the Domestic Relations Law. In California, imprisonment depends on whether the husband's lawyer has been able to obtain an integrated agreement with the wife providing in an inseparably interwoven fashion for both support and a division of property. The California Supreme Court has held that the obligation of a husband to support his wife is not a "debt" within the meaning of the constitutional provision against imprisonment for debt. But if his lawyer has been able to obtain an integrated agreement, the payments provided for by the agreement may not be enforced by contempt proceedings.271

265. In Speckler v. Speckler, 256 Md. 635, 261 A.2d 466 (1970), the court so held.
269. See generally Comment, Divorce Agreements in California, 2 U.C.L.A. Rev. 233 (1955).
L. Replevin.

Another ancient remedy which is subject to abuse at the hands of creditors is that of replevin. When this happens, counsel for debtors should think in terms of the due process clause of the fourteenth amendment. Recently in Laprease v. Raymours Furniture Co., Inc.,272 the Onondaga Neighborhood Legal Services, Inc., obtained a ruling from a federal three-judge court in New York that New York's replevin provisions permitting the prejudgment seizure of chattels by the plaintiff in a replevin action without an order of a judge or of a court of competent jurisdiction, are unconstitutional in that they violate the search and seizure provisions of the Fourth Amendment, made applicable to the states under the Fourteenth Amendment; and the provisions further violate the procedural due process requirements of the Fourteenth Amendment.273

M. Comparable Creditor Practices.

Creditors have yet other remedies, not as ancient as either imprisonment for debt or replevin, but which they can similarly use to harass debtors. Again, counsel for debtors should think in terms of the due process clause of the fourteenth amendment. In Sniadach v. Family Finance Corp.,274 the Court held that Wisconsin's garnishment procedure, which resulted in an interim freezing of wages without a chance to be heard "violates the fundamental principles of due process."275 Justice Harlan concurred on the ground that:

[T]he Due Process Clause of the Fourteenth Amendment limits state action by norms of "fundamental fairness" whose content in any given instance is to be judicially derived not alone, as my colleague believes it should be, from the specifics of the Constitution, but also, as I believe, from concepts which are part of the Anglo-American legal heritage — not, as my Brother Black continues to insist, from the mere predilections of individual judges.276

Justice Black, who wants to bind the due process clause of the fourteenth amendment to the specifics of the Federal Bill of Rights, found himself in dissent:

This holding savors too much of the "Natural Law," "Due Process," "Shock-the-conscience" test of what is constitutional for me to agree to the decision...
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[M]y Brother Harlan's "Anglo-American legal heritage" is no more definite than the "notions of Justice of English-speaking peoples" or the shock-the-conscience test. All of these so-called tests represent nothing more or less than an implicit adoption of a Natural Law concept which under our system leaves to judges alone, the power to decide what the Natural Law means.\(^{277}\)

There are other rulings in the same vein. For instance, in *In re Harris,*\(^ {278}\) the California Supreme Court in an opinion by Chief Justice Traynor held that California statutes which authorize the arrest and imprisonment of a defendant in a civil action on an ex parte application of the plaintiff violated due process:

A defendant who is deprived of his liberty by civil process is as much entitled to due process of law as a defendant who is deprived of his liberty because he is charged with crime. The mesne process of civil arrest without opportunity to be heard with the assistance of counsel is not due process.\(^ {276}\)

Or again, in *Klim v. Jones,*\(^ {280}\) a federal district court in California held that a California statute which gave an innkeeper a lien without provision for a hearing as a condition precedent, violated the fourteenth amendment's due process clause.

Several cases involve landlords. In one such case, *Sanks v. Georgia,*\(^ {281}\) where the Georgia Supreme Court held that Georgia statutes which required a tenant to post a bond as a condition precedent

\(^{277}\) Id. at 350, 350–51.

\(^{278}\) 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968).

\(^{279}\) Id. at 491, 446 P.2d at 152, 72 Cal. Rptr. at 344, In Wright v. Crawford, 401 S.W.2d 47 (Ky. 1966), the Kentucky Court of Appeals held that a defendant who was subject to imprisonment under a civil judgment was entitled to a hearing upon the issue of his claimed negligence and, if he should be adjudged indigent, to appointed counsel for his appeal as well as a free record and transcript.

\(^{276}\) 315 F. Supp. 109 (N.D. Cal. 1970), In Swarb v. Lemox, 314 F. Supp. 1091 (E.D. Pa. 1970), a federal three-judge district court in Pennsylvania held, with reference to Pennsylvania residents whose incomes were under $10,000, and who had signed a confession of judgment clause in commercial and financing transactions, that they did not intentionally waive known rights and that therefore as to them, Pennsylvania's procedure for the entry of confessed judgments violated due process. In *Means v. Municipal Court,* 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970), the court held that an unlawful detainer statute violated due process.

\(^{280}\) 225 Ga. 88, 166 S.E.2d 19 (1969), appeal dismissed and remanded, 39 U.S.L.W. 4171 (U.S., Feb. 23, 1971). In *Santiago v. McElroy,* 319 F. Supp. 284 (E.D. Pa. 1970), a federal three-judge district court in Pennsylvania held that distress sales under the distraint procedures of the Pennsylvania Landlord and Tenant Act, "in so far as they do not follow a hearing of some sort before a tenant is deprived of his property, violate the fundamental principles of due process." *Id.* at 295. The landlords "argue that distress is ancient, and that the landlord-tenant relation has been given special treatment since early common law." The court responded: "And even if distress calls were to qualify as a time-honored procedure, it is also true that the blessing of age wanes out." *Id.* Contra, *Harrington v. Harrington,* 269 A.2d 310 (Me. 1970). In *Hall v. Garson,* 430 P.2d 430 (5th Cir. 1970), the court held that a Texas statute which gives a landlord a lien on personal goods of tenants and authorizes the landlord to enforce that lien by peremptory seizure of property, might be violative of due process.
to filing a defense in a summary dispossession proceeding and to pay
double rent if he lost, did not violate the fourteenth amendment, the
Federal Supreme Court noted probable jurisdiction,\(^{282}\) heard argument
at its 1969 Term, and restored the case to the calendar for re-
argument at its 1970 Term.\(^{283}\)

In *United States v. Brand Jewelers, Inc.*, \(^{284}\) Federal Judge Marvin
E. Frankel of the Southern District of New York held that the United
States had standing to seek injunctive and other civil relief against
the alleged practice of obtaining default judgments against economi-
cally disadvantaged debtors by a technique known as "sewer service"
whereby process servers failed to make service or prepared false
affidavits. Judge Frankel held "that the United States may maintain
this action because it has standing to sue to end widespread depriva-
tions (i.e., deprivations affecting many people) of property through
'state action' without due process of law."\(^{285}\)

**N. Practice of Contraception.**

In area after area beyond the specifics of the first eight amend-
ments we shall find Justice Black in dissent, even vigorous dissent,
from the Court's decisions under the due process clause of the four-
teenth amendment. No situation better illustrates the difference be-
tween his approach and that of Justice Harlan than a case arising
under the legislation proscribing material for preventing conception.
Also, in these days of concern about the population explosion, no situ-
ation better illustrates the change in our own attitudes toward a problem.

In 1873 Congress, expanding existing obscenity prohibitions,
adopted legislation proscribing trading in and circulating contracep-
tive devices and literature pertaining thereto.\(^{286}\) This act is sometimes
referred to as the Comstock Act, for it was due in substantial measure
to the efforts of Anthony Comstock,\(^{287}\) and Comstock always called it
"my law."\(^{288}\) The provisions in the section relating to the mails ulti-
mately became the familiar section 1461 of Title 18 of the United

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\(^{285}\) Id. at 1299.

(1964). Section 3 prohibited the importation of such material.

\(^{287}\) For material on Comstock, see H. Broun & M. Leech, Anthony Comstock,
Roundsman Of The Lord (1927). The first federal obscenity provision was a
prohibition against the importation of pictorial matter in an 1842 customs act. Act of
Aug. 30, 1842, ch. 270, § 28, 5 Stat. 566. The first such provision relating to the 
mails was in 1865. Act of March 3, 1865, ch. 89, § 16, 13 Stat. 507.

\(^{288}\) For a history of the 1873 act, see Paul, The Post Office and Non-Mailability
States Code.²⁸⁹ No less than five of its six proscribing paragraphs include contraceptive material. These proscriptions are still on the books.

Moreover, the writer can testify that until recently the Post Office Department attempted to enforce the provisions of this section of the Code relating to contraception. The writer can testify to an instance involving a nudist client for whom a victory in the United States Supreme Court was obtained as to nudist materials on the Solicitor General's confession of error in Mounce v. United States.²⁹⁰ Mounce sought to mail a circular relating largely to nudist materials but which listed a book containing an address where information concerning contraception could be obtained. The Post Office Department objected, not to the advertisements of nudist materials (for in Mounce as well as in Sunshine Book Co. v. Summerfield,²⁹¹ the Court held nudist publications to be not obscene), but to the contraception advertisement in the book. The book's publisher got wind of the controversy, and wanted the book defended. Mounce, however, adopted the suggestion of the Post Office Department that the advertisement be blocked out and the circulars went on their way.

After the federal act of 1873,²⁹² many states adopted comparable legislation of their own.²⁹³ Much of it is still on the books. Connecticut went to the length of forbidding the use of contraceptives.²⁹⁴ California merely forbade advertisements of contraceptive materials, information, or help; but it made such acts a felony.²⁹⁵

Although the courts have uniformly given such provisions a restrictive interpretation,²⁹⁶ they have with equal uniformity sustained

A book introduced as an exhibit in the instant case by defendant (Contraception-Stokes) contains the following (pp. 354-55): "Following the Federal Act of 1873 [Comstock Act] there was an epidemic of State laws on this subject, mostly modelled closely on the Federal law, until now there are only two States in the Union which have not some sort of 'obscenity' statute. These relatively free states are North Carolina and New Mexico. The Federal Act was not only a very prolific ancestor of all these State laws, but there was an extraordinary family likeness in the progeny. In half the States the giving of contraceptive knowledge is definitely listed as a crime. In the other half of the States by virtue of the Federal precedent, courts can declare it a crime to impart this knowledge."
²⁹⁴. CONN. GEN. STAT. § 53-32 (1958) (forbidding the use of contraceptives), § 54-196 (general accessory law). This statute was held unconstitutional in Griswold v. Connecticut, 381 U.S. 479 (1965). See pp. 655-57 infra.
²⁹⁶. See, e.g., Consumers Union v. Walker, 145 F.2d 33 (D.C. Cir. 1944), where the court held mailable a special report of Consumers Union on contraceptive
their constitutionality. On the same day that the Connecticut Supreme Court of Errors held that contraceptive devices could not be seized and destroyed as nuisances under the state's seizure statutes, it decided on the other hand, in *State v. Nelson*, a test case against two doctors and a nurse who had allegedly disseminated contraceptive information, that the state's legislation prohibiting the use of contraceptives was constitutional. After the *Nelson* ruling a contemporary observer wrote with reference to it: "This serious setback to the birth control movement led to the closing of all the clinics in the state, just as they had been previously closed in the State of Massachusetts."

The Connecticut provisions came before the Federal Supreme Court in *Griswold v. Connecticut*. The Court held them violative of due process. Justice Douglas in the Court's opinion spoke of the "penumbras" of the specific guarantees in the Federal Bill of Rights, "formed by emanations from those guarantees that help give them life and substance." He referred to the first, third, fourth and fifth amendments, and quoted the ninth: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." He described the marriage relationship as involving "a right of privacy older than the Bill of Rights."
Justice Goldberg in a concurring opinion, in which Chief Justice Warren and Justice Brennan joined, relied heavily on the ninth amendment.

Justice Harlan, while concurring in the Court's judgment, did not want to tie down the due process clause of the fourteenth amendment to "some right assured by the letter or penumbra of the Bill of Rights."\(^{304}\)

Justices Black and Stewart wrote strong dissents. It was in this dissent that Justice Black quoted approvingly the language Justice Holmes used (to express his apprehensions at the Court's rulings in the area of state economic regulation) about the sky being the limit. Justice Black was critical of Justice Goldberg's reliance on the ninth amendment:

My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." . . . The whole history of the adoption of the Constitution and the Bill of Rights points the other way. . . . That Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. . . . Use of any such broad unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.\(^{305}\)

Justice Black in his criticism of Justice Goldberg's reliance on the ninth amendment is historically correct. The framers of the ninth amendment intended it as a declaration, should the need for it arise, that the people had other rights than those enumerated in the first eight amendments; and the federal judiciary and the state legislatures could so use it if they had to do so in order to pass judgment on the validity of an act of Congress. The ninth amendment was not so used. Even Madison, the principal draftsman of the first ten amendments, did not so use it. To be historically correct, counsel should place their reliance on the due process clauses; and, as the writer concluded more than a decade ago "these clauses, by virtue of their historic roots and historical role, will in most instances satisfactorily meet the demands on them."\(^{306}\)

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\(^{304}\) Id. at 499.

\(^{305}\) Id. at 518-20.

One of Griswold's products was *Baird v. Eisenstadt*,807 where the First Circuit struck down a Massachusetts statute which made it an offense to supply contraceptives to unmarried persons.

O. Right to an Abortion.

Rather than contraceptive advice, a woman may want an abortion. Her counsel should contend that she has a due process right to one.

New York passed an act, to take effect July 1, 1970, permitting a woman to have an abortion "within twenty-four weeks from the commencement of her pregnancy."808 New York City's health chief, Gordon Chase, estimated that between 18,000 and 19,000 abortions had been performed in New York City hospitals since the abortion law went into effect.809 In February 1971, he estimated that during the first six months of legalized abortion, an estimated total of 69,000

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It would also seem that *Griswold* furnishes the basis for another attack on the constitutionality of 18 U.S.C. § 1461 (1964); for no less than five (all but one) of the six proscribing paragraphs of section 1461 relate to contraceptive material. Only the first of the six proscribing paragraphs of this section deals with obscene material. Accordingly, one can now take the position that the elimination of five of these six proscribing paragraphs so emasculates it as to render the whole section unconstitutional.

Whether the invalid parts of an act are separable from the valid ones is a question of legislative intent. Carter v. Carter Coal Co., 298 U.S. 238 (1936); Utah Power & Light Co. v. Pfoest, 286 U.S. 163 (1932); Williams v. Standard Oil Co., 278 U.S. 235 (1929); Dorchy v. Kansas, 264 U.S. 286 (1924). Because of the fact that many modern statutes contain a separability clause, the absence of such a clause may result in the strict application of a presumption of indivisibility. See Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 121 (1937). In Family Security Life Ins. Co. v. Daniel, 79 F. Supp. 62, 65-66 (E.D.S.C. 1948), rev'd 336 U.S. 220 (1949), the majority of a three-judge statutory court stated: "In view of the modern form of legislative drafting, the omission of such a provision evidences clearly the legislative intent that this statute must stand or fall as a whole." State cases to this effect are Maury County v. Porter, 195 Tenn. 116, 257 S.W.2d 16 (1953); Burroughs v. Lyles, 142 Tex. 704, 181 S.W.2d 570 (1944). The leading federal case on separability and separability clauses is Carter v. Carter Coal Co., 298 U.S. 238 (1936). That case involved a separability clause which read:

> If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

After quoting it, the Court said:

> In the absence of a such a provision, the presumption is that the legislature intends an act to be effective as an entirety — that is to say, the rule is against the mutilation of a statute; and, if any provision be unconstitutional, the presumption is that the remaining provisions fall with it.

*Id.* at 12.

A modern statute without a separability clause is not necessarily indivisible. However, the absence of such a clause requires the proponents of divisibility to overcome a strong presumption against them.

The government can, of course, answer that the elimination of the five paragraphs relating to contraceptive material simply reduces section 1461 substantially to its original form, that this part is constitutional, and that Roth v. United States, 354 U.S. 476 (1957), so held.


abortion were performed in New York City, half of them on women from out of state.\textsuperscript{310}

If a state has no law comparable to that in New York, and most states do not, counsel should look for relief under the due process clause of the fourteenth amendment. Three recent cases are illustrative. In \textit{People v. Belous},\textsuperscript{811} the California Supreme Court invalidated a state statute which confined legal abortions to those instances where it was necessary to preserve a woman's life. The court said:

The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex.\textsuperscript{312}

In \textit{Babbitz v. McCann},\textsuperscript{313} a federal three-judge district court held that certain provisions of a Wisconsin abortion statute "suffer from an infirmity of fatal overbreadth"\textsuperscript{314}; and in \textit{Roe v. Wade},\textsuperscript{315} a three-judge federal district court in Texas held similarly as to Texas abortion laws. In \textit{Babbitz v. McCann}, the court stated:

The police power of the state does not, however, entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened.\textsuperscript{318}

A District of Columbia statute somewhat broader than the statutes involved in these three cases in that it used the words "necessary for the preservation of the mother's life or health," was argued before the United States Supreme Court in \textit{United States v. Vuitch},\textsuperscript{317} on January 12, 1971. District Judge Gerhard A. Gesell struck the quoted words from the statute with the comment "that as a secular matter, a woman's liberty and right of privacy . . . may well include the right to remove an unwanted child at least in early stages of pregnancy."\textsuperscript{318}

\textsuperscript{310} N.Y. Times, Feb. 7, 1971, at 70, cols. 3-4.
\textsuperscript{312} Id. at 963, 488 P.2d at 199, 80 Cal. Rptr. at 359.
\textsuperscript{314} Id. at 302.
\textsuperscript{316} 310 F. Supp. at 302.
P. Miscegenation Laws.

A recent front page account in The New York Times tells us that under a federal court order the state of Mississippi permitted a mixed marriage despite a miscegenation law that had been on the books for more than 100 years. Another recent front page story in the Times gives an account of a suit brought by the United States Department of Justice in Alabama to strike down provisions of Alabama’s Constitution and laws that make it a crime for whites and blacks to marry. The suit, filed in Birmingham and announced in Washington, asked the court to order state officials to permit the marriage of Sergeant Louis Voyer, a white soldier stationed at Fort McClellan, Alabama, and Phyllis Bett, a black woman from Anniston. It was not always thus.

Indeed, until recently, miscegenation laws were on the books of half the states. Moreover, the highest courts of at least twelve states have upheld these statutes. In Perez v. Lippold, however, the California Supreme Court ruled that state’s miscegenation law unconstitutional under the fourteenth amendment. But one cannot expect such a result from Southern courts. Nor will Southern legislatures repeal such laws. Any relief must come from the federal courts. It has.

Until recently, fifteen states still had such laws: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and West Virginia. Virginia also had such a law; but the Supreme Court struck it down in Loving v. Virginia as violative both of the equal protection clause and the due process clause of the fourteenth amendment.

Preceding Loving was the case of McLaughlin v. Florida, involving Florida statutes. Florida has one law against interracial cohabitation and another against interracial marriage. McLaughlin arose under the law prohibiting cohabitation. The Florida Supreme Court took the occasion to announce the validity of that state’s miscegenation law:

This Court is obligated by the sound rule of stare decisis and the precedent of the well written decision in Pace, supra. The

322. Id. at 209.
323. 32 Cal. 2d 711, 198 P.2d 17 (1948).
Federal Constitution, as it was when construed by the United States Supreme Court in that case, is quite adequate but if the new-found concept of "social justice" has outdated "the law of the land" as therein announced and, by way of consequence, some new law is necessary, it must be enacted by the legislative process or some other court must write it.328

The Florida Supreme Court, as had the Virginia Supreme Court of Appeals, relied on *Pace v. Alabama.*327 This case involved a discrete issue; for Pace and his co-defendant would have been guilty of a crime in Alabama even if they had both been white, whereas Florida has not made it a crime at all for a man and a woman of the same race to engage in the identical conduct charged. Moreover, in the later case of *Meyer v. Nebraska,*328 the United States Supreme Court stated that the liberty which the fourteenth amendment's due process clause protected included the right "to marry, establish a home and bring up children."329

As one would expect, the Supreme Court struck down the prohibitory statute. However, the Court acted under the equal protection of the laws provision of the fourteenth amendment. Also, the Court did not reach the question of the constitutionality of Florida's miscegenation law.330 In *Loving*, the Court invalidated such laws. Chief Justice Warren concluded the Court's opinion with these words:

The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.331

Q. *Administrative Investigations.*

We are in an inquisitional trend, and have been for over a century. In addition, we have become more and more administratively managed. In furtherance of our inquisitional trend the Court in two five-to-four decisions, *In re Groban,*332 involving the secret inquisitional proceedings of an Ohio fire marshal, and *Anonymous v. Baker,*333 involving similar proceedings conducted by a justice of the New York Supreme Court, sustained sentences of imprisonment although counsel had been excluded from the proceedings. It is a poignant commentary

326. 153 So. 2d at 3.
327. 106 U.S. 583 (1882).
328. 262 U.S. 390 (1923).
329. *Id.* at 399.
330. 397 U.S. at 187, 196.
331. 388 U.S. at 12.
on the current trend that neither in England, where our accusatorial method had its early development, nor in France, where the inquisitional technique took hold, it is permissible for an official to question a person in secret, and without counsel.

Inquisitions by officials occur on a federal as well as state level. However, the Federal Administrative Procedure Act affords certain protections. For instance, section 6(a) provides that:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.\textsuperscript{334}

There is nothing generally comparable on the state level; for example, of all the states which provide for inquisitions by officials in the case of suspicious fires, only Georgia specifically provides for counsel.\textsuperscript{335} Even when counsel is permitted to accompany a witness, the attorney's role is usually very limited. The Model State Administrative Procedure Act was approved by the National Conference of Commissioners on Uniform State Laws at its annual meeting in 1946, and the Revised Model State Administrative Procedure Act was approved by the National Conference in the summer of 1961; but one will search these documents in vain for any provision specifying counsel for witnesses in investigative proceedings.

In two recent cases involving somewhat different circumstances the Court went in opposite directions on the due process rights of a witness subpoenaed to appear before an administrative or executive official. In \textit{Hannah v. Larche},\textsuperscript{336} the Court held that the rules of the Federal Civil Rights Commission, which denied to a subpoenaed witness the full right to counsel, did not violate the due process clause of the fifth amendment. Under the Civil Rights Act of 1957,\textsuperscript{337} the Civil Rights Commission was required to hold its investigative hearings either before the commission itself or, on its authorization, before a "subcommittee of two or more members, at least one of whom shall be of each major political party."\textsuperscript{338} In this instance, the statute limited the role of counsel for subpoenaed witnesses to that of "advising them concerning their constitutional rights."\textsuperscript{339} Moreover, the statute gave the chairman or acting chairman of an investigative hearing the power to censure and exclude counsel for "breaches of order...

\textsuperscript{338} Id.
and decorum and unprofessional ethics.” The statute further provided that a witness could obtain a transcript of his testimony at an executive session only when authorized by the Commission.

Under this legislation, the Civil Rights Commission subpoenaed some voting registrars and private citizens to a hearing at Shreveport, Louisiana. They sought to enjoin the Commission from holding its proposed hearing on the dual ground that the Civil Rights Act of 1957 was unconstitutional and that the Commission’s Rules of Procedure were invalid because they did not accord to those under investigation the rights of appraisal, confrontation, and cross-examination. A three-judge court held the act constitutional but the rules invalid; the Supreme Court sustained both. In so doing, the Court approved the rules of the Federal Trade Commission and the Securities Exchange Commission, which contained restrictions on the right to counsel.

The Court erroneously compared administrative investigations to grand jury investigations. Chief Justice Warren, speaking for the Court, stated that the comparison was made to show that the rules of this Commission are not alien to those which have historically governed the procedure of investigations conducted by agencies in the three major branches of our Government. . . .

But Justice Douglas in a dissenting opinion in which Justice Black concurred pointed out the difference between a grand jury and the commission:

The grand jury brings suspects before neighbors, not strangers. . . .

This Commission has no such guarantee of fairness. Its members are not drawn from the neighborhood. The members cannot be as independent as grand juries because they meet not for one occasion only; they do a continuing job for the executive and, if history is a guide, tend to acquire a vested interest in that role. . . .

The Civil Rights Commission can hold all the hearings it desires; it can adduce testimony from as many people as it likes; it can search the records and archives for such information it

344. 363 U.S. at 449.
needs to make an informed report to Congress. . . . But when it summons a person, accused under affidavit of having violated the federal election law, to see if the charge is true, it acts in lieu either of a grand jury or a committing magistrate. The sifting of criminal charges against people is for the grand jury or for judges or magistrates and for them alone under our Constitution. In my view no other accusatory body can be used that withholds the rights of confrontation and cross-examination from those accused of federal crimes.  

During oral argument before the Court, Justice Black emphasized the difference between a grand jury and the Commission: "Do you think it [an investigation by the Commission] is the same as the work of a grand jury made up of people living in the community? They sift out the charges to be preferred." Deputy Attorney General Lawrence E. Walsh pressed the grand jury analogy. Justice Black responded: "Again I suggest a difference between investigation by a grand jury composed of persons from the community and an investigation by this Commission."  

Seemingly contrary to the result in Hannah, the Court in Jenkins v. McKeithen held that it was error to dismiss a complaint which challenged the procedure of a Louisiana body called the Labor-Management Commission of Inquiry as violating the due process and equal protection clauses of the fourteenth amendment. Justice Marshall announced the judgment of the Court and delivered an opinion in which Chief Justice Warren and Justice Brennan joined. Justice Marshall in his opinion stated that the Louisiana Act "was drafted with Hannah in mind and the structure and powers of the Commission here are similar to those of the Civil Rights Commission." The Louisiana Act provided that a witness had the right to the presence and advice of counsel, "subject to such reasonable limitations as the commission may impose in order to prevent obstruction of or interference with the orderly conduct of the hearing." Apparently the biggest difference between the two bodies was that the findings of the Federal Civil Rights Commission were to be used for legislative purposes whereas the findings of the Labor-Management Commission of Inquiry of Louisiana were for the purpose of exposing violation of criminal laws by specific individuals. Despite the fact that the Louisiana Act ac-

345. Id. at 498–99, 508.
347. Id.
349. 395 U.S. at 425.
corded certain rights to a witness, including the right to counsel, Justice Marshall nevertheless stated in his opinion

that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights.\textsuperscript{351}

Justices Douglas and Black concurred in the result for the reasons stated in Justice Douglas's dissenting opinion in \textit{Hannah}.

The Organized Crime Control Act of 1970\textsuperscript{352} made two extensions of inquisitions by officials, the one to the Attorney General of the United States, and the other to a body called a special grand jury, but which is more like the Louisiana Labor-Management Commission of Inquiry whose procedure the Court invalidated in \textit{Jenkins}. The grant of inquisitorial powers to the Attorney General is contained in the additions of sections 1961 through 1968 to title 18 of the United States Code. Section 1968, headed “Civil investigative demand,” provides in paragraph (a):

Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.\textsuperscript{353}

The dissenters of the House Judiciary Committee, Congressmen Conyers, Mikva and Ryan, objected:

In effect the Attorney General is given carte blanche to engage in fishing expeditions, unfettered even by the controls of a grand jury's proceeding. This section opens the books of virtually every business to Government search, and makes the Attorney General the Grand Chatelain of American enterprise.\textsuperscript{354}

It did them no good.

In opposing the Attorney General's civil investigative demands under section 1968, counsel can begin with a recent state case, \textit{Roberts v. Whitaker},\textsuperscript{355} where the Minnesota Supreme Court affirmed the quashing of a subpoena of Minnesota's public examiner on the ground

\begin{itemize}
  \item \textsuperscript{351} 395 U.S. at 429.
  \item \textsuperscript{352} U.S. Code Cong. & Ad. News 4452 (1970).
  \item \textsuperscript{353} \textit{Id}. at 4480 (1970).
  \item \textsuperscript{354} \textit{Id}. at 4782.
  \item \textsuperscript{355} ..... Minn. ....., 178 N.W.2d 869 (1970).
\end{itemize}
that the breadth of the subpoena violated the subpoenaed individual's right of privacy.

The Organized Crime Control Act of 1970 by the additions of sections 3331 through 3334 to title 18 also provided for a special grand jury and in section 3333(a) empowered it to submit to the court a report—

(1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation or removal or disciplinary action; or

(2) regarding organized crime conditions in the district.\textsuperscript{356}

The dissenters on the House Judiciary Committee pointed out the difference between the special grand jury provided for by the Organized Crime Control Act of 1970 and an ordinary grand jury. In doing so they relied on \textit{Wood v. Hughes},\textsuperscript{357} where the New York Court of Appeals in an opinion by Judge Fuld held that a grand jury which uncovered no evidence warranting an indictment could not present to the court for filing as a public record a report which censured and castigated public officials for their conduct in office. The dissenters quoted this language from Judge Fuld's opinion:

In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted.\textsuperscript{358}

The dissenters concluded that the special grand jury device in the Act "deprives both the innocent and the 'guilty' of basic rights of due process. Surely, we need not corrupt civil liberties in order to combat corruption in public office."\textsuperscript{359}

Counsel should begin their attacks on the special grand juries authorized under the Organized Crime Control Act of 1970 by arguing \textit{Jenkins}.

The writer made a study of administrative inquiries and concluded that a witness subpoenaed to appear before an administrative or executive official should be accorded certain rights as a matter of due process. Assistance of counsel should not be limited to ear-whispering. The witness should be appraised of the nature of the in-

\textsuperscript{359} U.S. Code Cong. & Ad. News at 4778.
quiry as well as the subject matter about which he is to be questioned. He should be supplied with a copy of his testimony and of any documentary material he supplies; and he should be afforded immunity from prosecution, unless, with full understanding, he waives his privilege against self-incrimination.\textsuperscript{360} \textit{In re Groban}\textsuperscript{361} and \textit{Anonymous v. Baker},\textsuperscript{362} should be overruled on due process grounds as unceremoniously as was \textit{Betts v. Brady}.\textsuperscript{363}

In suggesting these due process rights, the writer has no thought of curbing or reversing the current inquisitional trend. If the way of the future is inquisitions by officials, so be it. Nor is there in this suggestion any demand for confrontation and cross-examination, which Justice Marshall conceded in his opinion in \textit{Jenkins}. Although confrontation is a sixth amendment right, the writer does not seek to have it extended to inquisitions by officials. Let these investigations be sweeping, and let the inquisitors proceed in a truly unhampered, expeditious and effective manner. The writer's only concern is to make use of the due process clauses to safeguard individuals subpoenaed to appear before executive or administrative investigators, rights comparable to those which they had when grand juries were the accusers and our officials did not have inquisitional powers.

\textit{R. Administrative Determinations.}

In administrative proceedings which are adjudicatory as distinguished from investigative, there is usually an effort to comply with due process requirements. Several recent cases, including two in the Supreme Court, are illustrative. One of the cases involves a statute, which exists in many states, which provides that designated persons may post in liquor stores the names of individuals who are "excessive drinkers." To such persons sales or gifts of liquor are barred. The Wisconsin statute came before the Supreme Court in \textit{Wisconsin v. Constantineau}.\textsuperscript{364} The Court struck it down as violative of the due process rights of those individuals whose names are posted. The Court, in an opinion by Justice Douglas, held that: "Where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."\textsuperscript{365}

\begin{itemize}
  \item \textsuperscript{361} 352 U.S. 330 (1957).
  \item \textsuperscript{362} 360 U.S. 287 (1959).
  \item \textsuperscript{364} 39 U.S.L.W. 4128 (U.S., Jan. 19, 1971).
  \item \textsuperscript{365} \textit{Id.} at 4129.
\end{itemize}
In *Goldberg v. Kelly*, the Court held that the fourteenth amendment's due process clause requires that the recipient of public assistance payments is entitled to an evidentiary hearing before the termination of benefits. Justice Brennan wrote for the Court:

Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

The dissenters were Chief Justice Burger and Justices Black and Stewart. Justice Black in dissent wrote:

This decision is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes "unfair," "indecent," or "shocking to their consciences." . . . I regret very much to be compelled to say that the Court today makes a drastic and dangerous departure from a Constitution written to control and limit the government and the judges and moves toward a constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable.

The Second Circuit in *Escalera v. New York Housing Authority*, held that a complaint on behalf of tenants in New York City public housing projects against the New York City Housing Authority because of termination of their tenancies stated due process deficiencies in four respects. Three of these were: (1) one-sentence summary notices of termination did not adequately inform the tenants of the evidence against them; (2) the tenants were denied access to the material in the folders which the Housing Authority had with reference to them; and (3) the tenants did not have the opportunity to confront and cross-examine the persons who supplied the information in their folders.

A federal district court in *Davis v. Toledo Metropolitan Housing Authority*, held that it violated due process for applicants to be ruled ineligible for housing without an evidentiary hearing.

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367. 397 U.S. at 265.
368. Id. at 276, 277.
370. 425 F.2d at 862.
Federal District Judge Motley in New York in *Sostre v. Rockefeller*, 372 ordered prison officials to give to one whom they propose to punish a written copy of the charges, a recorded hearing before a disinterested official, the right to counsel, and a written reasoned decision. Judge Motley wrote:

Very recently, the Supreme Court reiterated the firmly established due process principle that where governmental action may seriously injure an individual, and the reasonableness of that action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. The individual must also have the right to retain counsel. The decision-maker's conclusion must rest solely on the legal rules and evidence adduced at the hearing. In this connection, the decision-maker should state the reasons for his determination and indicate the evidence upon which he relied. Finally, in such cases, the high Court ruled, an impartial decision-maker is essential. . . . 373

Government officials complained, as they often do when a new due process right is recognized in the criminal law area, that the new right will wreck law enforcement. This time the state claimed that Judge Motley's order "would be destructive of prison management, particularly prison discipline which is so fragile." 374 The state put its charge in its brief in the Second Circuit where it is seeking a reversal of Judge Motley's order.

A three-judge federal district court in the District of Columbia held in *Wright v. Finch*, 375 that it violated due process for the Social Security Administration to suspend or terminate disability insurance benefits without first giving the recipient an opportunity to respond, to submit evidence supporting his claim, and to have conflicting evidence resolved by an impartial decision-maker.

The Fifth Circuit Court of Appeals decided in *Rainey v. Jackson State College*, 376 that the complaint of an assistant professor of English

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at a Mississippi state college which alleged that he had been denied a hearing by the college's board of trustees on his charge that his contract of employment had not been renewed due to his testimony for the defense in a criminal obscenity case stated a cause of action under section 1983 of the Civil Rights Act.\textsuperscript{377}

There have been various types of proceedings, however, where an individual's rights and status have been determined on the basis of statements of secret informers, without confrontation or cross-examination, and even, at times, without appraisal. This has occurred in loyalty and security investigations and in hearings concerning federal, and state employees. It has also occurred in investigations directed at a multitude of employees in defense-related private industry, and at members or former members of our armed forces. It has also occurred in determinations involving aliens; selective service hearings to determine whether an individual is a conscientious objector; and the State Department's determinations with reference to the issuance or denial of passports. In one instance the Military Sea Transportation Service, a Navy branch, ordered a marine engineer and two seamen off an American President Lines ship for security reasons. All three seamen had Coast Guard clearance. The Navy branch took this step without notice or charges. According to this governmental agency, to disclose the reasons would "endanger the security of the United States."\textsuperscript{378} The government has also denied cash benefits due more than 250 former Korean War prisoners because of secret Army charges of collaboration.\textsuperscript{379} Various cases arising in such types of proceedings have reached the Supreme Court, but so far the Court has not spoken out against the practice of using secret informers. On the contrary, the Court has sustained it. The Court did so in the first two such cases to come before it, \textit{Bailey v. Richardson},\textsuperscript{380} and \textit{Washington v. McGrath},\textsuperscript{381} but by an evenly divided court. These cases arose out of federal loyalty investigations and hearings. In a third such case,\textsuperscript{382} that involving Dr. John P. Peters of Yale University, the Court avoided the issue. In \textit{United States v. Nugent},\textsuperscript{383} the Court sustained the practice of

\begin{footnotesize}
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  \item 380. 341 U.S. 918 (1951), \textit{aff'd} 182 F.2d 46 (D.C. Cir. 1950).
  \item 381. 341 U.S. 923 (1951), \textit{aff'd} 182 F.2d 375 (D.C. Cir. 1950).
\end{itemize}
\end{footnotesize}

Three cases decided in June 1959 involved the issue of confrontation: *Vitarelli v. Seaton*,\(^{385}\) *Greene v. McElroy*,\(^{386}\) and *Taylor v. McElroy*.\(^{387}\) All three cases involved security clearances of employees. Vitarelli was a federal employee, and Greene and Taylor were employees of private contractors with the Defense Department. In all three cases the lower courts ruled against confrontation. In all three cases the Supreme Court reversed; but once again, in two of the cases, it did not reach the issue, and in the third it said that it did not. In *Vitarelli* the Court rested its decision on the ground that the Secretary of the Interior had not followed his own regulations; and in *Taylor*, on mootness. (The Defense Department had notified all interested parties that the petitioner had been granted clearance.) In *Greene* the

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386. 360 U.S. 474 (1959), rev'g 254 F.2d 944 (D.C. Cir. 1958). In this case the Court of Appeals for the District of Columbia Circuit stated that the right to knowledge was not involved.
387. 254 F.2d at 949 n.9.

The American Civil Liberties Union in its brief before the Supreme Court, while claiming for the petitioner the right to cross-examine all persons who gave adverse information, nevertheless suggested as a minimum requirement (which would be dispositive of that case) confrontation at least as to the casual informant:

"The Industrial Personnel Security Program is in no way jeopardized when the Government is required to separate the professional or "undercover" agent from the casual informant having no legitimate reason for secrecy, affording confrontation and cross-examination of the latter. See, *Davis, The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, at 212–243, 333–34 (1956); *Donovan & Jones, Program for a Democratic Counter Attack to Communist Penetration of Government Service*, 58 YALE L.J. 1211, at 1234–35 (1959)."

Brief for American Civil Liberties Union as Amicus Curiae at 14, Greene v. McElroy, 360 U.S. 474 (1959).

387. 360 U.S. 709 (1959). In this case the Court granted certiorari in advance of the judgment of the Court of Appeals for the District of Columbia Circuit. For other employee cases where the Federal District Court in the District of Columbia denied confrontation, see *Coleman v. Brucker*, 156 F. Supp. 126 (D.D.C. 1957), rev'd and remanded on other grounds, 257 F.2d 661 (D.C. Cir. 1958); *Dressler v. Wilson*, 155 F. Supp. 373 (D.D.C. 1957). Both district court decisions were by Judge Alexander Holtzoff. In *Dressler*, Judge Holtzoff declared: "To be sure, he [petitioner] was not confronted with the witnesses against him, but as the Court has just stated, there is no constitutional requirement of confrontation with witnesses outside of the criminal courts." 155 F. Supp. at 376. In *Coleman*, he asserted: "In other words, procedural due process, in the opinion of this Court, obviously is inapplicable to removals of employees from the Government service." 156 F. Supp. at 128. In that case he not only ruled against confrontation, but also held that letters of notification which simply advised employees that their continued employment "would not be clearly consistent with the interests of national security" constituted findings under the applicable regulation. It was on the latter point that he was reversed.
Court held the procedures of the Defense Department to be unauthorized, but Chief Justice Warren in the Court's opinion further stated:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory action were under scrutiny. 388

During the course of the argument of this case, Chief Justice Warren said to counsel:

If my neighbor accuses me of anything else but this [that is, of being a bad security risk] that they are going to put me in jail or deprive me of my livelihood, I have a right to confront him. Why is this different? 389

The language in Chief Justice Warren's opinion led Justice Clark to feel that the Court had held that the due process clause of the fifth amendment required confrontation and an opportunity for cross-examination in security hearings:

While the Court disclaims deciding this constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy. Let us hope that the winds may change. If they do not the present temporary debacle will turn into a rout of our internal security. 389

The winds did blow in Justice Clark's direction for a time. In June two years later the Court, by a five to four vote, upheld the

388. 360 U.S. at 496-97 (1959).
Greene was before the Court again. This time the Court held that he was entitled to recover lost earnings, estimated by him at $49,960.41, from April 23, 1953, the date of his dismissal, to December 31, 1959. Greene v. United States, 376 U.S. 149 (1964).
390. 360 U.S. at 524 (1959) (Clark, J., dissenting).
security risk dismissal of Mrs. Rachel M. Brawner without notice and without a hearing.\footnote{391} She was an employee of a restaurant concessionaire at the United States Naval Gun Factory in the city of Washington. Justice Stewart, in the Court's opinion, wrote:

The Court has consistently recognized that an interest closely analogous to Rachel Brawner's, the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointment officer.\footnote{392}

Justice Brennan, in a dissenting opinion in which Chief Justice Warren and Justices Black and Douglas joined, answered:

In sum, the Court holds that petitioner has a right not to have her identification badge taken away for an "arbitrary" reason, but no right to be told in detail what the reason is, or to defend her own innocence, in order to show, perhaps, that the true reason for deprivation was one forbidden by the Constitution. That is an internal contradiction to which I cannot subscribe.\footnote{393}

The State Department claimed that it could make determinations with reference to the denial or issuance of passports without confrontation, and the courts never finally ruled against it. Federal district judges divided on the question. Judge Luther W. Youngdahl in \textit{Boudin v. Dulles},\footnote{394} ruled for confrontation. But Judge Joseph C. McGarraghy in \textit{Dayton v. Dulles},\footnote{395} reached a contrary conclusion and sustained a passport denial which was based in part on confidential information. The Court of Appeals for the District of Columbia Circuit did not find it necessary at this point to reach the question.\footnote{396} When \textit{Dayton} came before Judge McGarraghy a second time, he again ruled against confrontation.\footnote{397} This time the Court of Appeals did reach the issue and ruled similarly:

\begin{quote}
[T]he problem is whether disclosure would adversely affect our internal security or the conduct of our foreign affairs. The cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area. If he need not disclose the information he has, the only other course is for the courts to accept his assertion that disclosure
\end{quote}

\footnotesize{\begin{itemize}
\item \footnote{391}{Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).}
\item \footnote{392}{\textit{Id.} at 896.}
\item \footnote{393}{\textit{Id.} at 901.}
\item \footnote{394}{136 F. Supp. 218 (D.D.C. 1955).}
\item \footnote{395}{235 F.2d 43 (D.C. Cir. 1956) (no district court opinion).}
\item \footnote{396}{\textit{Id.} See also Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956).}
\item \footnote{397}{Dayton v. Dulles, 146 F. Supp. 876 (D.D.C. 1956).}
\end{itemize}}
would be detrimental in fields of highest importance entrusted to his exclusive care. We think we must follow that course. 398

This time the Supreme Court did not find it necessary to reach the question. 399

But the right of confrontation, as Chief Justice Warren indicated in the Court's opinion in *Greene v. McElroy*,400 should exist in any proceeding which involves a determination as to one's future status.401 Or as Justice Douglas put it in the Court's opinion in *Willner v. Committee on Character and Fitness*,402 where the Court held that an applicant for admission to the bar was entitled to confront and cross-examine those who had made charges against him:

We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. . . . 403

The Court's holding in *Willner* is certainly in contrast with its ruling against Mrs. Brawner.

In support of the right of confrontation in other than criminal cases, we have no less a protagonist than President Eisenhower himself. In an address to the B'nai B'rith Anti-Defamation League in Washington, D.C., in which he described Wild Bill Hickok's code in Abilene, Kansas, he said:

I was raised in a little town of which most of you have never heard. But in the West it is a famous place. It is called Abilene, Kansas. We had as our Marshal for a long time a man named Wild Bill Hickok. If you don't know anything about him, read your Westerns more. Now that town had a code, and I was raised as a boy to prize that code.

It was: meet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. If you met him face to face and took the same risks he did, you could get away with almost anything, as long as the bullet was in the front.

403. *Id.* at 103. After citing *Greene*, he continued:
That view has been taken by several state courts when it comes to procedural due process and the admission to practice law. Coleman v. Watts, 81 So. 2d 659; Application of Burke, 87 Ariz. 336, 351 P.2d 169; *In re* Crum, 103 Ore. 296, 204 P. 948; Moity v. Louisiana State Bar Ass'n, 239 La. 1081, 121 So. 2d 87. Cf. Brooks v. Laws, 208 F.2d 18, 33 (concurred opinion).
*Id.* at 103-04. *See also* *In re* Warren, 149 Conn. 266, 178 A.2d 528 (1962).
And today, although none of you has the great fortune, I think, of being from Abilene, Kansas, you live after all by the same code, in your ideals and in the respect you give to certain qualities. In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose.\textsuperscript{404}

And his advice was not entirely lost. Justices Frankfurter and Douglas in \textit{Jay v. Boyd},\textsuperscript{405} both quoted from his speech — in dissenting opinions. Justice Frankfurter said:

President Eisenhower has explained what is fundamental in any American Code. A code devised by the Attorney General for determining human rights cannot be less than Wild Bill Hickok's code in Abilene, Kansas. . . .\textsuperscript{406}

Justice Douglas added:

The statement that President Eisenhower made in 1953 on the American code of fair play is more than interesting Americana. As my Brother \textit{Frankfurter} says, it is Americana that is highly relevant to our present problem.\textsuperscript{407}

So far there has been but one strong decision in favor of confrontation in cases arising out of loyalty-security programs, that of \textit{Parker v. Lester}.\textsuperscript{408} In that case the Court of Appeals for the Ninth Circuit invalidated the Coast Guard's security procedure because it failed to provide for confrontation. The court based its decision on the due process clause of the fifth amendment. Judge Walter L. Pope of Montana, in the court's opinion, wrote:

But surely it is better that these agencies suffer some handicap than that the citizens of a freedom loving country shall be denied that which has always been considered their birthright. Indeed, it may well be that in the long run nothing but beneficial results will come from a lessening of such talebearing. . . . The objective of perpetuating a doubtful system of secret informers likely to bear upon the innocent as well as upon the guilty and carrying so high a degree of unfairness to the merchant seaman involved cannot justify an abandonment here of the ancient standards of due proc-

\textsuperscript{404} Address by President Eisenhower, November 23, 1953, on receiving America's Democratic Legacy Award at a dinner on the occasion of the fortieth anniversary of the Anti-Defamation League. U.S. President Press Release (Nov. 23, 1953).

\textsuperscript{405} 351 U.S. 345 (1956).

\textsuperscript{406} \textit{Id.} at 372.

\textsuperscript{407} \textit{Id.} at 374.

The Supreme Court's opinion in Greene; its earlier ruling in Cole v. Young that the government's security program, set up in President Eisenhower's Executive Order 10450 could not legally be applied to an employee in a non-sensitive position; the holding of the Court of Appeals for the Ninth Circuit in Parker v. Lester; and hearings by the Senate Subcommittee on Constitutional Rights resulted in much discussion of security questions, many recommendations for the reform of security procedures, and some reconsideration and revision of security programs. However, there has always been an exception to protect the secret informer.

The most widely hailed of the recommendations were in a comprehensive report of a special committee of the Association of the Bar of the City of New York. This report suggested that witnesses be subject to cross-examination, under subpoena if necessary, "unless the disclosure of the identity of the witness, or requiring him to submit to cross examination, would be injurious to national security." In other words there was to be confrontation unless the government decided, in the interest of secret informers, that there was not to be confrontation.

Justice Samuel H. Hofstadter of the New York Supreme Court criticized the special committee's retention of the exception in favor of secret informers, and suggested that in any case where they were used the hearing board should appoint a public advocate drawn from a panel of lawyers with security clearance. The public advocate would then cross-examine the secret witnesses — but in the absence of the accused and his private counsel. This was the farthest any proposal ever went toward the elimination of secret informers.

409. 227 F.2d at 720–21. Subsequently the courts ruled that the seamen were entitled to their sailing papers before rather than after a hearing which met due process requirements. Lester v. Parker, 233 F.2d 787 (9th Cir. 1956), aff'd 141 F. Supp. 519 (N.D. Cal. 1956). Thereafter the Court of Appeals denied a petition for rehearing. 237 F.2d 698 (9th Cir. 1956). But the United States Court of Claims held that a shipmaster to whom the Coast Guard refused to issue a certificate of loyalty while it had the procedure which the court condemned in Parker, did not have the basis for a claim against the United States which was within the class of cases cognizable in that court. Dupree v. United States, 141 F. Supp. 773 (Ct. Cl. 1956). Then the Court of Appeals for the Third Circuit, affirming the court below, ruled that the shipmaster could not make out a claim under the Federal Tort Claims Act either. Dupree v. United States, 264 F.2d 140 (3d Cir. 1959), and 247 F.2d 819 (3d Cir. 1957), aff'd 146 F. Supp. 1948 (E.D. Pa. 1956).


413. Id. at 16.

In 1964, Congress passed a bill\footnote{78 Stat. 1969 (1964), 50 U.S.C. § 833(a) (1964).} which gives the Secretary of Defense summary power to dismiss employees of the National Security Agency. The American Civil Liberties Union asked President Johnson to veto the measure because it gave the Secretary power to effectuate such dismissals without a hearing, without the right of cross-examination, without the right to have information against the employee revealed and without the right of appeal. Nevertheless, the bill became law.

A 1966 act of Congress,\footnote{80 Stat. 529 (1966), 5 U.S.C. § 7532(a), (b), and (c)(A) (Supp. V, 1970).} after defining “agency” to include the Departments of State, Commerce, Justice and Defense, a military department, the Coast Guard, the Atomic Energy Commission, the National Aeronautics and Space Administration, and any other governmental agency the President designated, provides that the head of the agency may suspend or remove an employee when “he determines that removal is necessary or advisable in the interests of national security.”\footnote{5 U.S.C. § 7532(b) (Supp. V, 1970).} An employee who has a permanent appointment is entitled after suspension and before removal to a written statement of the charges against him, but these charges need to be stated only “as specifically as security considerations permit.”\footnote{5 U.S.C. § 7532(c)(3)(A) (Supp. V, 1970).}

The provision applicable to a Selective Service registrant’s appearance before his local board even denies his right to counsel; but District Judge Robert F. Peckham in dismissing the indictment in United States v. Weller,\footnote{309 F. Supp. 50 (N.D. Cal. 1969), question of jurisdiction postponed to hearing of case on the merits, 397 U.S. 985 (1970). But in Scaggs v. Larsen, 423 F.2d 1224 (9th Cir.), cert. denied, 400 U.S. 930 (1970), the Ninth Circuit held that a member of the Army Ready Reserves could be declared delinquent and ordered to report for active duty without a hearing.} held that this provision was either unauthorized or unconstitutional. The Supreme Court heard argument in the case on December 10, 1970,\footnote{See 39 U.S.L.W. 3257 (U.S., Dec. 15, 1970).} but has made no decision as yet.

Lawyers for clients in administrative or executive adjudicatory hearings, no matter what type of proceeding, and no matter whether on a state or federal level, will insist on the right to counsel, to a hearing, and of confrontation and cross-examination as a matter of due process. Ultimately the point will generally prevail.

S. Right of Privacy.

One’s right of privacy, the right to be let alone, as Justice Brandeis described it in his dissenting opinion in Olmstead v. United

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Today finds recognition in a great variety of circumstances. The United States Supreme Court in *Mapp v. Ohio* the unlawful seizure case, spoke of the fourth amendment as including "the right to privacy." In *Griswold v. Connecticut*, involving Connecticut statutes against the practice of contraception, the Court referred to "a right of privacy older than the Bill of Rights." And in *Stanley v. Georgia*, it held that one's right of privacy included the right to have pornography in one's home.

In another interesting case, *York v. Story*, the Court of Appeals for the Ninth Circuit held that a complaint against police officers for taking and distributing photographs of the plaintiff in the nude stated a cause of action under the provision of the Federal Civil Rights Act, originally enacted in 1871. The plaintiff had gone to the police station to complain of an assault. The court found that the right of which the police officers had deprived her was her right of privacy under the fourteenth amendment's due process clause.

Moreover, in reaching its conclusion the court held that this clause was not tied to the specifics of the first eight amendments. Circuit Judge Hamley in the court's opinion reasoned:

"But granting all of that, must it still be held that the particular intrusions here alleged are not secured by the Due Process Clause of the Fourteenth Amendment because they are not proscribed in the Bill of Rights?"

"We think not. In the field of civil rights litigation the cases are not infrequent in which law enforcement action not banned in terms of any provision of the Bill of Rights has been made the subject of a successful claim."

The Supreme Judicial Court of Massachusetts in *Commonwealth v. Wiseman* enjoined the commercial distribution to general audiences of a film entitled *Titicut Follies*, a documentary of life in the Massachusetts Correctional Institution at Bridgewater for the criminally insane, on the ground that the showing of this film to general audiences infringed upon the right of privacy of the inmates.

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421. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Judge Cooley wrote: "The right to one's person may be said to be a right of complete immunity: to be let alone." T. COOLEY, LAW OF TORTS 29 (2d ed. 1888), quoted in Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891), and in part in Brandeis & Warren, The Right to Privacy, 4 Harv. L. Rev. 193, 195 (1890).
423. 381 U.S. 479 (1965).
424. 381 U.S. at 483.
426. 324 F.2d 480 (9th Cir. 1963).
428. 324 F.2d at 435-56.
The Supreme Court of Minnesota in Roberts v. Whitaker, 430 affirmed the quashing of a subpoena of an inquisitional state official because the breadth of the subpoena violated the subpoenaed individual's right of privacy.

In Babbitt v. McCann, 431 a federal district court in Wisconsin held that a woman's right of privacy included a right to an abortion when the embryo had not yet quickened.

The Community Action For Legal Services, Inc. brought a suit in a federal district court challenging the practice of the New York City Police Department of amassing unsubstantiated information about juveniles and then giving it to welfare authorities, the courts, and the schools. The complaint alleged that as a result of this practice

a sub rosa network of surveillance has arisen which invades the privacy of all plaintiffs, chills the freedom of expression of some, prejudices all when released to other agencies, and denies the most elementary standard of due process by failing to interpose either a magistrate, hearing, appeal mechanism or legal counsel between the accusing officer and a de facto adjudication of guilt. 432

The right of privacy began its development with an article by Justice Brandeis, before he reach the bench, and Samuel D. Warren, in the December 1890 issue of the Harvard Law Review. 433 Later Justice Brandeis, in his dissenting opinion in Olmstead v. United States 434 described the right to be let alone as "the most comprehensive of rights and the right most valued by civilized men." 435 Today the majority of our states recognize a right of privacy, and more are on their way to doing so. 436 One of the latest, New Hampshire, did so in Hamberger v. Eastman, 437 where the New Hampshire Supreme Court held a landlord liable to a pair of his tenants for surreptitiously installing a listening and recording device in their bedroom.

An interesting recent state case was the one which Ralph Nader won against the General Motors Corporation in the New York Court

434. 277 U.S. 438 (1929).
435. Id. at 478.
437. 106 N.H. 107, 206 A.2d 239 (1964). In a recent federal case, Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150 (5th Cir. 1965), the court held that lack of publication was not fatal to a suit against wire tappers for an invasion of the right of privacy accorded by Georgia law.
of Appeals, and subsequently settled for a large amount. The allegations of the complaint which the New York Court of Appeals found sufficient as a matter of law, charged, among other things that the defendants engaged in unauthorized wire tapping and eavesdropping by mechanical and electronic means.

Our insistence on the right of privacy for the individual comes at a time when there is the possibility of great inroads upon it by modern devices: Wire tapping; electronic surveillance; and, in our computer age, by centralized information systems and data banks on individuals. Recently it was reported that the United States Army had a spying operation known as Continental United States Intelligence, or Conus Intel, which spied on some 18,000 American civilians over a two-year period, from the tumultuous days of civil disturbances in the summer of 1967 through the fall of 1969. According to Senator Sam J. Ervin, Jr., a seventy-four-year-old former judge of the North Carolina Supreme Court, the spying was not just on radical groups such as the Weathermen and Black Panthers, not just on such liberal, antiwar public figures such as Mrs. Coretta King and Dr. Benjamin Spock, but on a list of 800 Illinois Democrats, including Senator Adlai E. Stevenson 3rd, Representative Abner J. Mikva, and Federal Judge Otto Kerner, a former Governor. The Army's intelligence material went into its computers.

The American Civil Liberties Union went into the federal district court in Chicago, Illinois, in order to obtain an order directing the Army to cease all surveillance of civilians and to destroy the records it had compiled on them. Judge Richard B. Austin, although characterizing the personnel of Conus Intel somewhat disparagingly as a "threatening, menacing assemblage of Keystone Cops," nevertheless denied relief. He thought, quoting one of Shakespeare's titles, that the case was "much ado about nothing."

A brief history of wire tapping can begin with the year 1924, when Chief Justice Stone as Attorney General, forbade wire tapping by the FBI as "unethical tactics." But in 1928 in Olmstead v. United States the Court in a five to four split allowed the use of wire tap evidence. Chief Justice Taft wrote the majority opinion. The dissenters were

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439.  See N.Y. Times, Jan. 18, 1971, at 1, cols. 1-4; at 22, cols. 1-5.

440.  See N.Y. Times, Dec. 27, 1970, at 1, cols. 6-8; at 44, col. 1.


442.  277 U.S. 438 (1928).
Justices Holmes, Brandeis, Butler and Stone. It was in this case that Justice Holmes, in dissent, characterized wire tapping as dirty business:

We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part. . . . If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed.443

Three years later Attorney General William Mitchell announced that the Department of Justice would approve wire tapping when requested by the director of the bureau concerned.444

But another three years later Congress sought to outlaw wire tapping in section 605 of the Federal Communications Act of 1934:

and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . .445

Despite the enactment of section 605 the Department of Justice continued to countenance wire tapping in criminal cases of "extreme importance," although not "in minor cases, nor on Members of Congress, or officials, or any citizen except where charge of a grave crime had been lodged against him."446

Two states under certain circumstances sanctioned wire tapping. Massachusetts by statute permitted it "when authorized by written permission of the attorney general of the commonwealth, or of the district attorney for the district."447 New York after an intense and prolonged debate in its constitutional convention of 1938 adopted a provision authorizing ex parte warrants to wire tap.448 A few years later a statute implemented this provision.449 Subsequently three more

443. Id. at 470.
446. 86 Cong. Rec. 1471-72 (statement of Attorney General Jackson, March 13, 1940).
448. N.Y. Const. art. 1, § 12, para. 2, provides in pertinent part:
449. N.Y. Comp. Crim. Proc. § 813-a (1942) (repealed). This section authorized any judge of the supreme court, a county court, or the court of general sessions of
states, Maryland, Oregon and Nevada, adopted statutes permitting wire tapping.\textsuperscript{450}

But the United States Supreme Court in three cases between 1937-1939 broadly enforced the prohibition in section 605. It refused to permit the use in a federal court of evidence so obtained,\textsuperscript{451} as well as leads from such evidence,\textsuperscript{452} and extended its rulings to wire taps of intrastate communications.\textsuperscript{453} The next year Attorney General Jackson announced a return to the Stone policy of 1924. He concluded that wire tapping could not be done unless Congress saw fit to modify the existing statutes. However, a year later he changed his mind about the proper interpretation of section 605. In March 1941 in a letter to the House Judiciary Committee urging the adoption of pending wire tap legislation he stated:

The only offense under the present law is to intercept any communication and divulge or publish the same. Any person, with no risk of penalty, may tap telephone wires . . . and act upon what he hears or make any use of it that does not involve divulging or publication.\textsuperscript{454}

In the following years wire tapping grew apace. Public officials, national, state and municipal, as well as private persons engaged in it, so much so that one writer concluded:

New York County to issue an \textit{ex parte} order for the interception of telephone or telegraph communications upon the oath or affirmation of any district attorney, the attorney general, or a police officer above the rank of sergeant that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

\textit{Id.}

The judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application.

\textit{Id.}

This statute was adopted in 1942.

The New York constitutional and statutory provisions providing for warrants to wire tap were held not to violate section 605 of the Federal Communications Act, 47 U.S.C. § 605 (1964). People v. Feld, 305 N.Y. 322, 113 N.E.2d 440 (1953); People v. Stemmer, 298 N.Y. 728, 83 N.E.2d 141 (1948); aff'd \textit{without opinion by an evenly divided court}, 336 U.S. 963 (1949); \textit{In re Harlem Check Cashing Corp. v. Bell}, 296 N.Y. 15, 68 N.E.2d 854 (1946). In \textit{In re} Interception of Tel. Comm., 207 Misc. 69, 136 N.Y.S.2d 612 (Sup. Ct. 1955), Justice Samuel H. Hofstadter, who had signed an order permitting wire tapping with "much misgiving" (207 Misc. at 70, 136 N.Y.S.2d at 613), refused to enter the order there requested.


\textsuperscript{451} Nardone v. United States, 302 U.S. 379 (1937).

\textsuperscript{452} Nardone v. United States, 308 U.S. 338 (1939).

\textsuperscript{453} Weiss v. United States, 308 U.S. 321 (1939).

\textsuperscript{454} \textit{Hearings on H.R. 2266 and H.R. 3099 Before Subcomm. No. 1 of the House Comm. on the Judiciary}, 77th Cong., 1st Sess. at 18 (1941).
For, despite the statutes and judicial decisions which purport to regulate wire tapping, today this practice flourishes as a wide-open operation at the federal, state, municipal, and private levels.

A wealth of collected information discloses that the conversations of public officials in every sort of government agency, bureau, and political subdivision have been tapped. Reports are legion that private citizens have had their conversations recorded. All kinds of business organization and social, professional, and political groups have been listed as victims. There are charges that wire tapping may be an essential part of the Federal Bureau of Investigation’s population-wide “loyalty” probe. And recently complaints have been made that telephones of United Nations delegates and employees are under surveillance, as well as the telephones of foreign embassies, legations, and missions in the United States.

In short, although wire tapping is a crime in almost every state, and although there is a federal law prohibiting the interception and divulging of the contents of telephone communications, wire tapping is carried on virtually unimpeded in the United States today.455

In July 1965, Internal Revenue Commissioner Sheldon S. Cohen and Attorney General Nicholas de B. Katzenbach both admitted before the Senate Judiciary Subcommittee on Administrative Practice and Procedure, headed by Senator Edward V. Long, Democrat of Missouri, that federal agents had used illegal wire tapping, hidden microphones and two-way mirrors in investigating suspected tax frauds. The Subcommittee, near the end of its hearings on governmental wire tapping, also turned up evidence of large-scale wire tapping by the FBI.456 However, it had no plans to investigate the FBI.

Moreover, during the time of Chief Justice Fred M. Vinson the judiciary weakened somewhat in its stand against the use of wire tap evidence in court proceedings. In Schwartz v. Texas,457 the Supreme Court sustained the use of such evidence in a state court proceeding even though the state, Texas, had a statutory provision which rendered inadmissible in criminal trials evidence obtained in violation of the

constitution or laws of the state or the Constitution of the United States. Only Justice Douglas dissented:

It is true that the prior decisions of the court point to affirmance. But those decisions reflect constructions of the Constitution which I think are erroneous. They impinge severely on the liberty of the individual and give the police the right to intrude into the privacy of any life. The practices they sanction have today acquired a momentum that is so ominous I cannot remain silent and bow to the precedents that sanction them.458

Three years later the United States Court of Military Appeals in three cases held that section 605 did not bar the use of wire tap evidence in courts-martial where it was obtained under these circumstances: (1) By interception of messages initiated and received on facilities operated by the Army independently of commercial telephone systems; (2) by interception of telephone messages initiated and received in foreign countries; and (3) by listening on an extension telephone, with an informer’s consent, to a conversation which the informer initiated with an accused person.459 The next year in Sugden v. United States,460 the Supreme Court held that the Government could tap radio communications broadcast over a licensed farm radio station by unlicensed operations.

Of course, private individuals who violated section 605 were indicted, convicted and sentenced.461 A similar thing happened to individuals in state prosecutions in Massachusetts and New York.462 The individual defendant in New York was John G. (Steve) Broady, who was a lawyer. After his conviction he was also disbarred. This constitutes but another of the instances, as in the case of capital punishment, where society permits itself conduct which it denies to the individual.

458. Id. at 205.
459. United States v. Noce, 5 U.S.C.M.A. 715, 19 C.M.R. 11 (1955); United States v. DeLeon, 5 U.S.C.M.A. 747, 19 C.M.R. 43 (1955); United States v. Gopalnsingh, 5 U.S.C.M.A. 772, 19 C.M.R. 68 (1955). But cf. United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952), where the court reversed a conviction for the double reason that the prosecution did not show in open court that none of the wire taps led to any of the evidence there involved, and that the defense was unduly prevented from learning whether the information which originally led to the tracking of her movements was itself the result of a wire tap.
460. 351 U.S. 916 (1956); aff’d per curiam 226 F.2d 281 (9th Cir. 1955).
461. Massicot v. United States, 254 F.2d 58 (5th Cir.), cert. denied, 358 U.S. 816 (1958); United States v. Gris, 247 F.2d 860 (2d Cir. 1957), aff’d 146 F. Supp. 293 (S.D.N.Y. 1956); cf. Frank v. United States, 347 F.2d 486 (D.C. Cir. 1965). In Ellkins v. United States, 364 U.S. 206 (1960), the charge was a violation of sections 605 and 501. In United States v. Fuller, 202 F. Supp. 356 (N.D. Cal. 1962), the court held that the first amendment did not bar a newspaperman’s prosecution under section 605 for unauthorized divulgence to a radio station of intercepted police and fire radio messages.
Although *Sugden* was decided during the time of Chief Justice Warren, the Court's stand against the use of wire tap evidence again became strong. In *Benanti v. United States*, the Court, speaking through Chief Justice Warren, held that wire tap evidence, even though procured by New York officials in accordance with that state's constitutional and statutory provisions and without participation by federal authorities, was nevertheless inadmissible in a federal criminal prosecution because of section 605. The Court concluded that, by virtue of preemption, section 605 was applicable to state officials even when in the performance of their official duties:

In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.  

Thus state officials who wire tapped and testified in a state case to what they heard violated section 605 and were guilty of a federal offense. The resulting situation was hardly to be borne. Under *Benanti*, state officials who testified in a state case to a wire tapped conversation committed a federal crime. But under *Schwartz* if a state court allowed the evidence to go in, the Federal Supreme Court would not upset the resulting conviction. A Bronx lawyer, Burton N. Pugach, who was indicted on the charge of throwing lye on his girl friend, sought to eliminate the confusion by proceeding against the state district attorney in the federal district court before his state prosecution came to trial and asking for an injunction against the use of illegal wire tap evidence or any evidence resulting from leads so obtained. The court denied a preliminary injunction, but the Court of Appeals for the Second Circuit by a two to one decision granted a stay pending the determination of the appeal. There were three opinions. Judge

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464. *Id.* at 105-06. In *United States v. Laughlin*, 223 F. Supp. 623 (D.D.C. 1963), the court dismissed a perjury indictment because it was based in part on wire tap evidence. Subsequently the defendant was indicted and convicted for trying to influence the actions of a material witness in a criminal case. But the Court of Appeals reversed on the ground of collateral estoppel. *Laughlin v. United States*, 344 F.2d 187 (D.C. Cir. 1965).

In *United States v. Guglielmo*, 245 F. Supp. 534 (N.D. Ill. 1965), the court held that section 605 precluded the United States from using against accused gamblers evidence obtained as a result of a pen register (the electronic equivalent of a mail cover) which the telephone company attached to their telephone line at the request of agents of the Internal Revenue Service. *But cf.* People v. Schneider, 45 Misc. 2d 680, 257 N.Y.S.2d 876 (Sup. Ct. N.Y. County 1965); Schmukler v. Ohio Bell Tel. Co., 116 N.E.2d 819 (C.F. Ohio 1953).

Medina voted to grant a stay on grounds that would lead equally to the grant of an injunction. Judge Waterman conurred in the grant solely to preserve the status quo lest the case become moot before the appeal could be decided. Judge Madden of the Court of Claims, sitting with the court by designation, dissented. Subsequently the court en banc, by a four to one decision, denied injunctive relief. Chief Judge Lumbard wrote the court's opinion, in which Judges Moore and Friendly joined. Judge Waterman wrote a concurring opinion and Judge Clark a dissenting one. However, the court granted another stay, this time to permit Pugach an opportunity to have the Federal Supreme Court rule.

In a proceeding of this kind one is confronted by Stefanelli v. Minard, 468 where the United States Supreme Court, while Wolf v. Colorado, 469 was still law, held that federal courts would not give equitable relief to prevent the fruits of an unlawful search from being used in evidence in a state criminal trial. The Court affirmed Pugach on the basis of Schwartz v. Texas and Stefanelli v. Minard. 470

But then in Mapp v. Ohio, 471 the Court overruled Wolf v. Colorado and held that illegally seized evidence by state officials was inadmissible in a state proceeding. Was evidence seized in violation of the Federal Constitution to be treated differently from evidence obtained by a violation of section 605 of the Federal Communications Act? The Federal Court of Appeals for the Second Circuit, following the Schwartz and the Pugach decisions, held that it was. 472 The court commented, however, that it was "unfortunate that Congress has not acted on the many proposals that have been made to deal with the wire tapping problem." 473 The Supreme Court denied certiorari in that case, as it did in state cases in New York and Pennsylvania which ruled that wire tap evidence was admissible in state criminal proceedings. 474

In four recent decisions, however, the Court has straightened out the constitutional muddle with reference to wire tapping and electronic surveillance. It held in Berger v. New York, 475 which involved a trespassory intrusion into a constitutionally protected area pursuant to a warrant issued under section 813-a of the New York Code of

473. 294 F.2d at 96.
Criminal Procedure, that the overbreadth of section 813-a violated the fourth and fourteenth amendments. Many who read Berger thought that it had overruled Olmstead v. United States, and held section 813-a to be unconstitutional. Justice Douglas in his concurring opinion in Berger stated that Berger overruled Olmstead sub silentio. However, in Kaiser v. New York, decided nearly two years later, the Court sanctioned the use of wire tap evidence in a state court proceeding. Justice Stewart in the Court's opinion stated that Berger did not overrule Olmstead; and added:

Furthermore, the Court in Berger found the overbreadth of N.Y. Code Crim. Proc. § 813-a repugnant to the Fourth Amendment only to the limited extent that it permitted a "trespassory intrusion into a constitutionally protected area." 

However, in between Berger and Kaiser, the Court did overrule Olmstead in Katz v. United States, where the Court held inadmissible telephone conversations obtained by means of an electronic listening and recording device attached to the outside of a public telephone booth. The Court in an opinion by Justice Stewart reasoned:

For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . .

In a fourth case, Lee v. Florida, the Court overruled Schwartz v. Texas, and held that wire tap evidence obtained by state officials in violation of section 605 of the Federal Communications Act of 1934, was inadmissible even in a state court proceeding. Justice Black dissented in three of the four cases, Berger v. New York, Katz v. United States, and Lee v. Florida, all but the one, Kaiser v. New York, where wire tap evidence was held admissible.

The constitutional picture is thus clear, and it is this: Wire tap evidence is inadmissible in either state or federal court trials unless it is obtained by a warrant procedure which meets the requirements of the fourth amendment.

477. 277 U.S. 438 (1928).
478. 388 U.S. at 64.
480. Id. at 282.
482. Id. at 351–52.
Proposals were perennially before Congress to amend section 605 to permit wire tapping. Finally the Omnibus Crime Control and Safe Streets Act of 1968 authorized court orders for eavesdropping by state as well as federal officials for various offenses.\(^484\) Thereafter Massachusetts and New York each enacted new legislation authorizing court orders for eavesdropping which followed the federal guidelines.\(^485\)

When the government engages in eavesdropping, counsel for the individual will make at least two inquiries: Does the order for the eavesdropping comply with the applicable statutory provisions; and does the eavesdropping itself meet the requirements of the fourth amendment.

In other governmental intrusions into areas which the individual feels should be free from such intrusion, counsel for the individual should consider going into court on a claim that there has been a violation of the due process clause of the fifth amendment in the case


In February 1971, Deputy Attorney General Richard G. Kleindienst told the House of Delegates of the American Bar Association at its mid-winter meeting in Chicago that under this legislation 253 orders for eavesdropping had been obtained, resulting in over 800 arrests and 72 convictions. See 39 U.S.L.W. 2450 (U.S., Feb. 16, 1971). The House of Delegates approved eavesdropping in limited situations.

In addition, the Omnibus Crime Control and Safe Streets Act of 1968, provides that nothing in the wire tapping chapter of the act or in section 605 of the Communications Act of 1934 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. . . . [or] . . . 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.


In Katz v. United States, 389 U.S. 347, 358 n.23 (1967), Justice Stewart in the last footnote to the Court's opinion wrote:

Whether safeguards other than prior authorization by a magistrate would satisfy the fourth amendment in a situation involving the national security is a question not presented by this case.

In the same case, Justice White concluded his concurring opinion with this sentence:

We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

of federal action, and of the fourteenth, in the case of state action. For instance, in *Buchanan v. Batchelor*, where a male who committed homosexual acts in public restrooms, was challenging the constitutionality of the Texas sodomy statute, a married couple and a male, who practiced sodomy in private, intervened to challenge the same statute on behalf of themselves and others similarly situated. A federal three-judge court held the statute unconstitutional for overbreadth. Judge Hughes wrote for the Court:

Sodomy is not an act which has the approval of the majority of the people. In fact such conduct is probably offensive to the vast majority, but such opinion is not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct. Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation.

In case of unenumerated rights, such as that of privacy, counsel for the individual will rely on the ninth amendment as well as the due process clause of the fifth, or fourteenth amendment, as the case may be, particularly in the light of Justice Goldberg's concurring opinion in *Griswold v. Connecticut*. However, the ninth amendment is little more than a reminder that the individual has unenumerated rights. In any event, even Justice Black has never contended that the due process clause of the fourteenth amendment made the ninth amendment applicable to the states.

**T. Right To Know.**

Recently in *The New York Times Magazine*, Senator Stuart Symington, Democrat of Missouri, who has been a member of the United States Senate since 1952, wrote an article entitled *Congress's Right to Know*. In it he began:

Executive secrecy surrounding the conduct of our foreign policy and its associated military operations is, I am convinced, endangering not only the welfare and prosperity of the United States but also, and most significantly, the national security.

In *Lamont v. Postmaster General*, the Court struck down a federal statute which required the Post Office Department to detain and destroy unsealed mail from foreign countries determined to be

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487. 308 F. Supp. at 733.
488. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring opinion).
490. 381 U.S. 301 (1965).


Communist political propaganda unless the addressee returned a reply
card requesting the detained item. The act which the Court invalidated
was the result of more than a decade of history. For over eleven
years, from 1950 until March 17, 1961, when President Kennedy
ended the practice, the Post Office Department seized books, magazines
and other non-first-class mail entering the United States from Com-
munist countries. About 15,000,000 pieces a year were intercepted.
Until 1958 the Post Office did not even inform addressees that their
mail was being withheld. Then it began to advise them that they could
get the "foreign political propaganda" addressed to them if they
returned a card saying they wanted it. When the President ended this
practice, Senator Styles Bridges of New Hampshire and Representative
Francis E. Walter of Pennsylvania objected. Congressman Walter
immediately introduced a bill for the creation of a "controller of foreign
propaganda" in the Customs Service. In 1962 Congress did pass an
act which adopted substantially the Post Office Department's practice
as it existed after 1958.491 It was this act which the Court in Lamont
held violative of the first amendment. The Court through Justice
Douglas reasoned:

We conclude that the Act as construed and applied is unconstitu-
tional because it requires an official act (viz. returning the reply
card) as a limitation on the unfettered exercise of the addressee's
First Amendment rights. . .

. . . .

The regime of this Act is at war with the "uninhibited, robust,
and wide-open" debate and discussion that are contemplated by
the First Amendment. . .492

Justice Brennan based his concurring opinion in which Justice Goldberg
joined and which Justice Harlan supported, on the right to receive
the publication in question.

Although Senator Symington's article is not directly in point,
it and Lamont suggest that an individual has a due process right
to know what is going on in the world about him as well as a due
process right to knowledge generally. As long ago as 1923 the Court
recognized the right to knowledge as part of the fourteenth amend-
ment's due process clause in Meyer v. Nebraska,493 where the Court
struck down a Nebraska statute which forbade the teaching in grade
schools of any language other than English.

492. 381 U.S. at 305, 307.
493. 262 U.S. 390 (1923).
However in today's world an individual knows less and less about what his government is doing or why. Congressman John E. Moss of California, chairman of the Special Subcommittee on Government Information, has tried to do something about the situation by the investigations of his subcommittee into official secrecy. This secrecy, sometimes to hide mistakes and sometimes even for political reasons, has continued to the present time.

This subcommittee prepared a report in which it concluded:
Slowly, almost imperceptibly, a paper curtain has descended over the Federal Government. Behind this curtain lies an attitude novel to democratic government — an attitude which says that we, the officials, not you, the people, will determine how much you are to be told about your own Government.

The paper curtain, now many layers thick, is not the fault of any one administration or any one party. It has developed over a 30-year period. And it began with the very "bigness" of Federal Government that is accepted today by the leadership of both political parties . . .

Unfortunately, there has existed and still does exist in high governmental and military circles a strange psychosis that the Government's business is not the people's business. . . . This psychosis persists to the point where some Government officials decide what is good for the public to know.494

The subcommittee noted as one of "the most ominous developments" an effort to extend government control over non-security information which was not eligible for classification.495 It further found that the information policies and practices of the Defense Department were

the most restrictive — and at the same time the most confused — of any major branch of the Federal Government. . . . The Defense Department and its component branches are classifying documents at such a rate that the Pentagon may some day become no more than a huge storage bin protected by triple-combination safes and a few security guards.496

During the course of the hearings which the subcommittee conducted, Trevor Gardner, former Assistant Secretary of the Air Force for Research and Development, related an incident which epitomized

495. Id. at 83.
496. Id. at 88-89.
what has happened. He told of the case of a scientist of international reputation who had his clearance withdrawn, but who had such inventive ability that he kept coming up with secret and top secret ideas. The Air Force solved the problem by giving him an unclassified contract. However, as soon as he produced interesting results, they classified the results and he no longer had access to them.\textsuperscript{497}

The problem of official secrecy reached such proportions that two leading newspapermen published books on it in 1956: Kent Cooper, \textit{The Right to Know}; and James Russell Wiggins, \textit{Freedom or Secrecy?} Cooper was formerly executive director of \textit{The Associated Press}, and Wiggins was executive editor of the \textit{Washington Post} and \textit{Times-Herald}. Cooper had written his book some years earlier. In a newly written forward he said:

Practically all of this book was written five years ago. At that time and earlier a trend in the withholding of news was discernible. I decided to defer publication for a few years to see if within that time the government of this free country would reverse the trend.

It has not done so. Instead, in its treatment of news it is in some respect slowly pressing toward the totalitarian pattern. It is doing so, in my opinion, with no intention of contravening a canon of liberty and without realizing that it was the antithesis of this practice that helped to make this nation great.\textsuperscript{498}

Wiggins had earlier criticized the “ominous” secrecy prevalent in the Defense Department and the National Security Council.\textsuperscript{499} Under one of Secretary Wilson’s directives, advising defense project contractors to release no information that might be of “possible value to a potential enemy,” the military could encourage management to suppress the release even of certain unclassified economic information.

The Federal Bar Association devoted the January 1959 issue of its Journal to the subject, \textit{Executive Privilege: Public’s Right to Know and Public Interest}, with an introduction by Congressman Moss and articles by Mr. Wiggins and Senator Thomas C. Hennings, Jr., of Missouri, among others.\textsuperscript{500} Senator Hennings’ article was also inserted in the \textit{Congressional Record}, on the request of then Senator Lyndon B. Johnson of Texas, the Senate leader.\textsuperscript{501} Senator Clinton P. Anderson of New Mexico, chairman of the Joint Committee on

\textsuperscript{497} \textit{Id.} at 40–41.
\textsuperscript{498} \textit{Cooper, The Right To Know} xii (1956).
\textsuperscript{499} \textit{See} N.Y. Times, Nov. 8, 1955, at 25, col. 1.
\textsuperscript{500} 19 \textit{Fed. B.J.} 1 (1959).
Atomic Energy wrote an article in The New York Times Magazine entitled 'Top Secret' — But Should It Be?\(^\text{502}\)

During the 1960 presidential campaign the United States Information Agency turned down a request from Congressman Moss' subcommittee for information on polls conducted abroad about attitudes toward the United States. This information would have refuted Vice President Nixon's claims that our prestige abroad was at "an all-time high," and supported President Kennedy's contentions that it had declined. George V. Allen, the Agency's director, refused even to say what authority decided not to release the polls. Congressman Moss commented:

If the U.S.I.A. reports were favorable to the Administration, I am sure the Republican publicity agents would be shouting from the rooftops. Obviously the reports confirm fears of slipping United States prestige abroad. And they are being hidden to keep the public from learning the facts before election time.\(^\text{503}\)

At election time the Pentagon attempted to suppress two embarrassing studies: One on the air-raid warning system; and the other comparing economic growth rates of the United States and the Soviet Union.\(^\text{504}\)

In a previous year the Defense Department refused to tell Congressman Moss' subcommittee why it applied security clearance procedures to a review of a book by a Civil War general.\(^\text{505}\) In two further instances, one involving the Agricultural Department and the other the Internal Revenue Service, the government made a secret even of its authority to impose secrecy.\(^\text{506}\) Scholars engaged in government contract studies complained that they were prevented from publishing articles in commercial magazines and scholarly journals and books in which they questioned policies of the administration.\(^\text{507}\) The Hoover Commission for an interval was denied some of its own reports because Secretary of State Dulles had stamped them secret.\(^\text{508}\)

On one occasion our government asked West Germany and the Netherlands to keep secret the relatively cheap method of producing fissionable material developed by a team of West German scientists.

\(^{502}\) N.Y. Times, May 3, 1959, § 6 (Magazine), at 14.


\(^{504}\) N.Y. Times, July 30, 1961, at 38, cols. 5–6.

\(^{505}\) N.Y. Times, Sept. 13, 1957, at 4, cols. 4–6.

\(^{506}\) N.Y. Times, Oct. 23, 1959, at 17, col. 3; Nov. 11, 1959, at 23, col. 3.

\(^{507}\) N.Y. Times, Apr. 18, 1960, at 15, col. 1.

\(^{508}\) N.Y. Times, March 27, 1958, at 27, cols. 4–5.
The West German government said that it would classify the method as a state secret. The new process was based on the use of a centrifuge to separate isotopes for the manufacture of uranium 235. News of the method gave rise to fears that it might enable smaller nations to produce less costly atomic bombs.

In November 1962 Congressman Moss in a speech prepared for the California Press Association conference in San Francisco stated that President Kennedy had taken control of the management of government news in a manner that was “unique in peacetime.” He criticized the restrictions imposed on covering underground nuclear tests in Nevada, secrecy about all military space activities, a blackout in information about Soviet satellite efforts, and the way in which the government laid down news guidelines during the Cuban crisis.

The preceding month Arthur Sylvester, Assistant Secretary of Defense for Public Affairs, defended lying to the nation. He contended that it was the inherent right of a government “to lie to save itself.”

In the same year Clark R. Mollenhoff, a Washington correspondent for The Des Moines Register and Tribune, and other Cowles publications, in his book Washington Cover-Up urged: “A wise citizen should be as outraged at arbitrary secrecy as he would be at arbitrary imprisonment.”

However, in the area of official secrecy, relief will usually have to come from the legislative and executive branches rather than the courts; and there has been a small amount of amelioratory legislation, beginning this time on a state level. In 1955 Ohio enacted a law which requires all meetings of local government boards, commissions and agencies to be open to the public. Some of Ohio’s local governing bodies had found the federal government’s practice of official secrecy

509. N.Y. Times, Oct. 12, 1960, at 1, col. 6; Oct. 13, 1960, at 18, col. 4. In Halpern v. United States, 258 F.2d 36, 44 (2d Cir. 1958), arising under the Invention Secrecy Act of 1951, the court held:

We conclude that the district court has jurisdiction to entertain the action during the pendency of the secrecy order, and we further conclude that a trial in camera in which the privilege relating to state secrets may not be availed of by the United States is permissible, if, in the judgment of the district court, such a trial can be carried out without substantial risk that secret information will be publicly divulged.

The plaintiff, Dr. Otto Halpern, Columbia University physicist, later made a settlement out of court for $340,000. The first trial under the Invention Secrecy Act of 1951 was in Farrand Optical Co. v. United States, 175 F. Supp. 235 (S.D.N.Y. 1959). This case involving bombsights, was won by the patent owner.

Generally, however, courts should operate on the principle that what “transpires in the court room is public property,” Craig v. Harney, 331 U.S. 367, 374 (1947). In New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 163 N.Y.S.2d 409, 143 N.E.2d 409 (1957), the court ruled that a newspaper was entitled to a transcript of a trial judge’s charge to the jury in a criminal case which had been concluded.


too tempting to resist. In 1957 California, Connecticut, Illinois and Pennsylvania adopted similar legislation.\textsuperscript{514} California enacted a total of sixty-six separate statutes providing for open meetings of various governing bodies. Such laws came to be known as right-to-know laws.\textsuperscript{515} Then the following year, as a result of the labors of Congressman Moss and his Subcommittee, the federal government itself adopted a so-called anti-secrecy law. This act was in the form of a one-sentence addition to section twenty-two of title 5 of the Code.\textsuperscript{516} This section was derived from a number of acts, including a series of four enacted in 1789.\textsuperscript{517} The four acts of 1789 simply gave the Secretaries of State, War, and the Treasury custody of the records of their departments. Section 22, among other things, simply authorized the heads of departments “to prescribe regulations, not inconsistent with law, for . . . the custody, use, and preservation of”\textsuperscript{518} records. The one-sentence addition provides: “This section does not authorize withholding information from the public or limiting the availability of records to the public.”\textsuperscript{519}

With reference to the passage of this measure Congressman Moss wrote:

Each of the ten Cabinet departments opposed this amendment. The reasons ranged from the attitude that the law had been on the books for 168 years and therefore should not be changed, to the contention that the amendment was unclear.

Passage of the amendment is merely a first, timid step toward eradicating unnecessary Government secrecy. The new legislation merely eliminates one glaring violation of the right to know.\textsuperscript{520}

As Congressman Moss indicated, despite this legislation most of the current restrictions on an individual’s right to know remain.

Subsequently Congress enacted the Freedom of Information Act,\textsuperscript{521} whose primary purpose was to make available to American citizens the identifiable records of federal, executive, and administrative

\begin{itemize}
  \item \textsuperscript{515} Recently the Florida Supreme Court in Miami Beach v. Berns, 39 U.S.L.W. 2242 (Fla., Oct. 7, 1970), held that the Florida act barred a city council from holding closed “executive sessions” which it considered public matters.
  \item \textsuperscript{516} 72 Stat. 547, 5 U.S.C. § 22 (1964).
  \item \textsuperscript{517} Act of July 27, 1789, ch. 4, § 4, 1 Stat. 28; Act of Aug. 7, 1798, ch. 7, § 4, 1 Stat. 49; Act of Sept. 2, 1789, ch. 12, 1 Stat. 65; Act of Sept. 15, 1789, ch. 14, § 7, 1 Stat. 68.
  \item \textsuperscript{518} 72 Stat. 547, 5 U.S.C. § 22 (1964).
  \item \textsuperscript{519} Id.
  \item \textsuperscript{520} N.Y. Times, Aug. 17, 1958, at 66, col. 1.
\end{itemize}
agencies. The courts have given some relief under this Act. In a recent case, Wellford v. Hardin, the plaintiff, a nonparty, sought copies of letters of warning sent by the Compliance and Evaluation staff of the Consumer Marketing Service to non-federally inspected meat or poultry processors suspected by the staff of engaging in interstate commerce and information with respect to detention of meat and poultry products. The court held that these letters were identifiable records under the Freedom of Information Act, and that the Department of Agriculture had to disclose them.

U. Right To An Education

We have reached the point in this country where an individual may fairly contend that he has a due process right to a public education, at least through high school. This comment is relevant to the Court's recent decision in Griffin v. School Board, which involved the question whether the school board of Prince Edward County, Virginia, could close that county's public schools in order to avoid integration. Elsewhere in Virginia, public schools remained open. The Court agreed with District Judge Oren R. Lewis that, under the circumstances here, closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment.

A comparable case, Hall v. St. Helena Parish School Board, before a three-judge federal court in New Orleans, involved the


Section 552(b)(1) of the Freedom of Information Act contains the usual exception for matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." For a case under this provision, see Epstein v. Resor, 421 F.2d 930 (9th Cir.), cert. denied, 398 U.S. 965 (1970). The plaintiff, Julius Epstein, a research associate at Stanford University's Hoover Institution on War, Revolution and Peace, is doing a book on the forced repatriation of anti-Communist Russians after World War II. He, therefore, wants to examine an Army file designated "Forcible Repatriation of Displaced Soviet Citizens — Operation Keelhaul." He has not yet obtained it. See J. Epstein, A Case for Suppression, N.Y. Times, Dec. 18, 1970, at 39, cols. 6-8.

In Soucie v. DuBridge, 39 U.S.L.W. 2123 (D.D.C., Aug. 8, 1970), the court held that the doctrine of executive privilege barred a federal court's jurisdiction over conservationists' suit to compel disclosure of a report of the Office of Science and Technology on supersonic transport planes.


524. 377 U.S. 218 (1964), rev'd 322 F.2d 332 (4th Cir. 1963), and aff'd 207 F. Supp. 349 (E.D. Va. 1962). This school board was one of the four bodies involved in the Court's decisions in Brown v. Board of Educ., 347 U.S. 483 (1954), which outlawed segregation in the public schools.

525. 377 U.S. at 225.

validity of a 1961 Louisiana law which permitted the citizens of school districts that were faced with desegregation orders to vote to abandon public schools. The judges in an unusual move asked the attorneys general of the fifty states to submit amici curiae briefs outlining their views in the case, including the duties of a state to establish and maintain public education. However, the court struck down the Louisiana law without reaching the point, saying in the last paragraph of its opinion: “This is not the moment in history for a state to experiment with ignorance.”

Nevertheless, whenever it becomes necessary to call upon the due process clause of the fourteenth amendment to sustain the claim of a right to a public education, this clause will not be found wanting. In an interesting recent case, Money v. Swank, a welfare recipient contended that the regulation of the Illinois Department of Public Aid which provided welfare aid recipients who attended vocational schools with education allowances, but denied such allowances for those attending college, deprived her of her due process and equal protection rights under the fourteenth amendment. Although the Seventh Circuit could find no substantial federal constitutional question involved, the mother's claim points in the direction of the future.

V. Public Accommodations.

The right to public accommodations is another area where one will see Justice Black from time to time in dissent. Those who stressed the due process ground in decisions in this area were Justices Douglas and Goldberg.

They are right in their insistence on due process. In today's world it is violative of due process for one who offers public accommodations to discriminate or segregate on account of race, creed or color.

The question came before the Supreme Court in two kinds of cases: Sit-in cases, of which there were thousands in Southern courts; and cases challenging the validity of the Civil Rights Act of 1964. One section of this act prohibits discrimination, by refusal of service or segregation, in hotels, motels, restaurants, gasoline stations, theaters and sports arenas.

The leading sit-in cases were Bell v. Maryland, and Griffin v. Maryland. The Court there reversed convictions, but on other

527. 197 F. Supp. at 659.
528. 432 F.2d 1140 (7th Cir. 1970).
than due process grounds. Justice Douglas concurred in the reversal in both cases on the due process ground. Justice Goldberg did so in Bell. He began with the Declaration of Independence, and concluded:

This history and the purposes of the Fourteenth Amendment compel the conclusion that the right to be served in places of public accommodation regardless of color cannot constitutionally be subordinated to the proprietor's interest in discriminatorily refusing service. 531

Justice Black in a dissenting opinion, in which Justices Harlan and White joined, took the opposite view:

We do not believe that Section 1 of the Fourteenth Amendment was written or designed to interfere with a storekeeper's right to choose his customers or with a property owner's right to choose his social or business associates, so long as he does not run counter to valid state or federal regulation. 532

The leading cases under the Civil Rights Act of 1964 were Heart of Atlanta Motel, Inc. v. United States 533 and Katzenbach v. McClung. 534 The Court sustained the act under "the Commerce Clause of the Constitution, as interpreted by this Court for 140 years." 535 The decision was unanimous. However, Justices Douglas and Goldberg in separate concurring opinions relied on the fourteenth amendment as well. This fact made it easy for them to dispose of pending sit-in convictions, even though the convictions occurred before the passage of the act.

The Court held as a matter of legislative interpretation that the act abated existing sit-in prosecutions. Here the leading cases were Hamm v. Rock Hill and Lupper v. Arkansas. 536 Justice Black was again in dissent. So were Justices Harlan, Stewart and White. Justice Black not only could find no legislative intent to abate pending prosecutions, but also felt that Congress lacked the power to do so: "The idea that Congress has power to accomplish such a result has no precedent, so far as I know, in the nearly 200 years that Congress has been in existence." 537

531. Id. at 315.
532. Id. at 343.
535. Id. at 261.
537. 379 U.S. at 318.
If one's client has a grievance with reference to public accommodations, one should first look to see if there are applicable statutes, either new or old. For instance, in *Jones v. Mayer Co.*, the respondents refused to sell the petitioner a home for the sole reason that petitioner Joseph Lee Jones was a Negro. The Court held that a provision of the Civil Rights Act of 1866, now section 1982 of title 42 of the United States Code, "bars all racial discrimination, private as well as public, in the sale or rental of property." Recently a federal district court in Florida ordered a cemetery in Fort Pierce to accept for burial the body of a black Vietnam veteran, Army Specialist 4 Pondexter E. Williams, whose coffin had been turned away because a charter provision had restricted the cemetery to whites.

But if there are no applicable statutory provisions one must rely on the due process clauses. Under the due process approach of Justices Douglas and Goldberg, courts can conceivably even recognize, in addition, a common law right of action in favor of those who suffer discrimination and against those who discriminate, although this will have to be done on a state level. The courts can do this in the same way that they created a right of action for invasions of privacy.

There are even suggestive cases, *Rudder v. United States* and *Bachrach v. 1001 Tenants Corp.*, and *Williams v. Joyce*. *Rudder* arose under the harsh Gwinn Amendment (named after representative Ralph W. Gwinn of New York), passed in 1952 and amended the following year, which forbade any housing unit constructed under the United States Housing Act of 1937 to be occupied by anyone "who is a member of an organization designated as subversive by the Attorney General." Despite this provision, the Court of Appeals for the District of Columbia Circuit held that the refusal on the part of tenants to sign a so-called certification of non-membership in subversive organizations, which asked the tenants to certify that they were not

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539. Id. at 413.

It strikes me that the carrying of racial discrimination into the burial grounds is a particularly stupid form of human arrogance and intolerance. If life does not do so, the universal fellowship of death should teach humility.

130 Cal. App. 2d at 330, 278 P.2d at 946.
members of any of the organizations on the attorney general's list, was not ground for eviction from a government housing project. Chief Judge Edgerton speaking for the court said:

The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.540

In Bachrach the complaint alleged a wilful denial of consent to the purchase of an apartment because the plaintiffs were members of the Jewish faith. The trial judge sustained the complaint on the ground that it stated a "prima facie tort." But the Appellate Division reversed on the ground that the New York City Administrative Code gave the plaintiffs no private or individual remedy in an action for damages.547 The courts overlooked the fact that they can create a new private due process right and enforce it by a common law cause of action against one who offers public accommodations and then discriminates.

By way of contrast, the Oregon reviewing court in Williams ruled that a black person who was refused a house lease because of his color was entitled to humiliation damages.

W. Long Hair and Dress.

Many individuals today do not conform in the matter of their dress, the length of their hair, and general appearance. Things have reached a point, to the distress of many, that it is sometimes impossible to tell a male from a female, or a nonpregnant woman from a pregnant one. However, there is no more distinctive way to express oneself than in one's dress and hair style.

Counsel representing such a nonconforming individual will make the point that his client has the due process right to look and dress as he pleases. There have been many such cases in the federal district courts. As the Ninth Circuit noted in King v. Saddleback Junior College District:548 "The number of District Court cases dealing with the problem is becoming epidemic." Or as Federal District Judge Philip C. Wilkins wrote in Jeffers v. Yuba City Unified School Dist.549 "No less than thirty 'haircut' opinions from district, circuit and state courts have been brought to the attention of the Court."

546. 226 F.2d at 53.
547. 21 App. Div. 2d 662, 249 N.Y.S.2d 855 (1st Dep't 1964).
548. 425 F.2d 426, 428 n.2 (9th Cir. 1970).
The Supreme Court has not yet dealt with the problem, but in *Tinker v. Des Moines School District*, where the Court ruled that the wearing of arm bands for the purpose of expressing ideas was akin to speech and thus entitled to first amendment protection, the Court took occasion to point out: "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment." United States Courts of Appeals and federal district courts have gone various ways on the question.

In *Breen v. Kahl*, the Seventh Circuit held that a school dress code regulating the length of students' hair violated the due process clause of the fourteenth amendment, saying:

The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution. . . . Whether this right is designated as within the "penumbras" of the first amendment freedom of speech, . . . or as encompassed within the ninth amendment as an "additional fundamental right[s] . . . which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments" . . . it clearly exists and is applicable to the states through the due process clause of the fourteenth amendment.

The First Circuit reasoned similarly in *Richards v. Thurston*, in an opinion by Circuit Judge Frank M. Coffin:

[W]e believe that the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests. . .

. . . .

We conclude that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes. . .

Federal District Judge Hugh H. Bownes used Circuit Judge Coffin's opinion as the basis for his ruling in *Bannister v. Paradies*, on behalf

551. 393 U.S. at 507-08.
553. Id. at 1036.
554. 424 F.2d 1281 (1st Cir. 1970).
555. Id. at 1284, 1285.
of a junior high school student, "that the prohibition against wearing dungarees is unconstitutional and invalid."

In Creuts v. Cloves,557 the school authorities contended that males should have short hair for health and safety reasons. The Seventh Circuit responded that the "defendants have offered no reasons why health and safety objectives are not equally applicable to high school girls."

However, there is a considerable body of authority to the contrary.558 Also, members of the armed forces and those in custody have not fared well in contesting regulations governing hair styles.

X. Use of Marijuana.

It may be that one has a client who wants to use marijuana. If so, counsel should contend that just as an individual under Stanley v. Georgia,562 has a due process right to have pornography in his home, so he has a due process right to smoke marijuana there. The point was raised but it lost in People v. Perkins.563 It should be raised again.

557. 432 F.2d 1259 (7th Cir. 1970).


Even in the Soviet Union, First Deputy Prosecutor General Mikhail P. Malyarov, took the position that shaggy haired young males, no matter how awful they looked, were not breaking any law and should not be arrested. See N.Y. Times, Jan. 8, 1971, at I, col. 4.


V. Environment and Pollution.

Professor E. F. Roberts of the Cornell Law School urges conservationists to plead the ninth amendment. What he means of course is that individuals have an unenumerated right under the ninth amendment to a decent environment. If they have this right, they would have it even if there were no ninth amendment. However, in the case of federal action, counsel should cite the ninth amendment as a reminder that individuals do have unenumerated rights.

There has been a flood of legislation as well as litigation in this area. On a federal level in recent years there have been a Clean Air Act, a Clean Air Act Amendment of 1966, a Clean Air Amendments of 1970, a Clean Water Restoration Act of 1966, and a Water Quality Improvement Act of 1970.

In 1970, President Nixon set up a new Federal Environmental Protection Agency. In February 1971, he sent to Congress an eighteen-page message which called for new initiatives to regulate noise, surface and underground mining, power plant sites, ocean dumping and pesticides, as part of a comprehensive environmental program for 1971. Discussing his message, he said it was time for all Americans to dedicate themselves to a decade of restoring the environment and reclaiming the earth. He quoted three lines from T. S. Eliot, *Murder in the Cathedral*: "Clean the air. Clean the sky. Wash the wind." On a state level, Illinois has a new Constitution, to take effect July 1, 1971, which contains a section giving private citizens the authority to initiate legal proceedings to enforce their "right to a healthful environment."

On an international level, the United Nations Secretariat is preparing for a World Conference on the Human Environment, to be held in Stockholm in 1972. A group in New York in January 1971, announced the establishment of the International Institute for Environmental Affairs with a charter providing for an international board of directors and an international staff. The Institute is to be a non-profit service organization designed to assist a network of agencies throughout the world that are concerned with environmental policies and action.

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568. 80 Stat. 1246 (1966) (codified in scattered sections of 33 U.S.C.) (repealed or transferred to other sections).
571. See N.Y. Times, Jan. 10, 1971, at 52, cols. 4-6.
Counsel for conservationists should first look for relevant legislation, either federal or state, but if it is not there they should insist that their clients have a due process right to a decent environment. In 1970 and 1971, the Practicing Law Institute conducted workshops in New York, Florida and Texas, on pollution litigation and legal control on the environment. The workshops were overscribed. Increasing numbers of lawyers are describing themselves as environmental lawyers.

A leading conservation case is *Scenic Hudson Preservation Conference v. Federal Power Commission*. There the Federal Power Commission licensed the Consolidated Edison Company of New York to construct a pumped-storage, hydroelectric reservoir near Storm King Mountain, one of the most scenic sights along the Hudson River. The Second Circuit told the Federal Power Commission to reconsider, this time taking into account the conservation of the environment. Circuit Judge Paul R. Hays, writing for the court said in one sentence of his opinion:

The Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered.

The court rested its decision on the ground that the Federal Power Commission had not followed the provisions of the act which had created it; but counsel should have as an additional point the claim that individuals have a right to a decent environment.

Two interesting recent decisions by the District of Columbia Circuit involved the regulation of the use of DDT. In *Environmental Defense Fund, Inc. v. Hardin*, the District of Columbia Circuit held that a coalition of five environmental groups, the Environmental Defense Fund, Inc., the National Audubon Society, Inc., the Sierra Club, the West Michigan Environmental Action Council, and the Izaak Walton League of America, had standing to challenge a determination by Secretary of Agriculture Clifford M. Hardin which, in part, failed to take action pursuant to their petition seeking to restrict the use of DDT. Secretary Hardin had taken no action against the DDT sprayed on cotton plants, which accounts for 75% of the pesticide's agricultural use. In *Environmental Defense Fund, Inc. v. Dep't

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574. 428 F.2d 1093 (D.C. Cir. 1970).
of Health, Education and Welfare,\textsuperscript{575} the District of Columbia Circuit ordered Secretary Robert H. Finch to publish in the Federal Register a proposal of petitioners to establish a zero tolerance for DDT residues in or on raw agricultural commodities, thus commencing the appropriate administrative procedures to determine the serious questions on human health by the continued use of DDT.

Suits to protect the environment have been increasing. They have been brought by various parties, and have occurred at various levels. In \textit{Ohio v. Wyandotte Chemicals Corp.},\textsuperscript{576} the United States Supreme Court set for oral argument the motion of the State of Ohio for leave to file a bill of complaint directly in that Court which seeks, among other things, to stop the Dow Chemical Company and its Canadian subsidiary from discharging poisonous mercury into Lake Erie.

On a trial court level, conservation organizations and Florida citizens were held to have standing to maintain a federal district court suit against the Army Corps of Engineers to halt construction of the Cross-Florida Barge Canal.\textsuperscript{577} The plaintiffs claimed that the canal would destroy timber and aquatic life and pollute the water supply. District Judge Barrington D. Parker issued a preliminary injunction, effective immediately. Thereafter President Nixon halted further construction of the canal.

In New York, a Long Island group filed suit in the federal District Court for the Eastern District of New York challenging the constitutionality of a Suffolk County highway construction program that the group said would contaminate two wildlife preserves and kill fish and marsh birds.\textsuperscript{578} Counsel for conservationists will always search for applicable legislation; but they will also seek to establish an individual's due process right to a decent environment.

\section*{Z. Equal Rights for Women.}

In August 1970, the Federal House of Representatives passed a joint resolution proposing an amendment to the Constitution which in the first sentence of its first section provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any

\textsuperscript{575} 428 F.2d 1083 (D.C. Cir. 1970).

\textsuperscript{576} 400 U.S. 810 (1970). In \textit{Texas v. Pankey}, 39 U.S.L.W. 2439 (10th Cir., Feb. 8, 1971), the court held that federal common law recognized the right of Texas to be protected from the improper impairment of its environment from pesticide spraying on New Mexico ranches.


\textsuperscript{578} \textit{See} N.Y. Times, Aug. 12, 1970, at 15, cols. 1–2.
State on account of sex."579 But until such an amendment is adopted, counsel must rely on the due process and equal protection clauses.

For example, in June 1970, a federal district court in New York decided that it was illegal for McSorley's Old Ale House, a 166-year old saloon in New York City, to bar women.580 Thereafter, Mayor John V. Lindsay of New York City, signed a bill which prohibited discrimination in public places on grounds of sex, and McSorley's opened its doors to women for the first time in its long history.581 The New Jersey Supreme Court has also invalidated a city ordinance which barred taverns from employing female bartenders.582

But in Krauss v. Sacramento Inn,583 a federal district court in California dismissed an action which sought to enjoin enforcement of a California legislative provision which made it a misdemeanor to employ a female bartender, unless she was the owner or licensee of the premises or the wife of the owner or licensee. Plaintiff did not contend that this statute violated the fourteenth amendment, but should have done so.

AA. Other Due Process and Equal Protection Cases.

Whenever one's client has a grievance which is not covered by any specifically applicable constitutional or statutory provision, or a common law decision, one should consider seeking relief under the due process clause of the fifth amendment or the due process and equal protection clauses of the fourteenth amendment. For example, the New York State Athletic Commission refused to renew the boxing license of Cassius M. Clay, who took the name of Muhammad Ali, because of his refusal to submit to induction in the Armed Forces of the United States, and his later conviction for this refusal. But the Commission in numerous instances granted, renewed or reinstated boxing licenses to applicants who had been convicted of one or more felonies, misdemeanors or military offenses involving moral turpitude. Muhammad Ali through his counsel obtained injunctive relief in the United States District Court for the Southern District of New York against the Commission on the ground that the Commission's action violated the equal protection clause of the fourteenth amendment. District Judge Walter R. Mansfield explained:

But the action of the Commission in denying him a license because of his refusal to serve in the Armed Forces while granting licenses to hundreds of other applicants convicted of other crimes and military offenses involving moral turpitude appears on its face to be an intentional, arbitrary and unreasonable discrimination against plaintiff, not the even-handed administration of the law which the Fourteenth Amendment requires.\footnote{584}

Or again, a federal district court in Minnesota held that it was a violation of the fourteenth amendment's due process clause for a state university to refuse to hire a qualified librarian solely on the basis of his public announcement that he was a homosexual.\footnote{585}

In \textit{Hawkins v. Shaw},\footnote{586} the Fifth Circuit held that under the equal protection clause the Town of Shaw, Mississippi, had to provide public services such as sewers, paving and traffic signals, on a racially equal basis.

In two recent cases, \textit{Baird v. State Bar of Arizona}\footnote{587} and \textit{In re Stolar},\footnote{588} the United States Supreme Court held that it violated the first amendment for the states to refuse to admit applicants to practice law solely because they would not answer questions about their personal beliefs and their affiliations with organizations suspected of advocating the overthrow of government by force. Justice Harlan in dissent in \textit{Baird}, referred to "the First Amendment, as reflected in the Fourteenth."\footnote{589}

There are a multitude of cases in the area of the first amendment as reflected in the fourteenth. The California Supreme Court in \textit{Diamond v. Bland},\footnote{590} held that the first amendment entitled orderly anti-pollution workers to gather signatures and distribute leaflets in a large, privately-owned shopping mall open to the public. The Wisconsin Supreme Court decided that a Wisconsin statute which required school attendance until the age of sixteen was unconstitutional as applied to the Amish because it interfered with their religious freedom.\footnote{591}

The Seventh Circuit in \textit{Mosley v. Police Dep't of the City of Chicago},\footnote{592} held that a Chicago ordinance which prohibited all forms of picketing or demonstrating, except labor picketing, within 150 feet


\textsuperscript{589.} \textit{Id.} at 4201.


\textsuperscript{591.} State v. Yoder, 182 N.W.2d 539 (Wis. Sup. Ct. 1971).

\textsuperscript{592.} 432 F.2d 1256 (7th Cir. 1970).
of a school violated the first amendment. The Second Circuit in Long Island Vietnam Moratorium Committee v. Cahn, 593 invalidated New York's flag desecration statute as violative of the first amendment, and a three-judge federal district court in Parker v. Morgan, 594 did likewise as to a similar North Carolina statute. There are many comparable rulings in the federal courts of appeals, three-judge district courts, and district courts as well as state courts. 595

If counsel has a client who feels aggrieved, and there are no visible avenues of relief (and even sometimes if there are) counsel should think in terms of the due process and equal protection clauses.

II. "RIGHT JUDGMENT."

The due process and equal protection clauses are safety valves to help us in our course as a maturing society. By means of them, counsel will seek relief for aggrieved clients who have no other recourse. Seeking due process relief is part of a legal tradition which goes back more than seven centuries, to the law of the land provision of the Magna Charta in 1215; and this legal tradition is part of a continuous legal history that goes back nearly eight centuries, to 1178, when Henry II appointed five judges for the whole kingdom and told them "to do right judgment." 596

Just as the early Year Books record the contentions of counsel that acts of the king would not subvert the common law, so the law books of today record the development of due process and equal protection rights, whether, as illustrations, it be the right of all of us to a decent environment, the right of non-conformists to look and dress as they please, or the right of deviants to fair treatment in prison.

Under the due process and equal protection clauses the Burger Court will move ahead of the Warren Court, and future Courts will move ahead of the Burger Court. Although there may be more restric-

596. 2 ENGLISH HISTORICAL DOCUMENTS 482 (Douglas gen. ed. 1953).
tions on the rights of criminal defendants under the Burger Court than there were under the Warren Court, most of the due process gains and all of the equal protection gains will probably remain; and in areas beyond the specifics of the Federal Bill of Rights the Burger Court will surpass the Warren Court just as future Courts will surpass the Burger Court.

In seeking due process relief, one of the threshold questions will be the choice of court, federal or state. Since federal constitutional questions are involved, counsel’s first thought of a forum should be the federal courts.

The writer well remembers a bit of colloquy he had more than two decades ago with Federal District Judge Don Gilliam in a federal habeas corpus proceeding involving state prisoners. The prisoners were two cousins by the name of Daniels, whose case was subsequently twice argued in the Federal Supreme Court and is reported under the name of Brown v. Allen, the leading case on habeas corpus in the federal courts to protect the federal constitutional rights of state prisoners. Judge Gilliam wanted to know of the writer whether a federal district court could sit in judgment on the Supreme Court of North Carolina. The writer responded, yes, if federal constitutional rights are involved.

Of course, in federal habeas corpus cases on behalf of state prisoners one must first exhaust state court remedies, but in other cases one’s initial thought should be, in the words of the three-judge federal district court in Doe v. Bolton, involving the right of a woman to an abortion, that “there is no requirement that a litigant in federal court exhaust state judicial remedies, where he is asserting a claim in proceedings other than habeas corpus involving a subject over which the federal and state courts have concurrent jurisdiction.”

However, just as the Burger Court will place more restrictions on the rights of defendants than did the Warren Court, so the Burger Court, in the area of concurrent jurisdiction in the state and federal courts, will be more insistent than was the Warren Court, in having aggrieved persons seek relief in the state courts first. In Wisconsin


598. 344 U.S. 443 (1953), aff’d Daniels v. Allen, 192 F.2d 763 (4th Cir. 1951).


An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

v. Constantineau,\(^601\) where the Court invalidated a Wisconsin statute which permitted the posting of an individual as an excessive drinker without a hearing, Chief Justice Burger and Justices Black and Blackmun dissented on the ground that the individual should have gone to the state courts first. Then in a total of six cases in which counsel had sought relief in three-judge federal district courts — three obscenity cases, Byrne v. Karalexis,\(^602\) Dyson v. Stein,\(^603\) and Perez v. Ledesma,\(^604\) two sedition cases, Samuels v. Mackell,\(^605\) and Younger v. Harris,\(^606\) and one case involving an Illinois intimidation statute, Boyle v. Landry\(^607\) — the Court told counsel to raise their federal constitutional points in state court trials unless there were "extraordinary circumstances"\(^608\) or the threat of "irreparable injury"\(^609\) or the danger of suffering "irreparable damages."\(^610\) But whatever the court, counsel for aggrieved persons will continue to ask under the due process and equal protection clauses for right judgment.

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608. Id. at 4206.
609. Id. at 4203, 4208, 4212, 4215 n.2, 4232, 4236.
610. Id. at 4203, 4208, 4212. The Second Circuit in a recent opinion by Circuit Judge Henry J. Friendly admonished "all counsel but especially those for civil rights organizations" to refrain from bringing suits in the federal courts for declaratory or injunctive civil rights relief "when no need for this exists." See N.Y.L.J., Jan. 15, 1971, at 1, cols. 1–2.