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UNITED STATES REPORTS

VOLUME 378

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1963

OPINIONS AND DECISIONS PER CURIAM
JUNE 15 (CONCLUDED) THROUGH JUNE 22, 1964
(END OF TERM)

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ARTHUR J. GOLDBERG, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.

ROBERT F. KENNEDY, Attorney General.
ARCHIBALD COX, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

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

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ARTHUR J. GOLDBERG, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 15, 1962.

(For next previous allotment, see 370 U. S., p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1963.

MALLOY *v.* HOGAN, SHERIFF.

CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 110. Argued March 5, 1964.—Decided June 15, 1964.

Petitioner, who was on probation after pleading guilty to a gambling misdemeanor, was ordered to testify before a referee appointed by a state court to investigate gambling and other criminal activities. He refused to answer questions about the circumstances of his arrest and conviction on the ground that the answers might incriminate him. Adjudged in contempt and committed to prison until he answered, he filed an application for writ of habeas corpus, which the highest state court denied. It ruled that petitioner was protected against prosecution growing out of his replies to all but one question, and that as to that question his failure to explain how his answer would incriminate him negated his claim to the protection of the privilege under state law. *Held:*

1. The Fourteenth Amendment prohibits state infringement of the privilege against self-incrimination just as the Fifth Amendment prevents the Federal Government from denying the privilege. P. 8.

2. In applying the privilege against self-incrimination, the same standards determine whether an accused's silence is justified regardless of whether it is a federal or state proceeding at which he is called to testify. P. 11.

3. The privilege is available to a witness in a statutory inquiry as well as to a defendant in a criminal prosecution. P. 11.

4. Petitioner's claim of privilege as to all the questions should have been upheld, since it was evident from the implication of each question in the setting in which it was asked, that a response or an explanation why it could not be answered might be dangerous because injurious disclosure would result. *Hoffman* v. *United States,* 341 U. S. 479, followed. Pp. 11–14.

150 Conn. 220, 187 A. 2d 744, reversed.

Harold Strauch argued the cause and filed a brief for petitioner.

John D. LaBelle, State's Attorney for Connecticut, argued the cause for respondent. With him on the brief were *George D. Stoughton* and *Harry W. Hultgren, Jr.,* Assistant State's Attorneys.

Melvin L. Wulf filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer,* Deputy Attorney General, for the State of California; and by *Frank S. Hogan, Edward S. Silver, H. Richard Uviller, Michael R. Juviler, Aaron E. Koota* and *Irving P. Seidman* for the National District Attorneys' Association.

Mr. Justice Brennan delivered the opinion of the Court.

In this case we are asked to reconsider prior decisions holding that the privilege against self-incrimination is not safeguarded against state action by the Fourteenth Amendment. *Twining* v. *New Jersey,* 211 U. S. 78; *Adamson* v. *California,* 332 U. S. 46.[1]

[1] In both cases the question was whether comment upon the failure of an accused to take the stand in his own defense in a state prosecution violated the privilege. It was assumed, but not decided, in both cases that such comment in a federal prosecution for a federal offense would infringe the provision of the Fifth Amendment that "no per-

The petitioner was arrested during a gambling raid in 1959 by Hartford, Connecticut, police. He pleaded guilty to the crime of pool selling, a misdemeanor, and was sentenced to one year in jail and fined $500. The sentence was ordered to be suspended after 90 days, at which time he was to be placed on probation for two years. About 16 months after his guilty plea, petitioner was ordered to testify before a referee appointed by the Superior Court of Hartford County to conduct an inquiry into alleged gambling and other criminal activities in the county. The petitioner was asked a number of questions related to events surrounding his arrest and conviction. He refused to answer any question "on the grounds it may tend to incriminate me." The Superior Court adjudged him in contempt, and committed him to prison until he was willing to answer the questions. Petitioner's application for a writ of habeas corpus was denied by the Superior Court, and the Connecticut Supreme Court of Errors affirmed. 150 Conn. 220, 187 A. 2d 744. The latter court held that the Fifth Amendment's privilege against self-incrimination was not available to a witness in a state proceeding, that the Fourteenth Amendment extended no privilege to him, and that the petitioner had not properly invoked the privilege available under the Connecticut Constitution. We granted certiorari. 373 U. S. 948. We reverse. We hold that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination, and that under the applicable federal standard, the Connecticut Supreme Court of Errors erred in holding that the privilege was not properly invoked.

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son . . . shall be compelled in any criminal case to be a witness against himself." For other statements by the Court that the Fourteenth Amendment does not apply the federal privilege in state proceedings, see *Cohen* v. *Hurley*, 366 U. S. 117, 127–129; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105.

The extent to which the Fourteenth Amendment prevents state invasion of rights enumerated in the first eight Amendments has been considered in numerous cases in this Court since the Amendment's adoption in 1868. Although many Justices have deemed the Amendment to incorporate all eight of the Amendments,[2] the view which has thus far prevailed dates from the decision in 1897 in *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, which held that the Due Process Clause requires the States to pay just compensation for private property taken for public use.[3] It was on the authority of that decision that the Court said in 1908 in *Twining* v. *New Jersey, supra,* that "it is possible that some of the personal rights safeguarded by the first eight Amendments

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[2] Ten Justices have supported this view. See *Gideon* v. *Wainwright,* 372 U. S. 335, 346 (opinion of MR. JUSTICE DOUGLAS). The Court expressed itself as unpersuaded to this view in *In re Kemmler,* 136 U. S. 436, 448–449; *McElvaine* v. *Brush,* 142 U. S. 155, 158–159; *Maxwell* v. *Dow,* 176 U. S. 581, 597–598; *Twining* v. *New Jersey, supra,* p. 96. See *Spies* v. *Illinois,* 123 U. S. 131. Decisions that particular guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment are: *United States* v. *Cruikshank,* 92 U. S. 542, 551; *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 543 (First Amendment); *Presser* v. *Illinois,* 116 U. S. 252, 265 (Second Amendment); *Weeks* v. *United States,* 232 U. S. 383, 398 (Fourth Amendment); *Hurtado* v. *California,* 110 U. S. 516, 538 (Fifth Amendment requirement of grand jury indictments); *Palko* v. *Connecticut,* 302 U. S. 319, 328 (Fifth Amendment double jeopardy); *Maxwell* v. *Dow, supra,* at 595 (Sixth Amendment jury trial); *Walker* v. *Sauvinet,* 92 U. S. 90, 92 (Seventh Amendment jury trial); *In re Kemmler, supra; McElvaine* v. *Brush, supra; O'Neil* v. *Vermont,* 144 U. S. 323, 332 (Eighth Amendment prohibition against cruel and unusual punishment).

[3] In *Barron* v. *Baltimore,* 7 Pet. 243, decided before the adoption of the Fourteenth Amendment, Chief Justice Marshall, speaking for the Court, held that this right was not secured against state action by the Fifth Amendment's provision: "Nor shall private property be taken for public use, without just compensation."

against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." 211 U. S., at 99.

The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme. Thus, although the Court as late as 1922 said that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . . ," *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 543, three years later *Gitlow* v. *New York,* 268 U. S. 652, initiated a series of decisions which today hold immune from state invasion every First Amendment protection for the cherished rights of mind and spirit—the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.[4]

Similarly, *Palko* v. *Connecticut,* 302 U. S. 319, decided in 1937, suggested that the rights secured by the Fourth Amendment were not protected against state action, citing, 302 U. S., at 324, the statement of the Court in 1914 in *Weeks* v. *United States,* 232 U. S. 383, 398, that "the Fourth Amendment is not directed to individual misconduct of [state] officials." In 1961, however, the

[4] *E. g., Gitlow* v. *New York,* 268 U. S. 652, 666 (speech and press); *Lovell* v. *City of Griffin,* 303 U. S. 444, 450 (speech and press); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (speech and press); *Staub* v. *City of Baxley,* 355 U. S. 313, 321 (speech); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (press); *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (religion); *De Jonge* v. *Oregon,* 299 U. S. 353, 364 (assembly); *Shelton* v. *Tucker,* 364 U. S. 479, 486 (association); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, 296 (association); *NAACP* v. *Button,* 371 U. S. 415 (association and speech); *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U. S. 1 (association).

Court held that in the light of later decisions,[5] it was taken as settled that ". . . the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth . . . ." *Mapp* v. *Ohio,* 367 U. S. 643, 655. Again, although the Court held in 1942 that in a state prosecution for a noncapital offense, "appointment of counsel is not a fundamental right," *Betts* v. *Brady,* 316 U. S. 455, 471; cf. *Powell* v. *Alabama,* 287 U. S. 45, only last Term this decision was re-examined and it was held that provision of counsel in all criminal cases was "a fundamental right, essential to a fair trial," and thus was made obligatory on the States by the Fourteenth Amendment. *Gideon* v. *Wainwright,* 372 U. S. 335, 343–344.[6]

We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. Decisions of the Court since *Twining* and *Adamson* have departed from the contrary view expressed in those cases. We discuss first the decisions which forbid the use of coerced confessions in state criminal prosecutions.

Brown v. *Mississippi,* 297 U. S. 278, was the first case in which the Court held that the Due Process Clause prohibited the States from using the accused's coerced confessions against him. The Court in *Brown* felt impelled, in light of *Twining,* to say that its conclusion did not involve the privilege against self-incrimination. "Compulsion by torture to extort a confession is a different matter." 297 U. S., at 285. But this distinction was soon

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[5] See *Wolf* v. *Colorado,* 338 U. S. 25, 27–28; *Elkins* v. *United States,* 364 U. S. 206, 213.

[6] See also *Robinson* v. *California,* 370 U. S. 660, 666, which, despite *In re Kemmler, supra; McElvaine* v. *Brush, supra; O'Neil* v. *Vermont, supra,* made applicable to the States the Eighth Amendment's ban on cruel and unusual punishments.

abandoned, and today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in *Bram* v. *United States,* 168 U. S. 532, the Court held that "[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Id.,* at 542. Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." *Id.,* at 542–543; see also *Hardy* v. *United States,* 186 U. S. 224, 229; *Wan* v. *United States,* 266 U. S. 1, 14; *Smith* v. *United States,* 348 U. S. 147, 150. In other words the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. *Haynes* v. *Washington,* 373 U. S. 503.

The marked shift to the federal standard in state cases began with *Lisenba* v. *California,* 314 U. S. 219, where the Court spoke of the accused's "free choice to admit, to deny, or to refuse to answer." *Id.,* at 241. See *Ashcraft* v. *Tennessee,* 322 U. S. 143; *Malinski* v. *New York,* 324 U. S. 401; *Spano* v. *New York,* 360 U. S. 315; *Lynumn* v. *Illinois,* 372 U. S. 528; *Haynes* v. *Washington,* 373 U. S. 503. 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. *Rogers* v. *Richmond,* 365 U. S. 534,

541. Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth Amendment prohibits the States from inducing a person to confess through "sympathy falsely aroused," *Spano* v. *New York, supra,* at 323, or other like inducement far short of "compulsion by torture," *Haynes* v. *Washington, supra,* it follows *a fortiori* that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining,* for such silence.

This conclusion is fortified by our recent decision in *Mapp* v. *Ohio,* 367 U. S. 643, overruling *Wolf* v. *Colorado,* 338 U. S. 25, which had held "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure," 338 U. S., at 33. *Mapp* held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases, and that the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States. We relied upon the great case of *Boyd* v. *United States,* 116 U. S. 616, decided in 1886, which, considering the Fourth and Fifth Amendments as running "almost into each other," *id.,* at 630, held that "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within

the condemnation of [those Amendments] . . . ." At 630. We said in *Mapp:*

> "We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] . . . only after years of struggle,' *Bram* v. *United States,* 168 U. S. 532, 543–544 . . . . The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence." 367 U. S., at 656–657.

In thus returning to the *Boyd* view that the privilege is one of the "principles of a free government," 116 U. S., at 632,[7] *Mapp* necessarily repudiated the *Twining* concept of the privilege as a mere rule of evidence "best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient." 211 U. S., at 113.

The respondent Sheriff concedes in his brief that under our decisions, particularly those involving coerced

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[7] *Boyd* had said of the privilege, ". . . any compulsory discovery by extorting the party's oath . . . to convict him of crime . . . is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." 116 U. S., at 631–632.

Dean Griswold has said: "I believe the Fifth Amendment is, and has been through this period of crisis, an expression of the moral striving of the community. It has been a reflection of our common conscience, a symbol of the America which stirs our hearts." The Fifth Amendment Today 73 (1955).

confessions, "the accusatorial system has become a fundamental part of the fabric of our society and, hence, is enforceable against the States." [8] The State urges, however, that the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding. We disagree. We have held that the guarantees of the First Amendment, *Gitlow* v. *New York, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, the prohibition of unreasonable searches and seizures of the Fourth Amendment, *Ker* v. *California,* 374 U. S. 23, and the right to counsel guaranteed by the Sixth Amendment, *Gideon* v. *Wainwright, supra,* 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. In the coerced confession cases, involving the policies of the privilege itself, there has been no suggestion that a confession might be considered coerced if used in a federal but not a state tribunal. The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a "watered-down, subjective version of the indi-

[8] The brief states further:

"Underlying the decisions excluding coerced confessions is the implicit assumption that an accused is privileged against incriminating himself, either in the jail house, the grand jury room, or on the witness stand in a public trial. . . .

". . . It is fundamentally inconsistent to suggest, as the Court's opinions now suggest, that the State is entirely free to compel an accused to incriminate himself before a grand jury, or at the trial, but cannot do so in the police station. Frank recognition of the fact that the Due Process Clause prohibits the States from enforcing their laws by compelling the accused to confess, regardless of where such compulsion occurs, would not only clarify the principles involved in confession cases, but would assist the States significantly in their efforts to comply with the limitations placed upon them by the Fourteenth Amendment."

vidual guarantees of the Bill of Rights," *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263, 275 (dissenting opinion). If *Cohen* v. *Hurley,* 366 U. S. 117, and *Adamson* v. *California, supra,* suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the *Twining* view of the privilege has been eroded. What is accorded is a privilege of refusing to incriminate one's self, and the feared prosecution may be by either federal or state authorities. *Murphy* v. *Waterfront Comm'n, post,* p. 52. It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.

We turn to the petitioner's claim that the State of Connecticut denied him the protection of his federal privilege. It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution, for it has long been settled that the privilege protects witnesses in similar federal inquiries. *Counselman* v. *Hitchcock,* 142 U. S. 547; *McCarthy* v. *Arndstein,* 266 U. S. 34; *Hoffman* v. *United States,* 341 U. S. 479. We recently elaborated the content of the federal standard in *Hoffman:*

> "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . . [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is

> asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 341 U. S., at 486–487.

We also said that, in applying that test, the judge must be

> "'*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." 341 U. S., at 488.

The State of Connecticut argues that the Connecticut courts properly applied the federal standards to the facts of this case. We disagree.

The investigation in the course of which petitioner was questioned began when the Superior Court in Hartford County appointed the Honorable Ernest A. Inglis, formerly Chief Justice of Connecticut, to conduct an inquiry into whether there was reasonable cause to believe that crimes, including gambling, were being committed in Hartford County. Petitioner appeared on January 16 and 25, 1961, and in both instances he was asked substantially the same questions about the circumstances surrounding his arrest and conviction for pool selling in late 1959. The questions which petitioner refused to answer may be summarized as follows: (1) for whom did he work on September 11, 1959; (2) who selected and paid his counsel in connection with his arrest on that date and subsequent conviction; (3) who selected and paid his bondsman; (4) who paid his fine; (5) what was the name of the tenant of the apartment in which he was arrested; and (6) did he know John Bergoti. The Connecticut Supreme Court of Errors ruled that the answers to these questions could not tend to incriminate him because the defenses of double jeopardy and the running of the one-year statute of limitations on misdemeanors would defeat any prosecution growing out of his answers to the first

five questions. As for the sixth question, the court held that petitioner's failure to explain how a revelation of his relationship with Bergoti would incriminate him vitiated his claim to the protection of the privilege afforded by state law.

The conclusions of the Court of Errors, tested by the federal standard, fail to take sufficient account of the setting in which the questions were asked. The interrogation was part of a wide-ranging inquiry into crime, including gambling, in Hartford. It was admitted on behalf of the State at oral argument—and indeed it is obvious from the questions themselves—that the State desired to elicit from the petitioner the identity of the person who ran the pool-selling operation in connection with which he had been arrested in 1959. It was apparent that petitioner might apprehend that if this person were still engaged in unlawful activity, disclosure of his name might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted.[9]

Analysis of the sixth question, concerning whether petitioner knew John Bergoti, yields a similar conclusion. In the context of the inquiry, it should have been apparent to the referee that Bergoti was suspected by the State to be involved in some way in the subject matter of the investigation. An affirmative answer to the question

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[9] See *Greenberg* v. *United States,* 343 U. S. 918, reversing *per curiam,* 192 F. 2d 201; *Singleton* v. *United States,* 343 U. S. 944, reversing *per curiam,* 193 F. 2d 464. In *United States* v. *Coffey,* 198 F. 2d 438 (C. A. 3d Cir.), cited with approval in *Emspak* v. *United States,* 349 U. S. 190, the Court of Appeals for the Third Circuit stated:

"in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry." 198 F. 2d, at 440–441.

might well have either connected petitioner with a more recent crime, or at least have operated as a waiver of his privilege with reference to his relationship with a possible criminal. See *Rogers* v. *United States,* 340 U. S. 367. We conclude, therefore, that as to each of the questions, it was "evident from the implications of the question, in the setting in which it [was] asked, that a responsive answer to the question or an explanation of why it [could not] be answered might be dangerous because injurious disclosure could result," *Hoffman* v. *United States,* 341 U. S., at 486–487; see *Singleton* v. *United States,* 343 U. S. 944.

Reversed.

While MR. JUSTICE DOUGLAS joins the opinion of the Court, he also adheres to his concurrence in *Gideon* v. *Wainwright,* 372 U. S. 335, 345.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

Connecticut has adjudged this petitioner in contempt for refusing to answer questions in a state inquiry. The courts of the State, whose laws embody a privilege against self-incrimination, refused to recognize the petitioner's claim of privilege, finding that the questions asked him were not incriminatory. This Court now holds the contempt adjudication unconstitutional because, it is decided: (1) the Fourteenth Amendment makes the Fifth Amendment privilege against self-incrimination applicable to the States; (2) the federal standard justifying a claim of this privilege likewise applies to the States; and (3) judged by that standard the petitioner's claim of privilege should have been upheld.

Believing that the reasoning behind the Court's decision carries extremely mischievous, if not dangerous, consequences for our federal system in the realm of criminal

law enforcement, I must dissent. The importance of the issue presented and the serious incursion which the Court makes on time-honored, basic constitutional principles justify a full exposition of my reasons.

I.

I can only read the Court's opinion as accepting in fact what it rejects in theory: the application to the States, via the Fourteenth Amendment, of the forms of federal criminal procedure embodied within the first eight Amendments to the Constitution. While it is true that the Court deals today with only one aspect of state criminal procedure, and rejects the wholesale "incorporation" of such federal constitutional requirements, the logical gap between the Court's premises and its novel constitutional conclusion can, I submit, be bridged only by the additional premise that the Due Process Clause of the Fourteenth Amendment is a shorthand directive to this Court to pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States.

I accept and agree with the proposition that continuing re-examination of the constitutional conception of Fourteenth Amendment "due process" of law is required, and that development of the community's sense of justice may in time lead to expansion of the protection which due process affords. In particular in this case, I agree that principles of justice to which due process gives expression, as reflected in decisions of this Court, prohibit a State, as the Fifth Amendment prohibits the Federal Government, from imprisoning a person *solely* because he refuses to give evidence which may incriminate him under the laws of the State.[1] I do not understand, how-

[1] That precise question has not heretofore been decided by this Court. *Twining* v. *New Jersey*, 211 U. S. 78, and the cases which

ever, how this process of re-examination, which must refer always to the guiding standard of due process of law, including, of course, reference to the particular guarantees of the Bill of Rights, can be short-circuited by the simple device of incorporating into due process, without critical examination, the whole body of law which surrounds a specific prohibition directed against the Federal Government. The consequence of such an approach to due process as it pertains to the States is inevitably disregard of all relevant differences which may exist between state and federal criminal law and its enforcement. The ultimate result is compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the States' sov-

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followed it, see *infra*, p. 17, all involved issues not precisely similar. Although the Court has stated broadly that an individual could "be required to incriminate himself in . . . state proceedings," *Cohen* v. *Hurley*, 366 U. S. 117, 127, the context in which such statements were made was that the State had in each case recognized the right to remain silent. In *Twining*, *supra*, until now the primary authority, the Court noted that "all the States of the Union have, from time to time, with varying form but uniform meaning, included the privilege in their constitutions, except the States of New Jersey and Iowa, and in those States it is held to be part of the existing law." 211 U. S., at 92.

While I do not believe that the coerced confession cases furnish any basis for incorporating the Fifth Amendment into the Fourteenth, see *infra*, pp. 17–20, they do, it seems to me, carry an implication that coercion to incriminate oneself, even when under the forms of law, cf. *Brown* v. *Mississippi*, 297 U. S. 278, 285, discussed *infra*, pp. 17–18, is inconsistent with due process. Since every State already recognizes a privilege against self-incrimination so defined, see VIII Wigmore, Evidence (McNaughton rev. 1961), § 2252, the effect of including such a privilege in due process is only to create the possibility that a federal question, to be decided under the Due Process Clause, would be raised by a State's refusal to accept a claim of the privilege.

ereign powers or by dilution in federal law enforcement of the specific protections found in the Bill of Rights.

II.

As recently as 1961, this Court reaffirmed that "the Fifth Amendment's privilege against self-incrimination," *ante,* p. 3, was not applicable against the States. *Cohen* v. *Hurley,* 366 U. S. 117. The question had been most fully explored in *Twining* v. *New Jersey,* 211 U. S. 78. Since 1908, when *Twining* was decided, this Court has adhered to the view there expressed that "the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution," 211 U. S., at 114. *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; *Brown* v. *Mississippi,* 297 U. S. 278, 285; *Palko* v. *Connecticut,* 302 U. S. 319, 324; *Adamson* v. *California,* 332 U. S. 46; *Knapp* v. *Schweitzer,* 357 U. S. 371, 374; *Cohen, supra.* Although none of these cases involved a commitment to prison for refusing to incriminate oneself under state law, and they are relevantly distinguishable from this case on that narrow ground,[2] it is perfectly clear from them that until today it has been regarded as settled law that the *Fifth Amendment* privilege did not, by any process of reasoning, apply *as such* to the States.

The Court suggests that this consistent line of authority has been undermined by the concurrent development of constitutional doctrine in the areas of coerced confessions and search and seizure. This is *post facto* reasoning at best. Certainly there has been no intimation until now that *Twining* has been tacitly overruled.

It was in *Brown* v. *Mississippi, supra,* that this Court first prohibited the use of a coerced confession in a state criminal trial. The petitioners in *Brown* had been tor-

[2] See note 1, *supra.*

tured until they confessed. The Court was hardly making an artificial distinction when it said:

> ". . . [T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements [from *Twining* and *Snyder, supra,*] refer is that of the *processes of justice* by which the accused may be called as a witness and required to testify. *Compulsion by torture* to extort a confession is a different matter." [3] 297 U. S., at 285. (Emphasis supplied.)

The majority is simply wrong when it asserts that this perfectly understandable distinction "was soon abandoned," *ante,* pp. 6–7. In none of the cases cited, *ante,* pp. 7–8, in which was developed the full sweep of the constitutional prohibition against the use of coerced confessions at state trials, was there anything to suggest that the Fifth Amendment was being made applicable to state proceedings. In *Lisenba* v. *California,* 314 U. S. 219, the privilege against self-incrimination is not mentioned. The relevant question before the Court was whether "the evidence [of coercion] requires that we set aside the finding of two courts and a jury, and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty, as to amount to a taking of life without due process of law." *Id.,* at 238. The question was the same in *Ashcraft* v. *Tennessee,* 322 U. S. 143; the Court there adverted to the "third degree," *e. g., id.,* at 150, note 5, and "secret inquisitorial prac-

[3] Nothing in the opinion in *Brown* supports the Court's intimation here, *ante,* p. 6, that if *Twining* had not been on the books, reversal of the convictions would have been based on the Fifth Amendment. The Court made it plain in *Brown* that it regarded the trial use of a confession extracted by torture as on a par with domination of a trial by a mob, see, *e. g., Moore* v. *Dempsey,* 261 U. S. 86, where the trial "is a mere pretense," 297 U. S., at 286.

tices," *id.*, at 152. *Malinski* v. *New York*, 324 U. S. 401, is the same; the privilege against self-incrimination is not mentioned.[4] So too in *Spano* v. *New York*, 360 U. S. 315; *Lynumn* v. *Illinois*, 372 U. S. 528; and *Haynes* v. *Washington*, 373 U. S. 503. Finally, in *Rogers* v. *Richmond*, 365 U. S. 534, although the Court did recognize that "ours is an accusatorial and not an inquisitorial system," *id.*, at 541, it is clear that the Court was concerned only with the problem of coerced confessions, see *ibid.*; the opinion includes nothing to support the Court's assertion here, *ante*, p. 7, that "the Fifth Amendment privilege is . . . [the] essential mainstay" of our system.

In *Adamson*, *supra*, the Court made it explicit that it did not regard the increasingly strict standard for determining the admissibility at trial of an out-of-court confession as undermining the holding of *Twining*. After stating that "the due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment," the Court said: "The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion. It forbids any other type of coercion that falls within the scope of due process." 332 U. S., at 54

[4] "And so, when a conviction in a state court is properly here for review, under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record can be found to disclose an infraction of one of the specific provisions of the first eight amendments. To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of psychological assumptions and reasoning, that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined." *Malinski*, *supra*, at 416 (opinion of Frankfurter, J.).

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(footnotes omitted). Plainly, the Court regarded these two lines of cases as distinct. See also *Palko* v. *Connecticut, supra,* at 326, to the same effect.[5] *Cohen, supra,* which adhered to *Twining,* was decided after all but a few of the confession cases which the Court mentions.

The coerced confession cases are relevant to the problem of this case not because they overruled *Twining sub silentio,* but rather because they applied the same standard of fundamental fairness which is applicable here. The recognition in them that federal supervision of state criminal procedures must be directly based on the requirements of due process is entirely inconsistent with the theory here espoused by the majority. The parallel treatment of federal and state cases involving coerced confessions resulted from the fact that the same demand of due process was applicable in both; it was not the consequence of the automatic engrafting of federal law construing constitutional provisions inapplicable to the States onto the Fourteenth Amendment.

The decision in *Mapp* v. *Ohio,* 367 U. S. 643, that evidence unconstitutionally seized, see *Wolf* v. *Colorado,* 338 U. S. 25, 28, may not be used in a state criminal trial furnishes no "fortification," see *ante,* p. 8, for today's decision. The very passage from the *Mapp* opinion which the Court quotes, *ante,* p. 9, makes explicit the distinct bases of the exclusionary rule as applied in federal and state courts:

> "We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation'

[5] In *Adamson* and *Palko, supra,* which adhered to the rule announced in *Twining, supra,* the Court cited some of the very cases now relied on by the majority to show that *Twining* was gradually being eroded. 332 U. S., at 54, notes 12, 13; 302 U. S., at 325, 326.

> in their perpetuation of 'principles of humanity and civil liberty [secured] . . . only after years of struggle,' *Bram* v. *United States,* 168 U. S. 532, 543–544 (1897)." 367 U. S., at 656–657 (footnote omitted). See also *id.,* at 655.

Although the Court discussed *Boyd* v. *United States,* 116 U. S. 616, a federal case involving both the Fourth and Fifth Amendments, nothing in *Mapp* supports the statement, *ante,* p. 8, that the Fifth Amendment was part of the basis for extending the exclusionary rule to the States. The elaboration of *Mapp* in *Ker* v. *California,* 374 U. S. 23, did in my view make the Fourth Amendment applicable to the States through the Fourteenth; but there is nothing in it to suggest that the Fifth Amendment went along as baggage.

III.

The previous discussion shows that this Court's decisions do not dictate the "incorporation" of the Fifth Amendment's privilege against self-incrimination into the Fourteenth Amendment. Approaching the question more broadly, it is equally plain that the line of cases exemplified by *Palko* v. *Connecticut, supra,* in which this Court has reconsidered the requirements which the Due Process Clause imposes on the States in the light of current standards, furnishes no general theoretical framework for what the Court does today.

The view of the Due Process Clause of the Fourteenth Amendment which this Court has consistently accepted and which has "thus far prevailed," *ante,* p. 4, is that its requirements are as "old as a principle of civilized government," *Munn* v. *Illinois,* 94 U. S. 113, 123, the specific applications of which must be ascertained "by the gradual process of judicial inclusion and exclusion . . . ," *Davidson* v. *New Orleans,* 96 U. S. 97, 104. Due process requires "observance of those general rules established in our system of jurisprudence for the security of private

rights." *Hagar* v. *Reclamation District No. 108,* 111 U. S. 701, 708. See *Hurtado* v. *California,* 110 U. S. 516, 537.

> "This court has never attempted to define with precision the words 'due process of law' . . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard . . . ." *Holden* v. *Hardy,* 169 U. S. 366, 389.

It followed from this recognition that due process encompassed the fundamental safeguards of the individual against the abusive exercise of governmental power that some of the restraints on the Federal Government which were specifically enumerated in the Bill of Rights applied also against the States. But, while inclusion of a particular provision in the Bill of Rights might provide historical evidence that the right involved was traditionally regarded as fundamental, inclusion of the right in due process was otherwise entirely independent of the first eight Amendments:

> ". . . [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . *If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.*" *Twining, supra,* at 99. (Emphasis supplied.)

Relying heavily on *Twining,* Mr. Justice Cardozo provided what may be regarded as a classic expression of this approach in *Palko* v. *Connecticut, supra.* After considering a number of individual rights (including the right

not to incriminate oneself) which were "not of the very essence of a scheme of ordered liberty," *id.*, at 325, he said:

> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed." *Id.*, at 326.

Further on, Mr. Justice Cardozo made the independence of the Due Process Clause from the provisions of the first eight Amendments explicit:

> "Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott* v. *McNeal,* 154 U. S. 34; *Blackmer* v. *United States,* 284 U. S. 421. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore* v. *Dempsey,* 261 U. S. 86; *Mooney* v. *Holohan,* 294 U. S. 103. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell* v. *Alabama, supra,* pp. 67, 68. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing." *Id.*, at 327.

It is apparent that Mr. Justice Cardozo's metaphor of "absorption" was *not* intended to suggest the transplantation of case law surrounding the specifics of the first eight Amendments to the very different soil of the Fourteenth Amendment's Due Process Clause. For, as he made perfectly plain, what the Fourteenth Amendment requires of the States does not basically depend on what the first eight Amendments require of the Federal Government.

Seen in proper perspective, therefore, the fact that First Amendment protections have generally been given equal scope in the federal and state domains or that in some areas of criminal procedure the Due Process Clause demands as much of the States as the Bill of Rights demands of the Federal Government, is only tangentially relevant to the question now before us. It is toying with constitutional principles to assert that the Court has "rejected the notion that the Fourteenth Amendment applies to the states only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights,' " *ante,* pp. 10–11. What the Court has, with the single exception of the *Ker* case, *supra,* p. 21; see *infra,* p. 26, consistently rejected is the notion that the Bill of Rights, as such, applies to the States in any aspect at all.

If one attends to those areas to which the Court points, *ante,* p. 10, in which the prohibitions against the state and federal governments have moved in parallel tracks, the cases in fact reveal again that the Court's usual approach has been to ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments. Although more recently the Court has referred to the First Amendment to describe the protection of free expression against state infringement, earlier cases leave no doubt that such references are "shorthand" for doctrines developed by an-

other route. In *Gitlow* v. *New York*, 268 U. S. 652, 666, for example, the Court said:

> "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

The Court went on to consider the extent of those freedoms in the context of state interests. Mr. Justice Holmes, in dissent, said:

> "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." *Id.*, at 672.

Chief Justice Hughes, in *De Jonge* v. *Oregon*, 299 U. S. 353, 364, gave a similar analysis:

> "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. As this Court said in *United States* v. *Cruikshank*, 92 U. S. 542, 552: 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.' 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."

The coerced confession and search and seizure cases have already been considered. The former, decided always directly on grounds of fundamental fairness, furnish no support for the Court's present views. *Ker* v. *California, supra,* did indeed incorporate the Fourth Amendment's protection against invasions of privacy into the Due Process Clause. But that case should be regarded as the exception which proves the rule.[6] The right to counsel in state criminal proceedings, which this Court assured in *Gideon* v. *Wainwright,* 372 U. S. 335, does not depend on the Sixth Amendment. In *Betts* v. *Brady,* 316 U. S. 455, 462, this Court had said:

"Due process of law is secured against invasion by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." (Footnote omitted.)

[6] Cf. the majority and dissenting opinions in *Aguilar* v. *Texas, post,* p. 108.

Although *Gideon* overruled *Betts,* the constitutional approach in both cases was the same. *Gideon* was based on the Court's conclusion, contrary to that reached in *Betts,* that the appointment of counsel for an indigent criminal defendant *was* essential to the conduct of a fair trial, and was therefore part of due process. 372 U. S., at 342–345.

The Court's approach in the present case is in fact nothing more or less than "incorporation" in snatches. If, however, the Due Process Clause *is* something more than a reference to the Bill of Rights and protects only those rights which derive from fundamental principles, as the majority purports to believe, it is just as contrary to precedent and just as illogical to incorporate the provisions of the Bill of Rights one at a time as it is to incorporate them all at once.

IV.

The Court's undiscriminating approach to the Due Process Clause carries serious implications for the sound working of our federal system in the field of criminal law.

The Court concludes, almost without discussion, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified," *ante,* p. 11. About all that the Court offers in explanation of this conclusion is the observation that it would be "incongruous" if different standards governed the assertion of a privilege to remain silent in state and federal tribunals. Such "incongruity," however, is at the heart of our federal system. The powers and responsibilities of the state and federal governments are not congruent; under our Constitution, they are not intended to be. Why should it be thought, as an *a priori* matter, that limitations on the investigative power of the States are in all respects identical with limitations on the investigative power of the Federal Government? This cer-

tainly does not follow from the fact that we deal here with constitutional requirements; for the provisions of the Constitution which are construed are different.

As the Court pointed out in *Abbate* v. *United States*, 359 U. S. 187, 195, "the States under our federal system have the principal responsibility for defining and prosecuting crimes." The Court endangers this allocation of responsibility for the prevention of crime when it applies to the States doctrines developed in the context of federal law enforcement, without any attention to the special problems which the States as a group or particular States may face. If the power of the States to deal with local crime is unduly restricted, the likely consequence is a shift of responsibility in this area to the Federal Government, with its vastly greater resources. Such a shift, if it occurs, may in the end serve to weaken the very liberties which the Fourteenth Amendment safeguards by bringing us closer to the monolithic society which our federalism rejects. Equally dangerous to our liberties is the alternative of watering down protections against the Federal Government embodied in the Bill of Rights so as not unduly to restrict the powers of the States. The dissenting opinion in *Aguilar* v. *Texas*, *post*, p. 116, evidences that this danger is not imaginary. See my concurring opinion in *Aguilar*, *ibid.*

Rather than insisting, almost by rote, that the Connecticut court, in considering the petitioner's claim of privilege, was required to apply the "federal standard," the Court should have fulfilled its responsibility under the Due Process Clause by inquiring whether the proceedings below met the demands of fundamental fairness which due process embodies. Such an approach may not satisfy those who see in the Fourteenth Amendment a set of easily applied "absolutes" which can afford a haven from unsettling doubt. It is, however, truer to the spirit which requires this Court constantly to re-examine funda-

mental principles and at the same time enjoins it from reading its own preferences into the Constitution.

The Connecticut Supreme Court of Errors gave full and careful consideration to the petitioner's claim that he would incriminate himself if he answered the questions put to him. It noted that its decisions "from a time antedating the adoption of . . . [the Connecticut] constitution in 1818" had upheld a privilege to refuse to answer incriminating questions. 150 Conn. 220, 223, 187 A. 2d 744, 746. Stating that federal cases treating the Fifth Amendment privilege had "persuasive force" in interpreting its own constitutional provision, and citing *Hoffman* v. *United States,* 341 U. S. 479, in particular, the Supreme Court of Errors described the requirements for assertion of the privilege by quoting from one of its own cases, 150 Conn., at 225, 187 A. 2d, at 747:

> "[A] witness . . . has the right to refuse to answer any question which would tend to incriminate him. But a mere claim on his part that the evidence will tend to incriminate him is not sufficient. . . . [He having] made his claim, it is then . . . [necessary for the judge] to determine in the exercise of a legal discretion whether, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, there is reasonable ground to apprehend danger of criminal liability from his being compelled to answer. That danger 'must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by,

should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios,* protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.' Cockburn, C. J., in *Regina* v. *Boyes,* 1 B. & S. 311, 330 . . . ." *McCarthy* v. *Clancy,* 110 Conn. 482, 488–489, 148 A. 551, 555.

The court carefully applied the above standard to each question which the petitioner was asked. It dealt first with the question whether he knew John Bergoti. The court said:

"Bergoti is nowhere described or in any way identified, either as to his occupation, actual or reputed, or as to any criminal record he may have had. . . . Malloy made no attempt even to suggest to the court how an answer to the question whether he knew Bergoti could possibly incriminate him. . . . On this state of the record the question was proper, and Malloy's claim of privilege, made without explanation, was correctly overruled. Malloy 'chose to keep the door tightly closed and to deny the court the smallest glimpse of the danger he apprehended. He cannot then complain that we see none.' *In re Pillo,* 11 N. J. 8, 22, 93 A. 2d 176 . . . ." 150 Conn., at 226–227, 187 A. 2d, at 748.

The remaining questions are summarized in the majority's opinion, *ante,* p. 12. All of them deal with the circumstances surrounding the petitioner's conviction on a gambling charge in 1959. The court declined to decide

"whether, on their face and apart from any consideration of Malloy's immunity from prosecution, the questions should or should not have been answered in the light of his failure to give any hint of explanation as to how answers to them could incriminate him." 150 Conn., at 227, 187 A. 2d, at 748. The court considered the State's claim that the petitioner's prior conviction was sufficient to clothe him with immunity from prosecution for other crimes to which the questions might pertain, but declined to rest its decision on that basis. *Id.*, at 227–229, 187 A. 2d, at 748–749. The court concluded, however, that the running of the statute of limitations on misdemeanors committed in 1959 and the absence of any indication that Malloy had engaged in any crime other than a misdemeanor removed all appearance of danger of incrimination from the questions propounded concerning the petitioner's activities in 1959. The court summarized this conclusion as follows:

> "In all this, Malloy confounds vague and improbable possibilities of prosecution with reasonably appreciable ones. Under claims like his, it would always be possible to work out some finespun and improbable theory from which an outside chance of prosecution could be envisioned. Such claims are not enough to support a claim of privilege, at least where, as here, a witness suggests no rational explanation of his fears of incrimination, and the questions themselves, under all the circumstances, suggest none." *Id.*, at 230–231, 187 A. 2d, at 750.

Peremptorily rejecting all of the careful analysis of the Connecticut court, this Court creates its own "finespun and improbable theory" about how these questions might have incriminated the petitioner. With respect to his acquaintance with Bergoti, this Court says only:

> "In the context of the inquiry, it should have been apparent to the referee that Bergoti was suspected

> by the State to be involved in some way in the subject matter of the investigation. An affirmative answer to the question might well have either connected petitioner with a more recent crime, or at least have operated as a waiver of his privilege with reference to his relationship with a possible criminal." *Ante,* pp. 13–14.

The other five questions, treated at length in the Connecticut court's opinion, get equally short shrift from this Court; it takes the majority, unfamiliar with Connecticut law and far removed from the proceedings below, only a dozen lines to consider the questions and conclude that they were incriminating:

> "The interrogation was part of a wide-ranging inquiry into crime, including gambling, in Hartford. It was admitted on behalf of the State at oral argument—and indeed it is obvious from the questions themselves—that the State desired to elicit from the petitioner the identity of the person who ran the pool-selling operation in connection with which he had been arrested in 1959. It was apparent that petitioner might apprehend that if this person were still engaged in unlawful activity, disclosure of his name might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted." (Footnote omitted.) *Ante,* p. 13.

I do not understand how anyone could read the opinion of the Connecticut court and conclude that the state law which was the basis of its decision or the decision itself was lacking in fundamental fairness. The truth of the matter is that under any standard—state or federal—the commitment for contempt was proper. Indeed, as indicated above, there is every reason to believe that the Connecticut court did apply the *Hoffman* standard

quoted approvingly in the majority's opinion. I entirely agree with my Brother WHITE, *post,* pp. 36–38, that if the matter is viewed only from the standpoint of the federal standard, such standard was fully satisfied. The Court's reference to a federal standard is, to put it bluntly, simply an excuse for the Court to substitute its own superficial assessment of the facts and state law for the careful and better informed conclusions of the state court. No one who scans the two opinions with an objective eye will, I think, reach any other conclusion.

I would affirm.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, dissenting.

I.

The Fifth Amendment safeguards an important complex of values, but it is difficult for me to perceive how these values are served by the Court's holding that the privilege was properly invoked in this case. While purporting to apply the prevailing federal standard of incrimination—the same standard of incrimination that the Connecticut courts applied—the Court has all but stated that a witness' invocation of the privilege to any question is to be automatically, and without more, accepted. With deference, I prefer the rule permitting the judge rather than the witness to determine when an answer sought is incriminating.

The established rule has been that the witness' claim of the privilege is not final, for the privilege qualifies a citizen's general duty of disclosure only when his answers would subject him to danger from the criminal law. The privilege against self-incrimination or any other evidentiary privilege does not protect silence which is solely an expression of political protest, a desire not to inform, a fear of social obloquy or economic disadvantage or fear of prosecution for future crimes. *Smith* v. *United States,*

337 U. S. 137, 147; *Brown* v. *Walker,* 161 U. S. 591, 605. If the general duty to testify when subpoenaed is to remain and the privilege is to be retained as a protection against compelled incriminating answers, the trial judge must be permitted to make a meaningful determination of when answers tend to incriminate. See *The Queen* v. *Boyes,* 1 B. & S. 311, 329–330 (1861); *Mason* v. *United States,* 244 U. S. 362. I do not think today's decision permits such a determination.

Answers which would furnish a lead to other evidence needed to prosecute or convict a claimant of a crime—clue evidence—cannot be compelled, but "this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman* v. *United States,* 341 U. S. 479, at 486; *Mason* v. *United States,* 244 U. S. 362. Of course the witness is not required to disclose so much of the danger as to render his privilege nugatory. But that does not justify a flat rule of no inquiry and automatic acceptance of the claim of privilege. In determining whether the witness has a reasonable apprehension, the test in the federal courts has been that the judge is to decide from the circumstances of the case, his knowledge of matters surrounding the inquiry and the nature of the evidence which is demanded from the witness. *Hoffman* v. *United States,* 341 U. S. 479; *Mason* v. *United States,* 244 U. S. 362. Cf. *Rogers* v. *United States,* 340 U. S. 367. This rule seeks and achieves a workable accommodation between what are obviously important competing interests. As Mr. Chief Justice Marshall said: "The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. . . . When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness." *In*

re Willie, 25 Fed. Cas. No. 14,692e, at 39–40. I would not only retain this rule but apply it in its present form. Under this test, Malloy's refusals to answer some, if not all, of the questions put to him were clearly not privileged.

II.

In November 1959, Malloy was arrested in a gambling raid in Hartford and was convicted of pool selling, an offense defined as occupying and keeping a building containing gambling apparatus. After a 90-day jail term, his one-year sentence was suspended and Malloy was placed on probation for two years. In early 1961, Malloy was summoned to appear in an investigation into whether crimes, including gambling, had been committed in Hartford County, and was asked various questions obviously and solely designed to ascertain who Malloy's associates were in connection with his pool-selling activities in Hartford in 1959. Malloy initially refused to answer virtually all the questions put to him, including such innocuous ones as whether he was the William Malloy arrested and convicted of pool selling in 1959. After he was advised to consult with counsel and did so, he declined to answer each one of the following questions on the ground that it would tend to incriminate him:

> "Q. Now, on September 11, 1959, when you were arrested at 600 Asylum Street, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, for whom were you working?
>
> . . . . . .
>
> "Q. On September 11, 1959, when you were arrested, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, who furnished the money to pay your fine when you were convicted in the Superior Court?
>
> . . . . . .

"Q. After your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who selected your bondsman?

. . . . . .

"Q. As a result of your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who furnished the money to pay your fine?

. . . . . .

"Q. Do you know whose apartment it was [that you were arrested in on September 11, 1959]?

. . . . . .

"Q. Do you know John Bergoti?

. . . . . .

"Q. I ask you again, Mr. Malloy, now, so there will be no misunderstanding of what I want to know. When you were arrested on September 11, 1959, at 600 Asylum Street in Hartford, and the same arrest for which you were convicted in Superior Court on November 5, 1959, for whom were you working?"

It was for refusing to answer these questions that Malloy was cited for contempt, the Connecticut courts noting that the privilege does not protect one against informing on friends or associates.

These were not wholly innocuous questions on their face, but they clearly were in light of the finding, of which Malloy was told, that he was immune from prosecution for any pool-selling activities in 1959. As the Connecticut Supreme Court of Errors found, the State bore its burden of proving that the statute of limitations barred any prosecution for any type of violation of the state pool-selling statute in 1959. Malloy advanced the claim before the Connecticut courts, and again before this Court, that he could perhaps be prosecuted for a conspiracy and that the statute of limitations on a felony was

five years. But the Connecticut courts were unable to find any state statute which Malloy's gambling activities in 1959 in Hartford, the subject of the inquiry, could have violated and Malloy has not yet pointed to one. Beyond this Malloy declined to offer any explanation or hint at how the answers sought could have incriminated him. In these circumstances it is wholly speculative to find that the questions about others, not Malloy, posed a substantial hazard of criminal prosecution to Malloy. Theoretically, under some unknown but perhaps possible conditions any fact is potentially incriminating. But if this be the rule, there obviously is no reason for the judge, rather than the witness, to pass on the claim of privilege. The privilege becomes a general one against answering distasteful questions.

The Court finds that the questions were incriminating because petitioner "might apprehend that if [his associates in 1959] were still engaged in unlawful activity, disclosure of [their names] might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted." *Ante,* p. 13. The assumption necessary to the above reasoning is that all persons, or all who have committed a misdemeanor, are continuously engaged in crime. This is but another way of making the claim of privilege automatic. It is not only unrealistic generally but peculiarly inappropriate in this case. Unlike cases relied on by the Court, like *Hoffman* v. *United States, supra,* where the claimant was known to be involved in rackets in the area, which were the subject of the inquiry, and had a "broadly published police record," Malloy had no record as a felon. He had engaged once in an unlawful activity—pool selling—a misdemeanor and was given a suspended sentence. He had been on probation since that time and was on probation at the time of the inquiry. Again, unlike *Hoffman,* nothing in these questions indicates peti-

tioner was called because he was suspected of criminal activities after 1959. There is no support at all in this record for the cynical assumption that he had committed criminal acts after his release in 1960.

Even on the Court's assumption that persons convicted of a misdemeanor are necessarily suspect criminals, sustaining the privilege in these circumstances is unwarranted, for Malloy placed no reliance on this theory in the courts below or in this Court. In order to allow the judge passing on the claim to understand how the answers sought are incriminating, I would at least require the claimant to state his grounds for asserting the privilege to questions seemingly irrelevant to any incriminating matters.

Adherence to the federal standard of incrimination stated in *Mason* and *Hoffman, supra,* in form only, while its content is eroded in application, is hardly an auspicious beginning for application of the privilege to the States. As was well stated in a closely analogous situation, "[t]o continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system." *Gideon* v. *Wainwright,* 372 U. S. 335, at 351 (HARLAN, J., concurring).

I would affirm.

Syllabus.

UNITED STATES ET AL. *v.* BOYD, COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 185. Argued April 20–21, 1964.—Decided June 15, 1964.

The appellants seek a refund of sales and use taxes imposed by the State of Tennessee on contractors using tangible personal property in the State in the performance of the contract. The contractor's use tax is assessed no matter who has title to the property, or whether the titleholder is subject to a sales or compensating use tax, unless such taxes have been paid thereon. The appellant contractors have cost-plus-fixed-fee management and construction contracts with the Atomic Energy Commission at Oak Ridge, Tennessee, under which the United States holds title to any property used in connection with the performance of the contract. The State Supreme Court held the sales tax could not be collected but upheld the contractor's use tax, finding that the appellant companies were independent contractors and taxable on their private use, for gain, of government-owned property. *Held:*

1. The use of government-owned property by a federal contractor, in connection with commercial activities, for his profit or gain, is a separate taxable activity, even if the tax is finally borne by the United States. Pp. 44–48.

(a) It is not material whether the contractor is making products for sale to the Government, or is furnishing services. P. 46.

(b) The appellant contractors, operating for profit on a cost-plus basis, did not become instrumentalities of the United States and thus partake of governmental immunity. Pp. 47–48.

2. Although payment of use taxes will increase the cost of the atomic energy program, Congress was aware of the problem when it repealed § 9 (b) of the Atomic Energy Act in 1953. Pp. 49–51.

211 Tenn. 139, 363 S. W. 2d 193, affirmed.

Solicitor General Cox and *R. R. Kramer* argued the cause for the United States et al. With them on the brief were *Assistant Attorney General Oberdorfer, Philip B. Heymann, I. Henry Kutz, George F. Lynch, Joseph F. Hennessey, Charles W. Hill* and *Jackson C. Kramer.*

Milton P. Rice, Assistant Attorney General of Tennessee, argued the cause for appellee. With him on the

brief were *George F. McCanless,* Attorney General of Tennessee, and *Walker T. Tipton,* Assistant Attorney General.

Mr. Justice White delivered the opinion of the Court.

In *Carson* v. *Roane-Anderson Co.,* 342 U. S. 232, it was held that § 9 (b) of the Atomic Energy Act [1] barred the collection of the Tennessee sales and use tax in connection with sales to private companies of personal property used by them in fulfilling their contracts with the Atomic Energy Commission. In 1953, Congress repealed the statutory immunity for activities and properties of the AEC contained in § 9 (b) in order to place Atomic Energy Commission contractors on the same footing as other contractors performing work for the Government.[2] In 1955 Tennessee amended its statute by adding a contractor's use tax which imposes a tax upon contractors using property in the performance of their contracts with others, irrespective of the ownership of the property and of the place where the goods are purchased. This tax, at the sales and use tax rate, is measured by the purchase price or fair market value of the property used by the contractor and is to be collected only when a sales tax on local purchases or a compensating use tax on out-of-state goods has not previously been collected in connection with the same property.[3]

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[1] 60 Stat. 765, c. 724, 42 U. S. C. (1952 ed.) § 1809 (b). The section read in pertinent part: "The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof."

[2] Act of August 13, 1953, 67 Stat. 575, c. 432.

[3] The Tennessee Retailers Sales Tax Act provides in pertinent part, 12 Tenn. Code Ann. § 67–3004 (1963 Cum. Supp.):

"Where a contractor or subcontractor hereinafter defined as a dealer, uses tangible personal property in the performance of his con-

Union Carbide Corp. and H. K. Ferguson Co. have contracts with the Atomic Energy Commission relating to work and services to be performed at the Oak Ridge, Tennessee, complex. Carbide's contract obligates it to manage, operate and maintain the Oak Ridge plants and facilities in accordance with such directions and instructions not inconsistent with the contract as the Commission deems necessary to issue from time to time. In the absence of applicable instructions, Carbide is to use its best judgment, skill and care in all matters pertaining to performance. Carbide is charged with the duty of procuring materials, supplies, equipment and facilities although the Government retains the right to furnish any of these items. Payment for purchases is to be made with government funds, and title to all property

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tract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax, except where the title holder is a church and the tangible personal property is for church construction, such contractor or subcontractor shall pay a tax at the rate prescribed by § 67–3003 measured by the purchase price or fair market value of such property, whichever is greater, unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid.

. . . . . .

"Provided, further, that the tax imposed by this section or by any other provision of this chapter, as amended shall have no application with respect to the use by, or the sale to, a contractor or subcontractor of atomic weapon parts, source materials, special nuclear materials and by-product materials, all as defined by the atomic energy act of 1954, or with respect to such other materials as would be excluded from taxation as industrial materials under paragraph (c) 2 of § 67–3002 when the items referred to in this proviso are sold or leased to a contractor or subcontractor for use in, or experimental work in connection with, the manufacturing processes for or on behalf of the atomic energy commission or when any of such items are used by a contractor or subcontractor in such experimental work or manufacturing processes."

passes directly from the vendor to the United States.[4] Carbide is generally free to make purchases up to $100,000 without prior approval.

Although Carbide exercises considerable managerial discretion from day to day in performing the contract, the Commission retains the right to control, direct and supervise the performance of the work and has issued directions and instructions governing large areas of the operation. Carbide has no investment in the Oak Ridge facility and at the time of this litigation employed some 12,000 employees and supervisors to perform the contract. Its annual fee, renegotiated periodically, was $2,751,000 at the time of suit.

The Ferguson contract was a contract to perform construction services relating both to new facilities and to the modification of the existing plant. The contract called for performing those projects ordered by the Commission. Ferguson also operated under instructions and directions of the AEC, it owned none of the property used in the performance of its contract and its purchases of property were handled in a manner similar to that

[4] The following is included among the terms and conditions attached to the order forms used by Carbide in making purchases:

"It is understood and agreed that this Order is entered into by the Company for and on behalf of the Government; that title to all supplies furnished hereunder by the Seller shall pass directly from the Seller to the Government, as purchaser, at the point of delivery; that the Company is authorized to and will make payment hereunder from Government funds advanced and agreed to be advanced to it by the Commission, and not from its own assets and administer this Order in other respects for the Commission unless otherwise specifically provided for herein; that administration of this Order may be transferred from the Company to the Commission or its designee, and in case of such transfer and notice thereof to the Seller the Company shall have no further responsibilities hereunder and that nothing herein shall preclude liability of the Government for any payment properly due hereunder if for any reason such payment is not made by the Company from such Government funds."

employed in the case of Carbide except that Ferguson was free to purchase without the consent of the Commission only up to $10,000. Ferguson's compensation is negotiated twice a year on the basis of the value of the services Ferguson performed during the preceding six months, a fee of $20,000 having been paid for the six months preceding suit.

Tennessee collected from Carbide and Ferguson a sales and contractor's use tax upon purchases made by them under their contracts with the Commission. The companies and the AEC sued to recover these taxes claiming that their collection infringed upon the implied constitutional immunity of the United States. The Tennessee Supreme Court refused to permit the collection of the sales tax [5] but sustained the collection of the contractor's use tax. This tax, it was held, is imposed upon the use by a contractor of tangible personal property whether the title is in him or in another, and whether or not the other has immunity from state taxation. The contractor's tax "was intended to be and is a tax upon the use per se by such a contractor. . . . [T]he tax is on [his] private use for [his] own profit and gain, and not a tax directly upon the Government." 211 Tenn 139, 163, 164, 363 S. W. 2d 193, 203, 204. We noted probable jurisdiction to resolve another of the recurring conflicts between the power of the State to tax persons doing business within its borders and the immunity of the Federal Government, its instrumentalities and property from state taxation. 375 U. S. 808. We affirm.

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[5] Relying on *Kern-Limerick, Inc.*, v. *Scurlock*, 347 U. S. 110, the Tennessee court determined that the United States itself was the actual purchaser, and that Carbide and Ferguson acted only as purchasing agents. No question in respect to the correctness of this determination is raised on this appeal and the validity of the contractor's use tax, as against a constitutional claim of immunity, in no way depends on the legality of the sales tax.

The Constitution immunizes the United States and its property from taxation by the States, *M'Culloch* v. *Maryland,* 4 Wheat. 316, but it does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States. *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Graves* v. *New York,* 306 U. S. 466; *Alabama* v. *King & Boozer,* 314 U. S. 1. Nor is it forbidden for a State to tax the beneficial use by a federal contractor of property owned by the United States, even though the tax is measured by the value of the Government's property, *United States* v. *City of Detroit,* 355 U. S. 466, and even though his contract is for goods or services for the United States. *Curry* v. *United States,* 314 U. S. 14; *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495; *United States* v. *Township of Muskegon,* 355 U. S. 484. The use by the contractor for his own private ends—in connection with commercial activities carried on for profit—is a separate and distinct taxable activity.

The United States accepts all this but insists that under the present contracts Carbide's and Ferguson's use of government property is not use by them for their own commercial advantage which the State may tax but a use exclusively for the benefit of the United States. Since they are paid for their services only, make no products for sale to the Government or others, have no investment in the Oak Ridge facility, do not stand to gain or lose by their efficient or nonefficient use of the property, and take no entrepreneurial risks, their use of government property, it is claimed, is in reality use by the United States.

We are not persuaded. In the first place, from the facts in this record it is incredible to conclude that the use of government-owned property was for the sole benefit of the Government. Both companies have a substantial stake in the Oak Ridge operation and a separate

taxable interest. Both companies maintain a sizable number of employees at Oak Ridge, Carbide some 12,000 men and Ferguson at times over 1,000, and both companies were paid sizable fees over and above their cost, Carbide over $2,000,000 a year. No one suggests that either Carbide or Ferguson has put profit aside in contracting with the Commission, that the fee of either company is not set with commercial, profit-making considerations in mind or that the operations of either company at Oak Ridge were not an important part of their regular business operations. "The vital thing" is that Carbide, as well as Ferguson, "was using the property in connection with its own commercial activities." *United States* v. *Township of Muskegon,* 355 U. S. 484, 486.[6]

[6] The Government's reliance on *United States* v. *Livingston,* 179 F. Supp. 9, aff'd *per curiam,* 364 U. S. 281, is misplaced. There a South Carolina statute imposed a sales tax and a tax on use, defined as the exercise of any right or power over property "by any transaction in which possession is given," on contractors "purchasing such property . . . as agents of the United States or its instrumentalities." The Government sought to enjoin collection of the tax from the du Pont Company, which performed management services under a contract, similar in many respects to Carbide's, with the AEC. The difference, however, was that du Pont was paid costs plus a nominal fee of one dollar for its entire undertaking. Passing over doubts as to whether the "use tax" was on the contractor's beneficial use rather than on the purchase of property for the Government, the District Court held the sales tax invalid in reliance on *Kern-Limerick, Inc.,* v. *Scurlock,* 347 U. S. 110, and the use tax invalid principally because du Pont entered the contract solely "out of the high sense of public responsibility" and not for profit. The property was therefore not used in du Pont's commercial or business activities. This Court affirmed, 364 U. S. 281, without opinion or citation, on the basis of the jurisdictional papers, which stressed the fact that the ruling below "was based upon a close analysis of the 'extraordinary' contractual relationship between du Pont and AEC at this plant . . ." and the factual determination that du Pont received no benefits from the contract. Because the services involved herein are performed for a substantial fee in the course of the contractor's commercial operation the *Livingston* decision is not controlling.

Secondly, it does not help at all to say that the companies were engaged in furnishing services only, had no investment or risks and made no products for sale to the Government or to others. Undoubtedly a service industry has different characteristics than a manufacturing operation, but the differences are irrelevant for present purposes. The commercial world is replete with profit-making service industries contracting with the Government on a cost-plus basis, using government properties in the performance of the contract and pursuing their own commercial ends within the meaning of *United States* v. *Township of Muskegon, supra.* Whether manufacturing products for sale to the Government or furnishing services, the cost-plus contractor has undertaken contractual obligations. If he properly performs his contract, he earns his fee; if he does not, he may lose the contract, be liable for damages and be forced to liquidate the organization which was built to perform the contract. Whatever limitations there are on entrepreneurial risks derive from the fact the companies perform under cost-plus-fixed-fee contracts, a widespread method of contracting with the Government. The Government's argument, if accepted, would not only insulate the cost-plus management contractor from state taxation but also those who make products or perform construction work on a cost-plus basis, a result foreclosed by the Court's prior decisions which the Government seems to accept. *Curry* v. *United States, supra; United States* v. *Township of Muskegon, supra.*

In *Muskegon, supra,* the Court remarked that "[t]he case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a 'servant' of the United States in agency terms." The Government urges that this is such a case. According to the Government, this case should be viewed as though the

Commission was doing its own work through its own employees, the legal incidence of the tax therefore falling on it. But, as in *Muskegon,* we cannot believe that either Carbide or Ferguson was "so assimilated by the Government as to become one of its constituent parts." 355 U. S., at 486.

Because of the extraordinary range and complexity of the work to be performed in the research and development of atomic energy, Congress empowered the AEC to choose between performing these undertakings directly, through its own facilities, personnel and staff, and seeking the assistance of private enterprise by means of grants and contracts. Act of August 30, 1954, c. 1073, 68 Stat. 919, 927–928, 42 U. S. C. §§ 2051 (a), 2052. In order to utilize the skill, technical know-how, knowledge and experience of American industry, the Government has, since the inception of the atomic energy program, generally chosen private companies to conduct the various and sundry activities involved in the undertaking, including the management and operation of Atomic Energy plants. See *Carson* v. *Roane-Anderson Co., supra.* As is well stated in the preface to Carbide's contract:

> "[S]uch agreement arose out of the need for the services of an organization with personnel of proved capabilities, both technical and administrative, to manage and operate certain facilities of the Commission and to perform certain work and services for the Commission; and the Commission recognizes the Corporation as an organization having such personnel, and that the initiative, ingenuity and other qualifications of such personnel should be exercised . . . to the fullest extent practicable . . . ."

The help of these companies was not sought merely to supply skilled manpower for employment by the United States and it is not argued that Carbide's 12,000 men have somehow become employees of the Commission rather

than of Carbide. See *Powell* v. *United States Cartridge Co.*, 339 U. S. 497; *Mahoney* v. *United States*, 216 F. Supp. 523 (D. C. E. D. Tenn.). Of course there are governmental directives and instructions which must be obeyed, for the Commission decides the uses of and needs for fissionable material; and, of course, in the sensitive area of atomic energy operations the Commission's controls are subject to modification and change in the light of technical and other developments.[7] But Carbide and Ferguson brought to the Oak Ridge operation both skill and judgment the United States needed and did not have and there is substantial room for the exercise of both, within and without the broad directives issued by the Commission. Should the Commission intend to build or operate the plant with its own servants and employees, it is well aware that it may do so and familiar with the ways of doing it. It chose not to do so here. We cannot conclude that Carbide and Ferguson, both cost-plus contractors for profit, have been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity.

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[7] The general purposes of Commission control and direction are stated in the preface to the contract:

"Whereas, the Corporation recognizes that attainment of the Commission's over-all objectives and discharge of its responsibility for economy and efficiency in the conduct of the atomic energy program require the Commission's general direction of the program, supervision of Government-financed activities of organizations managing Commission facilities and related functions so as to assure conformity with applicable law and policies of the Commission, and full access to information concerning such activities; and that the Commission's program of administration under the Atomic Energy Act requires integration and coordination of such activities which the various organizations may be in a position to perform, for the utilization of their services and of information, materials, facilities, funds and other property of the Commission, in the manner most advantageous to the Government."

It is undoubtedly true, as the Government points out, that subjection of government property used by AEC contractors to state use taxes will result in a substantial future tax liability. But this result was brought to the attention of Congress in the debates on the repeal of § 9 (b),[8] which exempted the activities of AEC contractors from state taxation; indeed the AEC argued that the repeal would substantially increase the cost of the atomic energy program by subjecting AEC contractors to state "sales and use taxes" and "business and occupation" taxes.[9] Nonetheless, Congress, well aware of the prin-

[8] See S. Rep. No. 694, 83d Cong., 1st Sess., 1–3.

[9] *Id.*, at 4–6. The AEC stated:

"Reducing the Commission's exemption from State and local taxes to the constitutional immunity generally applicable would result in an increase of several million dollars annually in the costs of the atomic energy program, in the form of added State and local taxes borne by the Federal Government. It is apparent that this consideration should not be regarded as decisive since it is the policy of the Federal Government to forego such savings in connection with other Federal activities, as is evidenced by the fact that other components of the Government are exempt from State and local taxation only to the extent of the constitutional immunity as delimited in the King and Boozer decision. We feel, however, that there are special aspects of the impact of the atomic energy program upon the fiscal position of the affected States and localities which should be taken into account in determining whether the broader tax exemption applicable to AEC should be preserved." *Id.*, at 5.

The Commission went on to note that generally its installations had a favorable economic impact in the areas where they were located and where its contractors performed, although it conceded a few special problems in certain small communities. It recommended direct payments by the Government in lieu of property taxes on property acquired by the Commission and the adjustment of internal state-local arrangements to insure that the distribution of revenues would take into account the problems of these special locales. It then added:

"*Eliminating the exemption applicable to sales and use taxes,* to business and occupation taxes, and to the other minor taxes now comprehended by section 9 (b) might not modify the revenues of the

ciple that "constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly on the United States," S. Rep. No. 694, 83d Cong., 1st Sess., 2, repealed the statutory exemption for the declared purpose of placing AEC contractors in the same position as all other government contractors. Act of August 13, 1953, c. 432, 67 Stat. 575.[10] The principles laid down in *King &*

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few localities burdened by Commission activities . . . ." *Id.*, at 5–6. (Emphasis supplied.)

[10] The purpose of the repeal is well revealed in the following excerpt from the Senate Report:

"The United States Supreme Court in *Carson* v. *Roane-Anderson Co.* (342 U. S. 232 (1952)) interpreted the last sentence of the foregoing subsection as exempting transactions involving certain AEC contractors from the Tennessee sales and use taxes. The Court held that 'activities' of the Commission, as that term is used in section 9 (b), may be performed by independent contractors of the Commission, as well as by its agents, and that, as a consequence, private contractors performing the governmental function under the Atomic Energy Act are within the scope of the section 9 (b) exemption from State and local taxation.

"This decision has the effect of affording the Atomic Energy Commission an exemption from State and local taxation much broader in scope than that available to the other departments and agencies of the Federal Government, which rely only upon the constitutional immunity of the Federal Government for their exemption from taxation. The Supreme Court, in *Alabama* v. *King and Boozer* (314 U. S. 1), established the principle that the constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly upon the United States. Thus, the Atomic Energy Commission's contractors, by reason of the statutory exemption as interpreted by the Supreme Court, are entitled to an exemption from taxation which is not enjoyed by comparably situated contractors of other agencies and departments.

"A number of States have expressed the view that section 9 (b), as interpreted in the Roane-Anderson decision carves out an area of exemption from State and local taxation which deprives State and local governmental units of substantial revenue, particularly in those areas in which the Atomic Energy Commission carries on large scale activities." S. Rep. No. 694, 83d Cong., 1st Sess., 2.

Boozer, Curry, Esso, and *Muskegon,* we think, strike a proper judicial accommodation between the interests of the States' power to tax and the concerns of the Nation, they are workable, and we adhere to them. If they unduly intrude upon the business of the Nation, it is for Congress, in the valid exercise of its proper powers, not this Court, to make the desirable adjustment.

Affirmed.

MR. JUSTICE HARLAN, concurring.

But for the legislative history set out in the Court's opinion, *ante,* pp. 49–50, notes 8–10, I would have thought this case an appropriate one for a thorough reconsideration of the principles governing federal immunity from state taxation, a subject which has long troubled this Court. See my opinion in the "Michigan cases," 355 U. S., at 505. In view of the legislative history, I concur in the judgment and opinion of the Court.

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MURPHY ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR.

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

No. 138. Argued March 5, 1964.—Decided June 15, 1964.

Although petitioners were granted immunity from prosecution under state laws, they refused to answer questions at a hearing conducted by the respondent on the ground that the answers might tend to incriminate them under federal law, to which the grant of immunity did not extend. They were held in civil and criminal contempt of court. The State Supreme Court reversed the criminal conviction on procedural grounds but affirmed the civil contempt judgment, holding that a State may constitutionally compel a witness to give testimony which might be used against him in a federal prosecution. *Held:* One jurisdiction in our federal system may not, absent an immunity provision, compel a witness to give testimony which might incriminate him under the laws of another jurisdiction.

(a) A state witness granted immunity from prosecution under state law may not be compelled to give testimony which may incriminate him under federal law unless such testimony and its fruits cannot be used in connection with a federal prosecution against him; and such use of compelled testimony or its fruits, as distinguished from independent evidence, by the Federal Government must be proscribed. *Feldman* v. *United States*, 322 U. S. 487, overruled. Pp. 79–80.

(b) The State may thus obtain information requisite for effective law enforcement and the witness and the Federal Government are left in the same position as if the witness claimed his privilege in the absence of a state grant of immunity. P. 79.

(c) With the removal of the fear of federal prosecution, the petitioners may be compelled to answer. Pp. 79–80.

39 N. J. 436, 189 A. 2d 36, judgment vacated in part, affirmed in part, and remanded.

Harold Krieger argued the cause and filed briefs for petitioners.

William P. Sirignano argued the cause for respondent. With him on the brief was *Irving Malchman.*

Briefs of *amici curiae,* urging affirmance, were filed by *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Irving Galt,* Assistant Solicitor General, and *Barry Mahoney,* Deputy Assistant Attorney General, for the State of New York; and by *H. Richard Uviller* and *Michael R. Juviler* for the National District Attorneys' Association.

Mr. Justice Goldberg delivered the opinion of the Court.

We have held today that the Fifth Amendment privilege against self-incrimination must be deemed fully applicable to the States through the Fourteenth Amendment. *Malloy* v. *Hogan, ante,* p. 1. This case presents a related issue: whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction.[1]

Petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor concerning a work stoppage at the Hoboken, New Jersey, piers. After refusing to respond to certain questions about the stoppage on the ground that the answers might tend to incriminate them, petitioners were granted immunity from prosecution under the laws of New Jersey and New York.[2] Notwithstanding this grant of immunity, they still refused to respond to the questions on the

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[1] Since the privilege is now fully applicable to the State and to the Federal Government, the basic issue is the same whether the testimony is compelled by the Federal Government and used by a State, or compelled by a State and used by the Federal Government.

[2] The Waterfront Commission of New York Harbor is a bistate body established under an interstate compact approved by Congress. 67 Stat. 541.

ground that the answers might tend to incriminate them under *federal* law, to which the grant of immunity did not purport to extend. Petitioners were thereupon held in civil and criminal contempt of court. The New Jersey Supreme Court reversed the criminal contempt conviction on procedural grounds but, relying on this Court's decisions in *Knapp* v. *Schweitzer,* 357 U. S. 371; *Feldman* v. *United States,* 322 U. S. 487; and *United States* v. *Murdock,* 284 U. S. 141, affirmed the civil contempt judgments on the merits. The court held that a State may constitutionally compel a witness to give testimony which might be used in a federal prosecution against him.[3] 39 N. J. 436, 452–458, 189 A. 2d 36, 46–49.

Since a grant of immunity is valid only if it is coextensive with the scope of the privilege against self-incrimination, *Counselman* v. *Hitchcock,* 142 U. S. 547, we must now decide the fundamental constitutional question of whether, absent an immunity provision, one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction. The answer to this question must depend, of course, on whether such an application of the privilege promotes or defeats its policies and purposes.

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[3] At a prior hearing, petitioners had refused to answer the questions, not on the ground of self-incrimination, but on the ground that the Commission had no statutory authority to investigate the work stoppage because it involved a labor dispute over which the National Labor Relations Board had exclusive jurisdiction. This claim was litigated through the state courts and rejected, 35 N. J. 62, 171 A. 2d 295, and this Court denied review, 368 U. S. 32. Petitioners thereupon purged themselves of contempt but again refused to answer the questions, this time on the ground of self-incrimination. In reviewing the contempt judgments which form the bases of this case, the New Jersey Supreme Court correctly held that petitioners did not, at the prior hearing, waive their privilege against self-incrimination. 39 N. J. 436, 449, 189 A. 2d 36, 44.

I. The Policies of the Privilege.

The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann* v. *United States,* 350 U. S. 422, 426.[4] It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States* v. *Grunewald,* 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev'd 353 U. S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn* v. *United States,* 349 U. S. 155, 162.

Most, if not all, of these policies and purposes are defeated when a witness "can be whipsawed into incriminating himself under both state and federal law even though" the constitutional privilege against self-incrimination is applicable to each. Cf. *Knapp* v. *Schweitzer,* 357 U. S. 371, 385 (dissenting opinion of Mr. Justice Black). This has become especially true in our age of

[4] The quotation is from Griswold, The Fifth Amendment Today (1955), 7.

"cooperative federalism," where the Federal and State Governments are waging a united front against many types of criminal activity.[5]

[5] It has been argued that permitting a witness in one jurisdiction within our federal structure to invoke the privilege on the ground that he fears prosecution in another jurisdiction:

"is rational only if the policy of the privilege is assumed to be to excuse the witness from the unpleasantness, the indignity, the 'unnatural' conduct of denouncing himself. [But] the policy of the privilege is not this. The policy of the privilege is to regulate a particular government-governed relation—first, to help prevent inhumane treatment of persons from whom information is desired and, second, to satisfy popular sentiment that, when powerful and impersonal government arrays its forces against solitary governed, it would be a violation of the individual's 'sovereignty' and less than fair for the government to be permitted to conscript the knowledge of the governed to its aid. Where the crime is a foreign crime, any motive to inflict brutality upon a person because of the incriminating nature of the disclosure—any 'conviction hunger' as such—is absent. And the sentiments relating to the rules of war between government and governed do not apply where the two are not at war. . . .

"Thus, reasoning from its rationales, the privilege should not apply no matter how incriminating is the disclosure under foreign law and no matter how probable is prosecution by the foreign sovereignty. This is so whether the relevant two sovereignties are different nations, different states, or different sovereignties (such as federal and state) with jurisdiction over the same geographical area." 8 Wigmore, Evidence (McNaughton rev., 1961), 345.

As noted in the text, however, the privilege against self-incrimination represents many fundamental values and aspirations. It is "an expression of the moral striving of the community. . . . a reflection of our common conscience . . . ." *Malloy* v. *Hogan, ante,* p. 9, n. 7, quoting Griswold, The Fifth Amendment Today (1955), 73. That is why it is regarded as so fundamental a part of our constitutional fabric, despite the fact that "the law and the lawyers . . . have never made up their minds just what it is supposed to do or just whom it is intended to protect." Kalven, Invoking the Fifth Amendment—Some Legal and Impractical Considerations, 9 Bull. Atomic Sci. 181, 182. It will not do, therefore, to assign one isolated policy to the privilege, and then to argue that since "the" policy may not be furthered

Respondent contends, however, that we should adhere to the "established rule" that the constitutional privilege against self-incrimination does not protect a witness in one jurisdiction against being compelled to give testimony which could be used to convict him in another jurisdiction. This "rule" has three decisional facets: *United States* v. *Murdock,* 284 U. S. 141, held that the Federal Government could compel a witness to give testimony which might incriminate him under state law; *Knapp* v. *Schweitzer,* 357 U. S. 371, held that a State could compel a witness to give testimony which might incriminate him under federal law; and *Feldman* v. *United States,* 322 U. S. 487, held that testimony thus compelled by a State could be introduced into evidence in the federal courts.

Our decision today in *Malloy* v. *Hogan, supra,* necessitates a reconsideration of this rule.[6] Our review of the pertinent cases in this Court and of their English antecedents reveals that *Murdock* did not adequately consider the relevant authorities and has been significantly weakened by subsequent decisions of this Court, and, further, that the legal premises underlying *Feldman* and *Knapp* have since been rejected.

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measurably by applying the privilege across state-federal lines, it follows that the privilege should not be so applied.

[6] The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements, see, *e. g., Counselman* v. *Hitchcock,* 142 U. S. 547; and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion. See, *e. g., Haynes* v. *Washington,* 373 U. S. 503. In every "whipsaw" case, either the "compelling" government or the "using" government is a State, and, until today, the States were not deemed fully bound by the privilege against self-incrimination. Now that both governments are fully bound by the privilege, the conceptual difficulty of pinpointing the alleged violation of the privilege on "compulsion" or "use" need no longer concern us.

II. The Early English and American Cases.

A. The English Cases Before the Adoption of the Constitution.

In 1749 the Court of Exchequer decided *East India Co.* v. *Campbell,* 1 Ves. sen. 246, 27 Eng. Rep. 1010. The defendant in that case refused to "discover" certain information in a proceeding in an English court on the ground that it might subject him to punishment in the courts of India. The court unanimously held that the privilege against self-incrimination protected a witness in an English court from being compelled to give testimony which could be used to convict him in the courts of another jurisdiction. The court stated the rule to be:

> "that this court shall not oblige one to discover that, which, if he answers in the affirmative, will subject him to the punishment of a crime . . . and that he is punishable appears from the case of *Omichund* v. *Barker,* [1 *Atk.* 21.] as a jurisdiction is erected in *Calcutta* for criminal facts: where he may be sent to government and tried, though not punishable here; like the case of one who was concerned in a rape in *Ireland,* and sent over there by the government to be tried, although the court of *B. R.* here refused to do it . . . for the government may send persons to answer for a crime wherever committed, that he may not involve his country; and to prevent reprisals." 1 Ves. sen., at 247, 27 Eng. Rep., at 1011.

In the following year, this rule was applied in a case involving separate systems of courts and law located within the same geographic area. The defendant in *Brownsword* v. *Edwards,* 2 Ves. sen. 243, 28 Eng. Rep. 157, refused to "discover, whether she was lawfully married" to a certain individual, on the ground that if she admitted to the marriage she would be confessing to an act which, although legal under the common law, would render her

"liable to prosecution in ecclesiastical court." The Lord Chancellor said:

> "This appears a very plain case, in which defendant may protect herself from making a discovery of her marriage; and I am afraid, if the court should over-rule such a plea, it would be setting up the oath *ex officio;* which then the parliament in the time of *Charles* I. would in vain have taken away, if the party might come into this court for it. The general rule is, that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law of the land." 2 Ves. sen., at 244–245, 28 Eng. Rep., at 158.

B. *The Saline Bank Case.*

It was against this background of English case law that this Court in 1828 decided *United States* v. *Saline Bank of Virginia,* 1 Pet. 100. The Government, seeking to recover certain bank deposits, brought suit in the District Court against the bank and a number of its stockholders. The defendants resisted discovery of "any matters, whereby they may impeach or accuse themselves of any offence or crime, or be liable by the laws of the commonwealth of Virginia, to penalties and grievous fines . . . ." *Id.,* at 102. The unanimous opinion of the Court, delivered by Chief Justice Marshall, reads as follows:

> "This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia.
>
> "The Court below decided in favour of the validity of the plea, and dismissed the bill.
>
> "It is apparent that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. 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.

"The decree of the Court below is therefore affirmed." *Id.*, at 104.

This case squarely holds that the privilege against self-incrimination protects a witness in a federal court from being compelled to give testimony which could be used against him in a state court.

C. *Subsequent Development of the English Rule.*

In 1851, the English Court of Chancery decided *King of the Two Sicilies* v. *Willcox,* 1 Sim. (N. S.) 301, 61 Eng. Rep. 116, a case which this Court in *United States* v. *Murdock,* 284 U. S. 141, erroneously cited as representing the settled "English rule" that a witness is not protected "against disclosing offenses in violation of the laws of another country." *Id.,* at 149. Defendants in that case resisted discovery of information, which, they asserted, might subject them to prosecution under the laws of Sicily. In denying their claim, the Vice Chancellor said:

> "The rule relied on by the Defendants, is one which exists merely by virtue of our own municipal law, and must, I think, have reference, exclusively, to matters penal by that law: to matters as to which, if disclosed, the Judge would be able to say, as matter of law, whether it could or could not entail penal consequences." 1 Sim. (N. S.), at 329, 61 Eng. Rep., at 128.

Two reasons were given in support of this statement: (1) "The impossibility of knowing, as matter of law, to what cases the objection, when resting on the danger of incurring penal consequences in a foreign country, may extend . . . ," *id.,* at 331, 61 Eng. Rep., at 128; and (2) the fact that "in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he

should first quit the protection of our laws, and wilfully go within the jurisdiction of the laws he has violated," [7] *ibid.*, 61 Eng. Rep., at 128.

Within a few years, the pertinent part of *King of the Two Sicilies* was specifically overruled by the Court of Chancery Appeal in *United States of America* v. *McRae*, L. R., 3 Ch. App. 79 (1867), a case not mentioned by this Court in *United States* v. *Murdock, supra.* In *McRae,* the United States sued in an English court for an accounting and payment of moneys allegedly received by the defendant as agent for the Confederate States during the Civil War. The defendant refused to answer questions on the ground that to do so would subject him to penalties under the laws of the United States. The United States argued that the "protection from answering applies only where a person might expose himself to the peril of a penal proceeding in this country [England], and not to the case where the liability to penalty or forfeiture is incurred by the breach of the laws of

[7] In *The Queen* v. *Boyes,* 1 B. & S. 311, decided by the Queen's Bench in 1861, a witness had declined to answer a question on the ground that it might tend to incriminate him, whereupon the "*Solicitor General* then produced a pardon of the witness." *Id.*, at 313. The witness nevertheless refused to answer the question on the ground that he could still be impeached by the Parliament. The court held:

"that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. . . .

Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment . . . . No instance of such a proceeding in the unhappily too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of." *Id.*, at 330–331.

a foreign country [the United States]." L. R., 3 Ch. App., at 83–84. The United States relied on *King of the Two Sicilies* v. *Willcox, supra.* The Lord Chancellor sustained the claim of privilege and limited *King of the Two Sicilies* to its facts. He said:

> "I quite agree in the general principles stated by Lord *Cranworth,* and in their application to the particular case before him. . . . [The defendants there] did not furnish the least information what the foreign law was upon the subject, though it was necessary for the Judge to know this with certainty before he could say whether the acts done by the persons who objected to answer had rendered them amenable to punishment by that law or not. . . . [Moreover,] it was doubtful whether the Defendants would ever be within the reach of a prosecution, and their being so depended on their voluntary return to [Sicily]." L. R., 3 Ch. App., at 84–87.

In refusing to follow *King of the Two Sicilies* beyond its particular facts, the court said:

> "But in giving judgment Lord *Cranworth* went beyond the particular case, and expressed his opinion that the rule upon which the Defendants relied to protect them from answering was one which existed merely by virtue of our own municipal law, and which must have reference exclusively to matters penal by that law. It was unnecessary to lay down so broad a proposition to support the judgment which he pronounced . . . . What would have been Lord *Cranworth's* opinion upon [the present] state of circumstances it is impossible for me to conjecture; but it is very different from that which was before his mind in that case, and I cannot feel that there is any judgment of his which ought to influence my decision upon the present occasion." *Id.,* at 85.

The court then concluded that under the circumstances it could not "distinguish the case in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law." *Id.*, at 87. This decision, not *King of the Two Sicilies,* represents the settled "English rule" regarding self-incrimination under foreign law. See *Heriz* v. *Riera,* 11 Sim. 318, 59 Eng. Rep. 896.

III. The Recent Supreme Court Cases.

In 1896, in *Brown* v. *Walker,* 161 U. S. 591, this Court, for the first time, sustained the constitutionality of a federal immunity statute. Appellant in that case argued, *inter alia,* that:

> "while the witness is granted immunity from prosecution by the Federal government, he does not obtain such immunity against prosecution in the state courts." *Id.*, at 606.

The Court construed the applicable statute, however, to prevent prosecutions either in state or federal courts.[8]

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[8] The Court in *Brown* v. *Walker,* 161 U. S. 591, signified approval of the English rule announced in *The Queen* v. *Boyes, supra,* as follows:

"But even granting that there were still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in *The Queen* v. *Boyes,* 1 B. & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate." 161 U. S., at 608. See note 7, *supra.*

The lower federal courts were also following the English rule that a refusal to answer questions could legitimately be based on the

Shortly thereafter, the Court decided *Jack* v. *Kansas*, 199 U. S. 372, in which the state court had held plaintiff in error in contempt for his refusal to answer certain questions on the ground that they would subject him to possible incrimination under federal law. In rejecting plaintiff's claim, this Court said that the Fifth Amendment "has no application in a proceeding like this," and hence "the sole question in the case" is whether "the denial of his claim of right to refuse to answer the questions was in violation of the Fourteenth

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danger of incrimination in another jurisdiction. In the case of *In re Graham*, 10 Fed. Cas. 913 (No. 5,659), for example, the witness refused to answer questions asked by a federal official on the ground that answers to such questions might expose "him to a criminal prosecution under the laws of the state of New York." *Id.*, at 914. Judge Blatchford held that the witness was "privileged from answering the questions." *Ibid.* In the case of *In re Hess*, 134 F. 109, decided in 1905, where a bankrupt refused to answer certain questions on the ground that they might tend to incriminate him under state law, the court said:

"Section 860 of the Revised Statutes only prohibits the use of evidence that may be obtained from the bankrupt's books in prosecutions in the federal courts. There is nothing in this section which extends that immunity to the use of such evidence in the state courts, and there is nothing to prevent the trustee from making use of the bankrupt's books in a criminal prosecution against him instituted in the state courts. Obviously, therefore, if section 7, cl. 9, of the bankrupt act, does not protect him against the use of the evidence which he alleges is contained in his books, of an incriminating nature, in either the state or federal courts, and section 860 of the Revised Statutes extends the immunity only to federal courts, and not to state courts, it is plain that whatever incriminating evidence the books may contain could be used without restriction in the state courts for the purpose of convicting him of any crime for which he might be indicted there, and, in consequence of this danger to him, the plea of his constitutional privilege must prevail." *Id.*, at 112.

Also see, *e. g.*, *In re Koch*, 14 Fed. Cas. 832 (No. 7,916); *In re Feldstein*, 103 F. 269; *In re Henschel*, 7 Am. Bankr. R. 207; *In re Kanter*, 117 F. 356; *In re Hooks Smelting Co.*, 138 F. 954, 146 F. 336.

Amendment to the Constitution . . . ." *Id.,* at 380. The Court stated that it did "not believe that in such case there is any real danger of a Federal prosecution, or that such evidence would be availed of by the Government for such purpose." *Id.,* at 382. Then, without citing any authority, the Court added the following cryptic dictum: "We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough." *Ibid.*

That this dictum related solely to the "legal immunity" under the Due Process Clause of the Fourteenth Amendment is apparent from the fact that it was regarded, five weeks later in *Ballmann* v. *Fagin,* 200 U. S. 186, as wholly inapplicable to cases decided under the Self-Incrimination Clause of the Fifth Amendment.[9] Ballmann had been held in contempt of a federal court for refusing to answer certain questions before a federal grand jury. He claimed that his answers might expose him "to the criminal law of the State in which the grand jury was sitting." *Id.,* at 195. Justice Holmes, writing for a Court which included the author of *Jack* v. *Kansas, supra,* squarely held that "[a]ccording to *United States* v. *Saline Bank,* 1 Peters, 100, he was exonerated from disclosures which would have exposed him to the penalties of the state law. See *Jack* v. *Kansas,* 199 U. S. 372, decided this term." 200 U. S., at 195.

A few months after *Ballmann,* the Court decided *Hale* v. *Henkel,* 201 U. S. 43. Appellant had been held in contempt of a federal court for refusing to answer certain questions and produce certain documents. His refusal was based in part on the argument that the federal immunity statute did not protect him from state prosecution. The Government argued, on the authority of *Brown* v. *Walker, supra,* that the statute did protect him

[9] At this time, the privilege against self-incrimination had not yet been held applicable to the States through the Fourteenth Amendment.

from state prosecution. The Government assumed that it was settled that a valid federal immunity statute would have to protect against state prosecution. It never suggested, therefore, that immunity from federal prosecution was all that was required. Appellant similarly assumed, without argument, that the Constitution required immunity from state conviction as a condition of requiring incriminating testimony in a federal court. Thus the critical constitutional issue—whether the Fifth Amendment protects a federal witness from incriminating himself under state law—was not briefed or argued in *Hale* v. *Henkel.* Nor was its resolution necessary to the decision of the case, for the Court could have decided the relevant point on the authority of *Brown* v. *Walker, supra,* which had held that a similar federal immunity statute protected against state prosecution. Nevertheless, the Court went on to say:

> "The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen* v. *Boyes,* 1 B. & S. 311; *King of the Two Sicilies* v. *Willcox,* 7 State Trials (N. S.), 1049, 1068; *State* v. *March,* 1 Jones (N. Car.), 526; *State* v. *Thomas,* 98 N. Car. 599.
>
> "The case of *United States* v. *Saline Bank,* 1 Pet. 100, is not in conflict with this. That was a bill for discovery, filed by the United States against the cashier of the Saline Bank, in the District Court of the Virginia District, who pleaded that the emission of certain unlawful bills took place, within the State of Virginia, by the law whereof penalties were inflicted for such emissions. It was held that defendants were not bound to answer and subject themselves to those penalties. It is sufficient to say that the prosecution was under a state law which im-

> posed the penalty, and that the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction." 201 U. S., at 69.

This dictum, subsequently relied on in *United States* v. *Murdock, supra,* was not well founded.

The settled English rule was exactly the opposite of that stated by the Court. The most recent authoritative announcement of the English rule had been that made in 1867 in *United States of America* v. *McRae, supra,* where the Court of Chancery Appeals held that where there is a real danger of prosecution in a foreign country, the case could not be distinguished "in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law." *Supra,* at 63. The dictum from *King of the Two Sicilies* cited by the Court in *Hale* v. *Henkel* had been rejected in *McRae.* Moreover, the two factors relied on by the English court in *King of the Two Sicilies* were wholly inapplicable to federal-state problems in this country. The first—"The impossibility of knowing, as matter of law, to what cases the [danger of incrimination] may extend . . . ," *supra,* at 60—has no force in our country where the federal and state courts take judicial notice of each other's law. The second—that "in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws, and wilfully go within the jurisdiction of the laws he has violated," *supra,* at 60–61—is equally inapplicable in our country where the witness is generally within "the jurisdiction" of the State under whose law he claims danger of incrimination, and where, if he is not, the State may demand his extradition. The second case relied on in *Hale* v. *Henkel, supra—The Queen* v. *Boyes, supra*—was irrelevant to the issue there presented. *The Queen* v. *Boyes* did not involve

different jurisdictions or systems of law. It merely held that the danger of prosecution "must be real and appreciable . . . not a danger of an imaginary and unsubstantial character . . . ." It in no way suggested that the danger of prosecution under foreign law could be ignored if it was "real and appreciable." [10]

Thus, the authorities relied on by the Court in *Hale* v. *Henkel* provided no support for the conclusion that under the Fifth Amendment "the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty." Nor was its attempt to distinguish Chief Justice Marshall's opinion in *United States* v. *Saline Bank of Virginia, supra,* more successful. The Court's reading of *Saline Bank* suggests that the state, rather than the federal, privilege against self-incrimination applies to federal courts when they are administering state substantive law. The most reason-

[10] See note 7, *supra.* Nor were the North Carolina cases relied on in *Hale* v. *Henkel* settled authority in favor of the proposition that the Fifth Amendment did not protect a federal witness from incriminating himself under state law. In *State* v. *March,* 1 Jones (N. C.) 526, the North Carolina Supreme Court in 1853 did say that the North Carolina "[c]ourts, in administering justice among their suitors, will not notice the criminal laws of another State or country, so far as to protect a witness from being asked whether he had not violated them." That court, of course, was not applying either the Fifth Amendment or the Fourteenth Amendment (which was not yet enacted), and the North Carolina rule against self-incrimination apparently was narrower in scope than the federal rule. See *State* v. *Thomas,* 98 N. C. 599, 603, 4 S. E. 518, 520 (citing cases). In any event, the authority of the *March* case had been significantly diminished, if not discredited, by the second of the North Carolina cases relied upon in *Hale* v. *Henkel.* In *State* v. *Thomas, supra,* the North Carolina Supreme Court conceded that the *March* "case is not distinguishable in principle from that before us." It continued: "We prefer, however, to put our decision upon other ground—*more satisfactory to our own minds* and well sustained by adjudications in other Courts." 98 N. C., at 604, 4 S. E., at 520–521. (Emphasis added.) The court then held that the witness had waived his privilege against self-incrimination.

able reading of that case, however, and the one which was plainly accepted by Justice Holmes in *Ballmann* v. *Fagin, supra,* is that the privilege against self-incrimination precludes a federal court from requiring an answer to a question which might incriminate the witness under state law.[11] This reading is especially compelling in light of the English antecedents of the *Saline Bank* case. See *East India Co.* v. *Campbell,* discussed, *supra,* at 58; and *Brownsword* v. *Edwards,* discussed, *supra,* at 58–59.

The weakness of the *Hale* v. *Henkel* dictum was immediately recognized both by lower federal courts [12] and by this Court itself. In *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, decided in 1927 by a unanimous

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[11] It has been argued that "[i]t is abundantly clear . . . that *Saline Bank* stands for no constitutional principle whatever. It was merely a reassertion of the ancient *equity rule* that a court of equity will not order discovery that may subject a party to criminal prosecution. In fact, the decision was cited in support of that proposition by an esteemed member of the very Court that decided the case. 2 Story, Commentaries on Equity, § 1494, n. 1 (1836)." *Hutcheson* v. *United States,* 369 U. S. 599, 608, n. 13 (opinion of Mr. Justice Harlan).

The cited authority does not, however, support the argument "that *Saline Bank* stands for no constitutional principle whatever." That case was cited by Story, intermingled with more than a dozen other cases, in a footnote to the following statement: "Courts of Equity . . . will not compel a discovery in aid of a criminal prosecution . . . for *it is against the genius of the Common Law to compel a party to accuse himself; and* it is against the general principles of Equity to aid in the enforcement of penalties or forfeitures." (Emphasis added.) This statement suggests that the common-law privilege and the equitable rule are so intermeshed that it serves no useful purpose to attempt to ascertain whether a given application by a Court of Equity rested on the former or the latter.

[12] See, *e. g., United States* v. *Lombardo,* 228 F. 980, aff'd on other grounds, 241 U. S. 73, where the court accepted defendant's contention that if she answered certain questions, she might "incriminate herself under the criminal laws of Washington." See also, *e. g., Buckeye Powder Co.* v. *Hazard Powder Co.,* 205 F. 827; *In re Doyle,* 42 F. 2d 686, rev'd without opinion, 47 F. 2d 1086.

Court, appellant refused to answer certain questions put to him in a deportation proceeding on the ground that they "might have tended to incriminate him under the Illinois Syndicalism Law . . . ." *Id.*, at 112. Instead of deciding the issue on the authority of the *Hale* v. *Henkel* dictum, the Court held that the privilege had been waived. The Court then said:

> "This conclusion makes it unnecessary for us to consider the extent to which the Fifth Amendment guarantees immunity from self-incrimination under state statutes or whether this case is to be controlled by *Hale* v. *Henkel,* 201 U. S. 43; *Brown* v. *Walker,* 161 U. S. 591, 608; compare *United States* v. *Saline Bank,* 1 Pet. 100; *Ballmann* v. *Fagin,* 200 U. S. 186, 195." 273 U. S., at 113.

In a subsequent case, decided in 1933, this Court said that the question—whether "one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law"—was "specifically reserved in *Vajtauer* v. *Comm'r of Immigration,*" and was not "definitely settled" until 1931. *United States* v. *Murdock,* 290 U. S. 389, 396.

In 1931, the Court decided *United States* v. *Murdock,* 284 U. S. 141, the case principally relied on by respondent here. Appellee had been indicted for failing to supply certain information to federal revenue agents. He claimed that his refusal had been justified because it rested on the fear of federal and state incrimination. The Government argued that the record supported only a claim of state, not federal, incrimination, and that the Fifth Amendment does not protect against a claim of state incrimination. Appellee did not respond to the latter argument, but instead rested his entire case on the claim that his refusals had in each instance been based on federal as well as state incrimination. In support of

its constitutional argument, the Government cited the same two English cases erroneously relied on in the *Hale* v. *Henkel* dictum—*King of the Two Sicilies* v. *Willcox, supra,* which had been overruled, and *The Queen* v. *Boyes, supra,* which was wholly inapposite. An examination of the briefs and summary of argument indicates that neither the Government nor the appellee informed the Court that *King of the Two Sicilies* had been overruled by *United States of America* v. *McRae, supra.*[13]

This Court decided that appellee's refusal to answer rested solely on a fear of state prosecution, and then concluded, in one brief paragraph, that such a fear did not justify a refusal to answer questions put by federal officers.

The Court gave three reasons for this conclusion. The first was that:

> "Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution, Art. VI, § 2." 284 U. S., at 149.

This argument, however, begs the critical question. No one would suggest that state law could prevent a proper federal investigation; the Court had already held that the Federal Government could, under the Supremacy Clause, grant immunity from state prosecution, and that, accordingly, state law could not prevent a proper federal investigation. The critical issue was whether the Federal Government, *without granting immunity from state prosecution,* could compel testimony which would incriminate under state law. The Court's first "reason" was not responsive to this issue.

The second reason given by the Court was that:

> "The English rule of evidence against compulsory self-incrimination, on which historically that con-

[13] The Government also relied on the North Carolina case of *State* v. *March, supra,* which, as previously noted, see note 10, *supra,* had been discredited by the subsequent case of *State* v. *Thomas, supra.*

> tained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. *King of the Two Sicilies* v. *Willcox,* 7 State Trials (N. S.) 1050, 1068. *Queen* v. *Boyes,* 1 B. & S. 311, 330." 284 U. S., at 149.

As has been demonstrated, the cases cited were in one instance overruled and in the other inapposite, and the English rule was the opposite from that stated in this Court's opinion: The rule did "protect witnesses against disclosing offenses in violation of the laws of another country." *United States of America* v. *McRae, supra.*

The third reason given by the Court in *Murdock* was that:

> "This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock,* 142 U. S. 547. *Brown* v. *Walker,* 161 U. S. 591, 606. *Jack* v. *Kansas,* 199 U. S. 372, 381. *Hale* v. *Henkel,* 201 U. S. 43, 68." 284 U. S., at 149.

This argument—that the rule in question had already been "established" by the past decisions of the Court—is not accurate. The first case cited by the Court—*Counselman* v. *Hitchcock*—said nothing about the problem of incrimination under the law of another sovereign. The second case—*Brown* v. *Walker*—merely held that the

federal immunity statute there involved did protect against state prosecution. The third case—*Jack* v. *Kansas*—held that the Due Process Clause of the Fourteenth Amendment did not prevent a State from compelling an answer to a question which presented no "real danger of a Federal prosecution." 199 U. S., at 382. The final case—*Hale* v. *Henkel*—contained dictum in support of the rule announced which was without real authority and which had been questioned by a unanimous Court in *Vajtauer* v. *Commissioner of Immigration, supra.* Moreover, the Court subsequently said, in no uncertain terms, that the rule announced in *Murdock* had not been previously "established" by the decisions of the Court. When Murdock appealed his subsequent conviction on the ground, *inter alia,* that an instruction on willfulness should have been given, the Court affirmed the Court of Appeals' reversal of his conviction and said that:

> "Not until this court pronounced judgment in *United States* v. *Murdock,* 284 U. S. 141, had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law. The question was involved, but not decided, in *Ballmann* v. *Fagin,* 200 U. S. 186, 195, and specifically reserved in *Vajtauer* v. *Comm'r of Immigration,* 273 U. S. 103, 113." *United States* v. *Murdock,* 290 U. S. 389, 396.

Thus, neither the reasoning nor the authority relied on by the Court in *United States* v. *Murdock,* 284 U. S. 141, supports its conclusion that the Fifth Amendment permits the Federal Government to compel answers to questions which might incriminate under state law.

In 1944 the Court, in *Feldman* v. *United States,* 322 U. S. 487, was confronted with the situation where evidence compelled by a State under a grant of state immunity was "availed of by the [Federal] Government" and

introduced in a federal prosecution. *Jack* v. *Kansas,* 199 U. S., at 382. This was the situation which the Court had earlier said it did "not believe" would occur. *Ibid.* Nevertheless, the Court, in a 4-to-3 decision, upheld this practice, but did so on the authority of a principle which is no longer accepted by this Court. The *Feldman* reasoning was essentially as follows:

> "[T]he Fourth and Fifth Amendments, intertwined as they are, [express] supplementing phases of the same constitutional purpose . . . ." 322 U. S. 489–490.
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> "[O]ne of the settled principles of our Constitution has been that these Amendments protect only against invasion of civil liberties by the [Federal] Government whose conduct they alone limit." *Id.,* at 490.
>
> "And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, *Weeks* v. *United States, supra;* . . . incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. *Burdeau* v. *McDowell,* 256 U. S. 465." 322 U. S., at 492.

The Court concluded, therefore, by analogy to the then extant search and seizure rule, that evidence compelled by a state grant of immunity could be used by the Federal Government. But the legal foundation upon which that 4-to-3 decision rested no longer stands. Evidence illegally seized by state officials may not now be received in federal courts. In *Elkins* v. *United States,* 364 U. S. 206, the Court held, over the dissent of the writer of the *Feldman* decision, that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's

timely objection in a federal criminal trial." 364 U. S., at 223. Thus, since the fundamental assumption underlying *Feldman* is no longer valid, the constitutional question there decided must now be regarded as an open one.

The relevant cases decided by this Court since *Feldman* fall into two categories. Those involving a federal immunity statute—exemplified by *Adams* v. *Maryland,* 347 U. S. 179—in which the Court suggested that the Fifth Amendment bars use by the States of evidence obtained by the Federal Government under the threat of contempt. And those involving a state immunity statute—exemplified by *Knapp* v. *Schweitzer,* 357 U. S. 371—where the Court, applying a rule today rejected, held the Fifth Amendment inapplicable to the States.[14]

In *Adams* v. *Maryland, supra,* petitioner had testified before a United States Senate Committee investigating crime, and his testimony had later been used to convict him of a state crime. A federal statute at that time provided that no testimony given by a witness in congressional inquiries "shall be used as evidence in any criminal proceeding against him in any court . . . ." 62 Stat. 833. The State questioned the application of the statute to petitioner's testimony and the constitutionality of the statute if construed to apply to state courts. The Court, in an opinion joined by seven members, made the following significant statement: "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." 347 U. S., at 181.[15] This statement suggests

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[14] In *Mills* v. *Louisiana,* 360 U. S. 230, the Court, without opinion, simply applied the rule announced in *Knapp* v. *Schweitzer,* 357 U. S. 371. In *Hutcheson* v. *United States,* 369 U. S. 599, there was no opinion of the Court.

[15] The Court in *Adams* v. *Maryland,* 347 U. S. 179, went on to construe the statute as affording more protection than would be provided

that any testimony elicited under threat of contempt by a government to whom the constitutional privilege against self-incrimination is applicable (at the time of that decision it was deemed applicable only to the Federal Government) may not constitutionally be admitted into evidence against him in any criminal trial conducted by a government to whom the privilege is also applicable. This statement, read in light of today's decision in *Malloy* v. *Hogan, ante,* at 1, draws into question the continuing authority of the statements to the contrary in *United States* v. *Murdock,* 284 U. S. 141, and *Feldman* v. *United States, supra.*[16]

Knapp v. *Schweitzer,* 357 U. S. 371, involved a state contempt conviction for a witness' refusal to answer questions, under a grant of state immunity, on the ground that his answers might subject him to prosecution under federal law. Petitioner claimed that "the Fifth Amendment gives him the privilege, which he can assert against either a State or the National Government, against giving testimony that might tend to implicate him in a violation" of federal law. *Id.,* at 374. The Court, apply-

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by the Fifth Amendment alone. It held that the statute applied even where, as there, the witness had not claimed his privilege against self-incrimination before being required to testify. It held, as well, that the statute did, and constitutionally could, prevent use of the testimony in state as well as federal courts.

[16] In *Ullmann* v. *United States,* 350 U. S. 422, decided two years after *Adams,* the Court did not reach the constitutional question of whether a State could prosecute a person on the basis of evidence obtained by the Federal Government under a federal immunity statute. The Court again construed the applicable statute, which related to testimony involving national security, to apply to the States and held that the paramount federal "authority in safeguarding national security" justifies "the restriction it has placed on the exercise of state power . . . ." *Id.,* at 436.

ing the rule then in existence, denied petitioner's claim and declared that:

> "It is plain that the [Fifth Amendment] can no more be thought of as restricting action by the States than as restricting the conduct of private citizens. The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." *Id.*, at 380.

The Court has today rejected that rule, and with it, all the earlier cases resting on that rule.

The foregoing makes it clear that there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.

IV. Conclusions.

In light of the history, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts [17] and by Chief Justice Marshall and Justice Holmes. See *United States* v. *Saline Bank of Virginia, supra; Ballmann* v. *Fagin, supra.* We reject—as unsupported by history or policy—the deviation from that construction only recently adopted by this Court in *United States* v. *Murdock, supra,* and *Feldman* v. *United States, supra.* We hold that the constitutional privilege

[17] The English rule apparently prevails also in Canada, Australia and India. See Grant, Federalism and Self-Incrimination: Common Law and British Empire Comparisons, 5 U. C. L. A. L. Rev. 1 (1958).

against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.

We must now decide what effect this holding has on existing state immunity legislation. In *Counselman* v. *Hitchcock,* 142 U. S. 547, this Court considered a federal statute which provided that no "evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States . . . ." *Id.,* at 560. Notwithstanding this statute, appellant, claiming his privilege against self-incrimination, refused to answer certain questions before a federal grand jury. The Court said "that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." *Id.,* at 585. Applying this principle to the facts of that case, the Court upheld appellant's refusal to answer on the ground that the statute:

> "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court . . . ," *id.,* at 564,

that it:

> "could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted . . . ," *ibid.,*

and that it:

> "affords no protection against that use of compelled testimony which consists in gaining therefrom a

> knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." *Id.*, at 586.

Applying the holding of that case to our holdings today that the privilege against self-incrimination protects a state witness against federal prosecution, *supra,* at 77–78, and that "the same standards must determine whether [a witness'] silence in either a federal or state proceeding is justified," *Malloy* v. *Hogan, ante,* at 11, we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.[18] This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

It follows that petitioners here may now be compelled to answer the questions propounded to them. At the time they refused to answer, however, petitioners had a reasonable fear, based on this Court's decision in *Feldman* v. *United States, supra,* that the federal authorities might use the answers against them in connection with a federal

[18] Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.

prosecution. We have now overruled *Feldman* and held that the Federal Government may make no such use of the answers. Fairness dictates that petitioners should now be afforded an opportunity, in light of this development, to answer the questions. Cf. *Raley* v. *Ohio,* 360 U. S. 423. Accordingly, the judgment of the New Jersey courts ordering petitioners to answer the questions may remain undisturbed. But the judgment of contempt is vacated and the cause remanded to the New Jersey Supreme Court for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the judgment and opinion of the Court for the reasons stated in that opinion and for the reasons stated in *Feldman* v. *United States,* 322 U. S. 487, 494 (dissenting opinion), as well as *Adamson* v. *California,* 332 U. S. 46, 68 (dissenting opinion); *Speiser* v. *Randall,* 357 U. S. 513, 529 (concurring opinion); *Bartkus* v. *Illinois,* 359 U. S. 121, 150 (dissenting opinion); and *Abbate* v. *United States,* 359 U. S. 187, 201 (dissenting opinion).

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, concurring in the judgment.

Unless I wholly misapprehend the Court's opinion, its holding that testimony compelled in a state proceeding over a witness' claim that such testimony will incriminate him may not be used against the witness in a federal criminal prosecution rests on *constitutional* grounds. On that basis, the contrary conclusion of *Feldman* v. *United States,* 322 U. S. 487, is overruled.

I believe that the constitutional holding of *Feldman* was correct, and would not overrule it. To the extent, however, that the decision in that case may have rested

also on a refusal to exercise this Court's "supervisory power" over the administration of justice in federal courts, I think that it can no longer be considered good law, in light of this Court's subsequent decision in *Elkins* v. *United States,* 364 U. S. 206. In *Elkins,* this Court, exercising its supervisory power, did away with the "silver platter" doctrine and prohibited the use of evidence unconstitutionally seized by state authorities in a federal criminal trial involving the person suffering such a seizure. I believe that a similar supervisory rule of exclusion should follow in a case of the kind now before us, and solely on that basis concur in this judgment.

I.

The Court's constitutional conclusions are thought by it to follow from what it terms the "policies" of the privilege against self-incrimination and a re-examination of various cases in this Court, particularly in the context of early English law. Almost entirely absent from the statement of "policies" is any reference to the particular problem of this case; at best, the statement suggests the set of values which are on one side of the issue. The discussion of precedent is scarcely more helpful. It intertwines decisions of this Court with decisions in English courts, which *perhaps* follow a different rule,[1] and casts

[1] The English rule is not clear. In *United States of America* v. *McRae,* L. R., 3 Ch. App. 79 (1867), the case on which the majority primarily relies, the United States came into court as a party and sought to elicit from the defendant answers which would have subjected him to a forfeiture of property under the laws of the United States. Upholding the defendant's refusal to answer, the Lord Chancellor pointed out that the ". . . Plaintiffs calling for an answer are the sovereign power by whose authority and in whose name the proceedings for the forfeiture are instituted, and who have the property to be forfeited within their reach." *Id.,* at 85. That case, in which one sovereign, as a party in a civil proceeding, attempted to use the judicial process of another sovereign to obtain answers which would subject

doubt for one reason or another on every American case which does not accord with the result now reached. When the skein is untangled, however, and the line of cases is spread out, two facts clearly emerge:

(1) With two early and somewhat doubtful exceptions, this Court has consistently rejected the proposition that

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the witness to a forfeiture under the laws of the former is clearly distinguishable from the present case.

In *King of the Two Sicilies* v. *Willcox*, 1 Sim. (N. S.) 301, 61 Eng. Rep. 116 (1851), the Vice-Chancellor had said that "the rule of protection [against self-incrimination] is confined to what may tend to subject a party to penalties *by our own laws* . . . ." 1 Sim. (N. S.), at 331, 61 Eng. Rep., at 128 (emphasis added). The Lord Chancellor said in *McRae, supra,* that *King of the Two Sicilies* had been "most correctly decided," L. R., 3 Ch. App., at 85, but that the general rule there laid down was unnecessarily broad. He declined to apply the rule in *McRae* on the ground that "the presumed ignorance of the Judge as to foreign law . . . [had been] completely removed by the admitted statements upon the pleadings, in which the exact nature of the penalty or forfeiture incurred by the party objecting to answer is precisely stated . . . ," L. R., 3 Ch. App., at 85, and the further ground, noted above, that the property subject to a forfeiture was "within the power of the *United States*," *id.*, at 87.

The other two English cases which the majority cites in this connection were decided more than 100 years earlier than *King of the Two Sicilies*. Moreover, both cases involved disclosures which would have been incriminating under a separate system of laws operating within the same legislative sovereignty. *East India Co.* v. *Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (Ex. 1749); *Brownsword* v. *Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (Ch. 1750). In *King of the Two Sicilies*, which involved the laws of another sovereign, the Vice-Chancellor observed that there was an "absence of all authority on the point" raised before him. 1 Sim. (N. S.), at 331, 61 Eng. Rep., at 128.

There is little agreement among the authorities on the effect of these cases. See Grant, Federalism and Self Incrimination: Common Law and British Empire Comparisons, 5 U. C. L. A. L. Rev. 1–8; 8 Wigmore, Evidence (3d ed. 1940), § 2258, n. 3; Kroner, Self Incrimination: The External Reach of the Privilege, 60 Col. L. Rev. 816, 820, n. 26; McNaughton, Self-Incrimination Under Foreign Law, 45 Va. L. Rev. 1299, 1302.

the danger of incrimination in the court of another jurisdiction is a sufficient basis for invoking a privilege against self-incrimination;

(2) Without any exception, in every case involving an immunity statute in which the Court has treated the question now before us, it has rejected the present majority's views.

The first of the two exceptional cases is *United States* v. *Saline Bank of Virginia,* 1 Pet. 100, decided in 1828; the entire opinion in that case is quoted in the majority opinion, *ante,* pp. 59–60. It is not clear whether that case has any bearing on the privilege against self-incrimination at all.[2] The second case is *Ballmann* v. *Fagin,* 200 U. S. 186, decided in 1906. The statement that the appellant "was exonerated from disclosures which would have exposed him to the penalties of the state law," *id.,* at 195, was at best an *alternative* holding and probably not even that.[3] Ballmann had based his refusal to testify before the Grand Jury solely on the possibility of incrimination under state law, *id.,* at 193–194. Nevertheless, before considering the effect of state incrimination at all, the Court pointed out that the facts showed a likelihood

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[2] Compare McNaughton, *supra,* note 1, at 1305–1306, with Kroner, *supra,* note 1, at 818. See *Hutcheson* v. *United States,* 369 U. S. 599, 608, n. 13; *Feldman* v. *United States, supra,* at 494.

That this case has meant different things to different people is evidenced by the opinion in *Hale* v. *Henkel,* 201 U. S. 43, in which the Court distinguished *Saline Bank,* presumably inadequately, on the ground that in it "the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction." 201 U. S., at 69.

[3] In *United States* v. *Murdock,* 290 U. S. 389, 396, the Court said that the question whether "one under examination in a federal tribunal could . . . refuse to answer on account of probable incrimination under state law" had been "involved, but not decided" in *Ballmann.*

of incrimination under *federal* law. *Id.*, at 195. The Court then proceeded to say:

> "Not impossibly Ballmann took this aspect of the matter for granted, as one which would be perceived by the court without his disagreeably emphasizing his own fears. But he did call attention to another less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a 'bucket shop,' and so subject to the criminal law of the State in which the grand jury was sitting. According to *United States* v. *Saline Bank,* 1 Peters, 100, he was exonerated from disclosures which would have exposed him to the penalties of the state law. See *Jack* v. *Kansas,* 199 U. S. 372, decided this term. One way or the other we are of opinion that Ballmann could not be required to produce his cash book if he set up that it would tend to criminate him." *Id.*, at 195–196.

Since the *Jack* case which the Court cited immediately after referring to *Saline Bank* had been decided just a few weeks before *Ballmann* and was contrary to *Saline Bank,* it is plain that the Court was *not* approving and applying the latter case. The explanation for the Court's inclusion of this ambiguous and inconclusive discussion of state incrimination is surely the fact that Ballmann had failed to set up the claim of federal incrimination on which the Court relied.

Neither of these two cases, therefore, "squarely holds," *ante,* p. 60; see *ante,* p. 65, that a danger of incrimination under state law relieves a witness from testifying before federal authorities. More to the point, whatever force these two cases provide for the majority's position is wholly vitiated by subsequent cases, which are flatly contradictory to that position.

In *Jack* v. *Kansas,* 199 U. S. 372, decided in 1905, the Court considered a Kansas immunity statute. The witness had refused to testify on the ground that his testimony might incriminate him under federal law. The Court upheld his commitment for contempt over his claim that the immunity granted by the state statute was not "broad enough," *id.,* at 380, and that his imprisonment therefore violated the Fourteenth Amendment. The Court said:

> "We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough." *Id.,* at 382.

The present majority characterizes this statement as "cryptic dictum," *ante,* p. 65. But, I submit, there is nothing cryptic about it. Nor is it dictum. The Court assumed for purposes of that case that the Fourteenth Amendment required that a state statute "give sufficient immunity from prosecution or punishment," *id.,* at 380, and it is evident from the opinion that the Court regarded the remoteness of a danger of prosecution in the courts of another jurisdiction, including the federal courts, as a basis for holding *generally,* and not merely on the facts of the case before it, that a state immunity statute need not protect against such danger. See *id.,* at 381–382.

The next case is *Hale* v. *Henkel,* 201 U. S. 43, decided one year later, shortly after *Ballmann.* The Court there rejected the appellant's argument that the federal immunity statute to be valid had to confer immunity from punishment under state law. It said:

> "The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered in *Brown* v. *Walker* and held to be no answer. The converse of this was also decided in *Jack* v. *Kansas,* 199 U. S. 372, namely, that the fact

that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this court and by the Supreme Court of Kansas that the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. . . ." 201 U. S., at 68–69.[4]

In *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, which did not involve an immunity statute, the Court

[4] In *Brown* v. *Walker,* 161 U. S. 591, on which the Court relied in *Hale,* the Court intimated that a federal immunity statute need not protect a witness from "a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty." 161 U. S., at 608.

In *Jack, supra,* the Court described *Brown* as follows:

"In the subsequent case of *Brown* v. *Walker,* 161 U. S. 591, the statute there involved was held to afford complete immunity to the witness, and he was therefore obliged to answer the questions that were put to him, although they might tend to incriminate him. In that case it was contended, on the part of the witness, that the statute did not grant him immunity against prosecutions in the state courts, although it granted him full immunity from prosecution by the Federal Government. This contention was held to be without merit. While it

found it unnecessary to consider the question, extensively argued by the parties, whether "the Fifth Amendment guarantees immunity from self-incrimination under state statutes . . . ," *id.*, at 113; the Court indicated that it did not necessarily regard *Hale* and *Brown, supra,* as conclusive of that question, *ibid.* Cf. *United States* v. *Murdock,* 290 U. S. 389, 396. Any doubts on this score, however, were settled in 1931, in *United States* v. *Murdock,* 284 U. S. 141. The Court there held unmistakably that an individual could not avoid testifying in federal proceedings on the ground that his testimony might incriminate him under state law.

> "This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute.

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was asserted that the law of Congress was supreme, and that judges and courts in every State were bound thereby, and that therefore the statute granting immunity would *probably* operate in the state as well as in the Federal courts, yet still, and *aside from that view,* it was said that while there might be a bare possibility that a witness might be subjected to the criminal laws of some other sovereignty, it was not a real and probable danger, but was so improbable that it needed not to be taken into account." 199 U. S., at 381. (Emphasis added.)

Brown is cited for the proposition that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination," in *United States* v. *Murdock,* 284 U. S. 141, 149. And see *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113.

The majority is incorrect when it states, *ante,* p. 67, that the Court in *Hale,* relying on *King of the Two Sicilies, supra,* disregarded a "settled English rule" contrary to its own conclusion. See note 1, *supra.*

> The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination." *Id.*, at 149.

The Court has not until now deviated from that definitive ruling. In later proceedings in the *Murdock* case, the Court said it was "definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law." 290 U. S. 389, 396. The Court adhered to this view in *Feldman, supra,* where it established an equivalent rule allowing the use in a federal court of testimony given in a state court. The general principle was said to be one of "separateness in the operation of state and federal criminal laws and state and federal immunity provisions." 322 U. S., at 493–494.[5]

In *Adams* v. *Maryland,* 347 U. S. 179, the Court held that a federal immunity statute,[6] the language of which "could be no plainer," *id.*, at 181, prohibited the use in a state criminal trial of testimony given before a Senate Committee. Quite obviously, the remark in *Adams* that the Fifth Amendment protects a witness "from the use of self-incriminating testimony he is compelled to give over his objection," *ibid.*, does not even remotely suggest "that any testimony elicited under threat of contempt by

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[5] This was the principle underlying the decision in *Feldman* rather than the so-called "*Feldman* reasoning," *ante,* p. 74, which, as described by the majority, consists of phrases plucked from separate paragraphs appearing on four different pages of the reported opinion, see *Feldman, supra,* at 489–492. The Court referred to the "silver platter" doctrine only to illustrate a related principle then applicable in the area of search-and-seizure. See *id.*, at 492.

The majority is, however, correct in stating that the decision in *Elkins* v. *United States,* 364 U. S. 206, discarding the "silver platter" doctrine has an important bearing on this case. See *infra,* p. 91.

[6] See *Adams, supra,* at 180, note 1.

a government to whom the constitutional privilege against self-incrimination is applicable . . . may not constitutionally be admitted into evidence against him in any criminal trial conducted by a government to whom the privilege is also applicable," *ante,* p. 76.

In *Knapp* v. *Schweitzer,* 357 U. S. 371, the Court again upheld the validity of state immunity statutes against the charge that they did not, as they could not, confer immunity from federal prosecution. The Court adhered to its position in *Knapp, supra,* in 1959, in *Mills* v. *Louisiana,* 360 U. S. 230.

This, then, is the "history" mustered by the Court in support of overruling the sound constitutional doctrine lying at the core of *Feldman.*

II.

Part I of this opinion shows, I believe, that the Court's analysis of prior cases hardly furnishes an adequate basis for a new departure in constitutional law. Even if the Court's analysis were sound, however, it would not support reversal of the *Feldman* rule on *constitutional* grounds.

If the Court were correct in asserting that the "separate sovereignty" theory of self-incrimination should be discarded, that would, as the Court says, lead to the conclusion that "a state witness [is protected] against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Ante,* p. 78. However, dealing strictly with the situation presented by this case, that conclusion does *not* in turn lead to a constitutional rule that the testimony of a state witness (or evidence to which his testimony leads) who is compelled to testify in state proceedings may not be used against him in a federal prosecution. Protection which the Due Process Clause affords against the *States* is quite obviously not any basis for a constitu-

tional rule regulating the conduct of *federal* authorities in *federal* proceedings.

The Court avoids this problem by mixing together the Fifth Amendment and the Fourteenth and talking about "the constitutional privilege against self-incrimination," *ante,* pp. 77–78. Such an approach, which deals with "constitutional" rights at large, unrelated either to particular provisions of the Constitution or to relevant differences between the States and the Federal Government warns of the dangers for our federalism to which the "incorporation" theory of the Fourteenth Amendment leads. See my dissenting opinion in *Malloy* v. *Hogan, ante,* p. 14.

The Court's reasons for overruling *Feldman* thus rest on an entirely new conception of the *Fifth Amendment,* namely that it applies to federal use of state-compelled incriminating testimony. The opinion, however, contains nothing at all to contradict the traditional, well-understood conception of the Fifth Amendment, to which, therefore, I continue to adhere:

> "The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." *Knapp* v. *Schweitzer, supra,* at 380.

It is no service to our constitutional liberties to encumber the particular provisions which safeguard them with a gloss for which neither the text nor history provides any support.

Accordingly, I cannot accept the majority's conclusion that a rule prohibiting federal authorities from using in aid of a federal prosecution incriminating testimony compelled in state proceedings is constitutionally required.

III.

I would, however, adopt such a rule in the exercise of our supervisory power over the administration of federal criminal justice. See *McNabb* v. *United States,* 318 U. S. 332, 340–341. The rule seems to me to follow from the Court's rejection, in the exercise of its supervisory power, of the "silver platter" doctrine as applied to the use in federal courts of evidence unconstitutionally seized by state officers. *Elkins* v. *United States,* 364 U. S. 206.

Since I reject the majority's argument that the "separate sovereignty" theory of self-incrimination is historically unfounded, I do not base my conclusion on the holding in *Malloy, ante,* that due process prohibits a State from compelling a witness to testify. My conclusion is based rather on the ground that such a rule is protective of the values which the federal privilege against self-incrimination expresses, without in any way interfering with the independent action of the States and the Federal Government in their respective spheres. Increasing interaction between the State and Federal Governments speaks strongly against permitting federal officials to make prosecutorial use of testimony which a State has compelled when that same testimony could not constitutionally have been compelled by the Federal Government and then used against the witness. Prohibiting such use in no way limits federal power to investigate and prosecute for federal crime, which power will be as full after a State has completed an investigation as before.[7] This adjustment between state investigations of local crime

[7] Speculation that federal agents may first have "gotten wind" of a federal crime by a witness' testimony in state proceedings would not be a basis for barring federal *prosecution,* unaided by the state testimony. As I understand the rule announced today, albeit resting on premises which I think are unsound, it is a prohibition against *the use of state-compelled incriminating evidence or the "fruits" directly attributable thereto* in a federal prosecution.

and federal prosecutions for federal crime seems particularly desirable in view of the increasing, productive cooperation between federal and state authorities in the prevention of crime. By insulating intergovernmental cooperation from the danger of any encroachment on the federal privilege against self-incrimination, such a rule in the long run will probably make joint programs for crime prevention more effective.[8]

On this basis, I concur in the judgment of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring.

The Court holds that the constitutional privilege against self-incrimination is nullified "when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." *Ante,* p. 55. Whether viewed as an exercise of this Court's supervisory power over the conduct of federal law enforcement officials or a constitutional rule necessary for meaningful enforcement of the privilege, this holding requires that compelled incriminating testimony given in a state proceeding not be used in any manner by federal officials in connection with a federal criminal prosecution. Since these petitioners declined to answer in the belief that their very testimony as well as evidence derived from it could be used by federal authorities in a criminal prosecution against them, they should be afforded an opportunity to purge themselves of the civil contempt convictions by answering the questions. Cf. *Raley* v. *Ohio,* 360 U. S. 423.

In reaching its result the Court does not accept the far-reaching and in my view wholly unnecessary constitu-

[8] The question whether *federally* compelled incriminating testimony could be used in a state prosecution is not involved in this case and would, of course, present wholly different considerations.

tional principle that the privilege requires not only complete protection against any use of compelled testimony in any manner in other jurisdictions but also absolute immunity in these jurisdictions from any prosecution pertaining to any of the testimony given. The rule which the Court does not adopt finds only illusory support in a dictum of this Court and, as I shall show, affords no more protection against compelled incrimination than does the rule forbidding federal officials access to statements made in exchange for a grant of state immunity. But such a rule would invalidate the immunity statutes of the 50 States since the States are without authority to confer immunity from federal prosecutions, and would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system. It would not only require widespread federal immunization from prosecution in federal investigatory proceedings of persons who violate state criminal laws, regardless of the wishes or needs of local law enforcement officials, but would also deny the States the power to obtain information necessary for state law enforcement and state legislation. That rule, read in conjunction with the holding in *Malloy* v. *Hogan, ante,* p. 1, that an assertion of the privilege is all but conclusive, would mean that testimony in state investigatory proceedings, and in trials also, is on a voluntary basis only. The Federal Government would become the only law enforcement agency with effective power to compel testimony in exchange for immunity from prosecution under federal and state law. These considerations warrant some elaboration.

I.

Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to

testify in court or before grand juries or agencies. See *Blair* v. *United States,* 250 U. S. 273.[1] Such testimony constitutes one of the Government's primary sources of information. The privilege against self-incrimination, safeguarding a complex of significant values, represents a broad exception to governmental power to compel the testimony of the citizenry. The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory, *McCarthy* v. *Arndstein,* 266 U. S. 34, 40; *United States* v. *Saline Bank,* 1 Pet. 100, and it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used. *Mason* v. *United States,* 244 U. S. 362; *Hoffman* v. *United States,* 341 U. S. 479. Because of the importance of testimony, especially in the discovery of certain crimes for which evidence would not otherwise be available, and the breadth of the privilege, Congress has enacted over 40 immunity statutes and every State, without exception, has one or more immunity acts pertaining to certain offenses or legislative investigations.[2] Such statutes have for more than a century been resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable, such as political bribery, ex-

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[1] The power and corresponding duty are recognized in the Sixth Amendment's commands that defendants be confronted with witnesses and that they have the right to subpoena witnesses on their own behalf. The duty was recognized by the first Congress in the Judiciary Act of 1789, which made provision for the compulsion of attendance of witnesses in the federal courts. 1 Stat. 73, 88 (1789). See also Lilienthal, The Power of Governmental Agencies to Compel Testimony, 39 Harv. L. Rev. 694–695 (1926); 8 Wigmore, Evidence, §§ 2190–2193 (McNaughton rev., 1961).

[2] For a listing of Federal Witness Immunity Acts see Comment, 72 Yale L. J. 1568, 1611–1612; the state acts may be found in 8 Wigmore, Evidence, § 2281, n. 11 (McNaughton rev., 1961).

tortion, gambling, consumer frauds, liquor violations, commercial larceny, and various forms of racketeering. This Court, in dealing with federal immunity acts, has on numerous occasions characterized such statutes as absolutely essential to the enforcement of various federal regulatory acts. In *Brown* v. *Walker,* 161 U. S. 591, the case in which the Court first upheld a congressional immunity act over objection that the witness' right to remain silent was inviolate, the Court said: "[If] witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible." 161 U. S. 591, at 610. Again in *Hale* v. *Henkel,* 201 U. S. 43, the Court noted the highly significant role played by immunity acts in the enforcement of federal legislation:

> "As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employés, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?" *Id.,* at 70.

And only recently the Court declared that immunity statutes have "become part of our constitutional fabric . . . included '. . . in virtually all of the major regulatory enactments of the Federal Government,' " and "the States . . . have passed numerous statutes compelling testimony in exchange for immunity in the form either of complete amnesty or of prohibition of the use of the compelled testimony." *Ullmann* v. *United States,* 350 U. S. 422, 438.

These state statutes play at least an equally important role in compelling testimony necessary for enforcement of state criminal laws. After all, the States still bear primary responsibility in this country for the administration of the criminal law; most crimes, particularly those for which immunity acts have proved most useful and necessary, are matters of local concern; federal preemption of areas of crime control traditionally reserved to the States has been relatively unknown and this area has been said to be at the core of the continuing viability of the States in our federal system. See *Abbate* v. *United States,* 359 U. S. 187, 195; *Screws* v. *United States,* 325 U. S. 91, 109; *United States* v. *Cruikshank,* 92 U. S. 542, 553–554; *United States* v. *Ah Hung,* 243 F. 762 (D. C. E. D. N. Y.). Cf. 18 U. S. C. § 5001, 18 U. S. C. § 659.[3]

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[3] See also *Rutkin* v. *United States,* 343 U. S. 130, 139–147 (BLACK, J., dissenting).

The Senate Crime Committee stated in its third interim report:

"Any program for controlling organized crime must take into account the fundamental nature of our governmental system. The enforcement of the criminal law is primarily a State and local responsibility." S. Rep. No. 307, 82d Cong., 1st Sess., 5 (1951).

Attorney General Mitchell commented:

"Experience has shown that when Congress enacts criminal legislation of this type [dealing with local crime] the tendency is for the State authorities to cease their efforts toward punishing the offenders and to leave it to the Federal authorities and the Federal Courts. That has been the experience under the Dyer Act." 72 Cong. Rec. 6214 (1930).

National enactments which touch upon these areas are not designed directly to suppress activities illegal under state law but to assist state enforcement agencies in the administration of their own statutes. See Int. Rev. Code of 1954, §§ 4701–4707, 4711–4716 (narcotics tax); Int. Rev. Code of 1954, §§ 4401–4404, 4411–4413, 4421–4423 (wagering tax). See generally, Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law and Contemp. Prob. 64, 83–86 (1948); Comment, 72 Yale L. J. 108, 140–142.

Whenever access to important testimony is barred by possible state prosecution, the State can, at its option, remove the impediment by a grant of immunity; but if the witness is faced with prosecution by the Federal Government, the State is wholly powerless to extend immunity from prosecution under federal law in order to compel the testimony. Almost invariably answers incriminating under state law can be claimed to be incriminating under federal law. Given the extensive sweep of a host of federal statutes, such as the income tax laws, securities regulation, laws regulating use of the mails and other communication media for an illegal purpose, and regulating fraudulent trade practices, and given the very limited discretion, if any, in the trial judge to scrutinize the witness' claim of privilege, *Malloy* v. *Hogan, supra,* investigations conducted by the State into matters of corruption and misconduct will obviously be thwarted if immunity from prosecution under federal law was a constitutionally required condition to testimonial compulsion in state proceedings. Wherever the witness, for reasons known only to him, wished not to respond to orderly inquiry, the flow of information to the State would be wholly impeded. Every witness would be free to block vitally important state proceedings.

It is not without significance that there were two ostensibly inconsistent lines of cases in this Court regarding the external reach of the privileges in respect to the laws of another jurisdiction. In the cases involving refusals to answer questions in a federal grand jury or discovery proceedings on the ground of incrimination under state law, absent any immunity statute, the Court suggested that the Fifth Amendment privilege protected such answers, *United States* v. *Saline Bank,* 1 Pet. 100; *Ballmann* v. *Fagin,* 200 U. S. 186, while in the cases involving refusals to answer after immunity was conferred, the Court indicated that immunity in regard to a prosecution

in the jurisdiction conducting the inquiry satisfied the privilege. *Brown* v. *Walker,* 161 U. S. 591; *Jack* v. *Kansas,* 199 U. S. 372; *Hale* v. *Henkel,* 201 U. S. 43. Cf. *United States* v. *Murdock,* 284 U. S. 141. The decision in *Ballmann* that a witness in a federal grand jury proceeding could not be compelled to make disclosures incriminating under very similar federal and state criminal statutes was announced by members of the same Court and within a very short time of the decisions in *Jack* and *Hale,* holding that immunity under the laws of one sovereign was sufficient. The basis for these latter holdings, as well as *Knapp* v. *Schweitzer,* 357 U. S. 371, upholding a state contempt conviction for a refusal to answer after a grant of state immunity, was not a niggardly view of the privilege against self-incrimination but "the historic distribution of power as between Nation and States in our federal system." 357 U. S. 371, at 375. As the concurring and dissenting members of the Court in *Knapp* pointed out, the dilemma posed to our federal system by federally incriminating testimony compelled in a state proceeding was not really necessary but for the prior decision in *Feldman* v. *United States,* 322 U. S. 487, which upheld the Federal Government's use of incriminatory testimony compelled in a state proceeding. Although *Feldman* was questioned, no one suggested in *Knapp* that the solution to the problem lay in forbidding the State to ask questions incriminating under federal law.

To answer that the underlying policy of the privilege subordinates the law enforcement function to the privilege of an individual will not do. For where there is only one government involved, be it state or federal, not only is the danger of prosecution more imminent and indeed the likely purpose of the investigation to facilitate prosecution and conviction, but that authority has the choice of exchanging immunity for the needed testimony. To transform possible federal prosecution into a source of

absolute protected silence on the part of a state witness would leave no such choice to the States. Only the Federal Government would retain such an option.

Nor will it do to say that the Congress could reinstate state power by authorizing state officials to confer absolute immunity from federal prosecutions. Congress has established highly complicated procedures, requiring the approval of the Attorney General, before a limited group of federal officials may grant immunity from federal prosecutions. *E. g.*, 18 U. S. C. § 3486,[4] 18 U. S. C. § 1406. The decision to grant immunity is based upon the importance of the testimony to federal law enforcement interest, a matter within the competence of federal officials to assay. These procedures would create insurmountable obstacles if the requests for approval were to come from innumerable local officials of the 50 States. Obviously federal officials could not properly evaluate the extent of the State's need for the testimony on a case-by-case basis. Further, the scope of the immunity conferred wholly depends on the testimony given, a matter of con-

[4] The debates on the bill leading to the statute which granted a congressional committee the power to confer immunity well reveal the concern over immunization from federal prosecution without the express approval of the Attorney General in each case. 99 Cong. Rec. 4737–4740, 8342–8343; H. R. Rep. No. 2606, 83d Cong., 2d Sess. (1954). See Brownell, Immunity From Prosecution Versus Privilege Against Self-Incrimination, 28 Tul. L. Rev. 1 (1953):

"[I]f any measure is to be enacted permitting the granting of immunity to witnesses before either House of Congress, or its committees, it should vest the Attorney General, or the Attorney General acting with the concurrence of appropriate members of Congress, with the authority to grant such immunity, and if the testimony is sought for a court or grand jury that the Attorney General alone be authorized to grant the immunity." (Remarks of Attorney General Brownell.) *Id.*, at 19.

Congress adopted this view in recent immunity statutes. 18 U. S. C. § 3486; 18 U. S. C. § 1406. See also Comment, 72 Yale L. J. 1568, 1598–1610 (1963).

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siderable difficulty to determine after, no less than before, the question is answered, the time when federal approval would be necessary, *Heike* v. *United States,* 227 U. S. 131; *Lumber Products Assn.* v. *United States,* 144 F. 2d 546 (C. A. 9th Cir.), and a matter whose determination requires intimate familiarity with both the nature and details of the investigation and the background of the witness. Finally, it is very doubtful that Congress would, if it had the power to, authorize one State to confer immunity on persons subject to prosecution under the criminal laws of another State.

II.

Neither the conflict between state and federal interests nor the consequent enthronement of federal agencies as the only law enforcement authorities with effective power to compel testimony is necessary to give full effect to a privilege against self-incrimination whose external reach embraces federal as well as state law. The approach need not and, in light of the above considerations, should not be in terms of the State's power to compel the testimony rather than the use to which such testimony can be put. It is unquestioned that an immunity statute, to be valid, must be coextensive with the privilege which it displaces, but it need not be broader. *Counselman* v. *Hitchcock,* 142 U. S. 547; *Brown* v. *Walker,* 161 U. S. 591; *Hale* v. *Henkel,* 201 U. S. 43. If the compelled incriminating testimony in a state proceeding cannot be put to any use whatsoever by federal officials, quite obviously the witness' privilege against self-incrimination is not infringed. For the privilege does not convey an absolute right to remain silent. It protects a witness from being compelled to furnish evidence that could result in his being subjected to a criminal sanction, *Hoffman* v. *United States,* 341 U. S. 479; *Mason* v. *United States,* 244 U. S. 362, if, but only if, after the disclosure the witness will be in greater danger of prosecution and conviction.

Rogers v. *United States,* 340 U. S. 367; *United States* v. *Gernie,* 252 F. 2d 664 (C. A. 2d Cir.). When federal officials are barred not only from introducing the testimony into evidence in a federal prosecution but also from introducing any evidence derived from such testimony, the disclosure has in no way contributed to the danger or likelihood of a federal prosecution. This approach secures the protections of the privilege against self-incrimination for all defendants without impairing local law-enforcement and investigatory activities. It, of course, forecloses the use of state-compelled testimony in any manner by federal prosecutors, but the privilege in my view commands that the Federal Government should not have the benefit of compelled incriminatory testimony. Both the Federal Government and the witness are in exactly the same position as if the witness had remained silent.[5] And state immunity statutes remain constitutional and state law enforcement agencies viable.

It is argued that a rule only forbidding use of compelled testimony does not afford absolute protection against the possibility of a federal prosecution based in part on the compelled testimony. It is said that absent any deliberate attempt by federal officers to utilize the testimony the very identification and testimony of the witness in the state proceedings, perhaps in the newspapers, may

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[5] *Feldman* v. *United States,* 322 U. S. 487, allowed the use of testimony compelled in exchange for a grant of state immunity to secure a conviction for a federal offense. I think the Court in *Feldman* erred in its assumption that an effective exclusionary rule would allow the States to determine on the basis of local policy which offenders should be immune from federal prosecution. The Federal Government can prosecute and convict persons who have received immunity for testimony in a state investigation. But it must do so without the assistance of the compelled incriminatory testimony.

That case also relied on the doctrine since repudiated in *Elkins* v. *United States,* 364 U. S. 206, that evidence illegally seized by state officials is admissible in federal courts.

increase the possibility of a federal prosecution and alternatively that the defendant may not be able to prove that evidence was intentionally and unlawfully derived from his compelled testimony. These are fanciful considerations, hardly sufficient as a basis for a constitutional adjudication working a substantial reallocation of power between state and national governments.

In the absence of any misconduct or collusion by federal officers, whatever increase there is, if any, in the likelihood of federal prosecution following the witness' appearance before a state grand jury or agency results from the inferences drawn from the invocation of the privilege to specific questions on the ground that they are incriminating under federal law and not from the fact the witness has testified in what is frequently an *in camera* proceeding under a grant of immunity. Whether *in camera* or not, the testimony itself is hardly reported in newspapers and the transcripts and records of the state proceedings are not part of the files of the Federal Government. Access and use require misconduct and collusion, a matter quite susceptible of proof. But this is quibbling, since the very fact that a witness is called in a state crime investigation is likely to be based upon knowledge, or at least a suspicion based on some information, that the witness is implicated in illegal activities, which knowledge and information are probably available to federal authorities.

The danger that a defendant may not be able to establish that other evidence was obtained through the unlawful use by federal officials of inadmissible compelled testimony is insubstantial. The privilege protects against real dangers, not remote and speculative possibilities. *Brown* v. *Walker,* 161 U. S. 591, 599–600; *Heike* v. *United States,* 227 U. S. 131; *Mason* v. *United States,* 244 U. S. 362. First, one might just as well argue that the Constitution requires absolute immunity from prosecution wherever

the Government has obtained an inadmissible confession or other evidence through an illegal search and seizure, an illegal wiretap, illegal detention, and coercion. A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege. *Malloy* v. *Hogan, ante,* pp. 7–8; *Spano* v. *New York,* 360 U. S. 315; *Bram* v. *United States,* 168 U. S. 532. In all these situations a defendant must establish that testimony or other evidence is a fruit of the unlawfully obtained evidence, *Nardone* v. *United States,* 308 U. S. 338; *Wilson* v. *United States,* 218 F. 2d 754 (C. A. 10th Cir.); *Lotto* v. *United States,* 157 F. 2d 623 (C. A. 8th Cir.), which proposition would seem *a fortiori* true where the Government has not engaged in illegal or unconstitutional conduct and where the inadmissible testimony is obtained by a government other than the one bringing the prosecution and for a purpose unrelated to the prosecution. Second, there are no real proof problems in this situation. As in the analogous search and seizure and wiretap cases—where the burden of proof is on the Government once the defendant establishes the unlawful search or wiretap, *United States* v. *Coplon,* 185 F. 2d 629 (C. A. 2d Cir.); *United States* v. *Goldstein,* 120 F. 2d 485, 488 (C. A. 2d Cir.), aff'd, 316 U. S. 114—once a defendant demonstrates that he has testified in a state proceeding in exchange for immunity to matters related to the federal prosecution, the Government can be put to show that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence. Since the Government has the relevant information within its control, valid prosecutions need not be sacrificed and infringement of the privilege through use of compelled testimony, direct or indirect, need not be tolerated. It is carrying a premise of perjury and judicial incom-

petence to excess to believe that this procedure poses any hazards to the rights of an accused. Third, greater requirements or difficulties of proof by a defendant inhere in the rule of absolute immunity. When a witness testifies under the auspices of an immunity act, the immunity he gets does not secure him from indictment or conviction. *Heike* v. *United States,* 217 U. S. 423. The witness must plead and prove, as an affirmative defense, that he has received immunity and that the instant prosecution is on account of a matter testified to in exchange for immunity, *Heike* v. *United States,* 227 U. S. 131, which may pose considerable difficulties where the relationship between the testimony and the prosecution is not obvious or where the immunity is acquired as a result of testimony before a grand jury or in an *in camera* administrative proceeding. See *Edwards* v. *United States,* 312 U. S. 473; 131 F. 2d 198 (C. A. 10th Cir.) (retrial), certiorari denied, 317 U. S. 689; *United States* v. *Lumber Products Assn.,* 42 F. Supp. 910 (D. C. N. D. Cal.), rev'd, *sub nom. Ryan* v. *United States,* 128 F. 2d 551 (C. A. 9th Cir.); *Lumber Products Assn.* v. *United States* (plea of immunity finally upheld after trial), 144 F. 2d 546 (C. A. 9th Cir.). Cf. *Pandolfo* v. *Biddle,* 8 F. 2d 142 (C. A. 8th Cir.).

Counselman v. *Hitchcock,* 142 U. S. 547, does not require that absolute immunity from state prosecution be conferred on a federal witness and the Court has declined on many occasions to so read it, the limitation of the privilege to one sovereign rationale aside, *Brown* v. *Walker,* 161 U. S. 591; *Adams* v. *Maryland,* 347 U. S. 179; *Ullmann* v. *United States,* 350 U. S. 422; *Reina* v. *United States,* 364 U. S. 507.[6] It does not therefore re-

[6] As MR. JUSTICE BLACK stated for the Court in *Adams* v. *Maryland,* a case dealing with the use of federally compelled testimony in a state proceeding "[A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to

quire that absolute immunity from federal prosecution be conferred on a state witness. Counselman, an officer of an interstate railroad, refused to reveal whether he engaged in discriminatory rate practices, a criminal offense, under the Interstate Commerce Act, before a federal grand jury investigating specific violations of that Act. The Court established for the first time that the coverage of the privilege extended to not only a confession of the offense but also disclosures leading to discovery of incriminating evidence, a matter of considerable doubt at the time. See *United States* v. *Brown,* 1 Saw. 531, 536, Fed. Cas. No. 14,671; *United States* v. *McCarthy,* 18 F. 87, 89 (C. C. S. D. N. Y.); *In re Counselman,* 44 F. 268 (C. C. N. D. Ill.). It then invalidated the first immunity statute to come before it because "[the statute] could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . . . It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on

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give over his objection. The Fifth Amendment takes care of that without a statute." 347 U. S., at 181.

Neither Congress nor the States have read *Counselman* to mean that the Constitution requires absolute immunity from prosecution. There are numerous statutes providing for immunity from use, not prosecution, in exchange for incriminatory testimony. *E. g.*, 30 Stat. 548 (1898), 11 U. S. C. § 25; 18 U. S. C. § 1406; 49 U. S. C. § 9; 18 U. S. C. § 3486. Ala. Code, Tit. 9, § 39; Ala. Code, Tit. 29, § 171; Ariz. Rev. Stat. Ann., § 13–384; Ark. Const., Art. III, § 9; Cal. Const., Art. 4, § 35; Colo. Rev. Stat., § 40–8–8; *id.*, § 49–17–8; Conn. Gen. Stat. (1958 rev.), § 12–2 and § 12–53; Fla. Stat. Ann., § 55.59 and § 350.60; Idaho Code Ann., § 48–308 (Supp. 1963); Ill. Ann. Stat., c. 100½, § 4; Ky. Rev. Stat., § 124.330; Mich. Stat. Ann., § 7.411 (17); N. J. Rev. Stat., § 2A:93–9.

The effect of the rule petitioners urge would be to hold the above and numerous other statutes barring use but not prosecution unconstitutional.

which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." 142 U. S. 547, at 564. In a dictum indicating that some immunity statutes are valid, the Court added that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution *for the offence to which the question relates.*" *Id.*, at 586. Whatever may be the validity of this dictum where the witness is being investigated by a grand jury for the purpose of indictment for a particular offense and where the grand jury proceedings are conducted by the same government attempting to obtain a conviction for the offense—the facts of *Counselman*—it clearly has no validity, and by its own terms, no applicability, where the inquiry does not concern any federal offense, no less a particular one, and the government seeking the testimony has no purpose or authority to prosecute for federal crimes.

The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates, including prosecutions of another government, whether or not there is any causal connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation. Likewise it is possible that information gathered by a state government which has an important but wholly separate purpose in conducting the investigation and no interest in any federal prosecution will not in any manner be used in subsequent federal proceedings, at least "while this Court sits" to review invalid convictions. *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, at 223 (Holmes, J., dissenting). It is precisely this possibility of a prosecution based on untainted evidence that we must recognize. For if it is meaningful

to say that the Federal Government may not use compelled testimony to convict a witness of a federal crime, then, of course, the Constitution permits the State to compel such testimony.

"The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him." *Feldman* v. *United States*, 322 U. S. 487, 500 (BLACK, J., dissenting). I believe the State may compel testimony incriminating under federal law, but the Federal Government may not use such testimony or its fruits in a federal criminal proceeding. Immunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination.

AGUILAR *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 548. Argued March 25–26, 1964.—
Decided June 15, 1964.

The affidavit given by police officers to obtain a state search warrant stated that: "Affiants have received reliable information from a credible person and do believe that heroin . . . and other narcotics . . . are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." The affidavit provided no further information concerning either the undisclosed informant or the reliability of the information. The warrant was issued, a search made, and the evidence obtained was admitted at the trial at which petitioner was found guilty of possessing heroin. *Held:*

1. The standard of reasonableness for obtaining a search warrant is the same under the Fourth and the Fourteenth Amendments. *Ker* v. *California,* 374 U. S. 23, followed. P. 110.

2. Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable. *Giordenello* v. *United States,* 357 U. S. 480, followed. Pp. 110–115.

172 Tex. Cr. R. 629, 631, 362 S. W. 2d 111, 112, reversed and remanded.

Clyde W. Woody argued the cause and filed a brief for petitioner.

Carl E. F. Dally argued the cause for respondent. With him on the brief were *Waggoner Carr,* Attorney General of Texas, and *Gilbert J. Pena,* Assistant Attorney General.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This case presents questions concerning the constitutional requirements for obtaining a state search warrant.

Two Houston police officers applied to a local Justice of the Peace for a warrant to search for narcotics in petitioner's home. In support of their application, the officers submitted an affidavit which, in relevant part, recited that:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." [1]

The search warrant was issued.

In executing the warrant, the local police, along with federal officers, announced at petitioner's door that they

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[1] The record does not reveal, nor is it claimed, that any other information was brought to the attention of the Justice of the Peace. It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention. *Giordenello* v. *United States,* 357 U. S. 480, 486; 79 C. J. S. 872 (collecting cases). In *Giordenello,* the Government pointed out that the officer who obtained the warrant "had kept petitioner under surveillance for about one month prior to the arrest." The Court of course ignored this evidence, since it had not been brought to the magistrate's attention. The fact that the police may have kept petitioner's house under surveillance is thus completely irrelevant in this case, for, in applying for the warrant, the police did not mention any surveillance. Moreover, there is no evidence in the record that a surveillance was actually set up on petitioner's house. Officer Strickland merely testified that "we *wanted to* set up surveillance on the house." If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case.

were police with a warrant. Upon hearing a commotion within the house, the officers forced their way into the house and seized petitioner in the act of attempting to dispose of a packet of narcotics.

At his trial in the state court, petitioner, through his attorney, objected to the introduction of evidence obtained as a result of the execution of the warrant. The objections were overruled and the evidence admitted. Petitioner was convicted of illegal possession of heroin and sentenced to serve 20 years in the state penitentiary.[2] On appeal to the Texas Court of Criminal Appeals, the conviction was affirmed, 172 Tex. Cr. R. 629, 362 S. W. 2d 111, affirmance upheld on rehearing, 172 Tex. Cr. R. 631, 362 S. W. 2d 112. We granted a writ of certiorari to consider the important constitutional questions involved. 375 U. S. 812.

In *Ker* v. *California,* 374 U. S. 23, we held that the Fourth "Amendment's proscriptions are enforced against the States through the Fourteenth Amendment," and that "the standard of reasonableness is the same under the Fourth and Fourteenth Amendments." *Id.,* at 33. Although *Ker* involved a search without a warrant, that case must certainly be read as holding that the standard for obtaining a search warrant is likewise "the same under the Fourth and Fourteenth Amendments."

An evaluation of the constitutionality of a search warrant should begin with the rule that "the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action

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[2] Petitioner was also indicted on charges of conspiring to violate the federal narcotics laws, Act of February 9, 1909, c. 100, 35 Stat. 614, § 2, as amended, 21 U. S. C. § 174; Internal Revenue Code of 1954, § 7237 (b), as amended, 26 U. S. C. § 7237 (b). He was found not guilty by the jury. His codefendants were found guilty and their convictions affirmed on appeal. *Garcia* v. *United States,* 315 F. 2d 679.

of officers . . . who may happen to make arrests." *United States* v. *Lefkowitz,* 285 U. S. 452, 464. The reasons for this rule go to the foundations of the Fourth Amendment. A contrary rule "that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson* v. *United States,* 333 U. S. 10, 14. Under such a rule "resort to [warrants] would ultimately be discouraged." *Jones* v. *United States,* 362 U. S. 257, 270. Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," *ibid.,* and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present . . . ." *Id.,* at 271. As so well stated by Mr. Justice Jackson:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States, supra,* at 13–14.

Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.

In *Nathanson* v. *United States,* 290 U. S. 41, a warrant was issued upon the sworn allegation that the affiant "has cause to suspect and does believe" that certain merchandise was in a specified location. *Id.,* at 44. The Court, noting that the affidavit "went upon a mere affirmation of suspicion and belief *without any statement of adequate supporting facts," id.,* at 46 (emphasis added), announced the following rule:

> "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from *facts or circumstances* presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." *Id.,* at 47. (Emphasis added.)

The Court, in *Giordenello* v. *United States,* 357 U. S. 480, applied this rule to an affidavit similar to that relied upon here.[3] Affiant in that case swore that petitioner "did receive, conceal, etc., narcotic drugs . . . with knowledge of unlawful importation . . . ." *Id.,* at 481. The Court announced the guiding principles to be:

> "that the inferences from the facts which lead to the complaint '[must] be drawn by a neutral and de-

[3] In *Giordenello,* although this Court construed the requirement of "probable cause" contained in Rule 4 of the Federal Rules of Criminal Procedure, it did so "in light of the constitutional" requirement of probable cause which that Rule implements. *Id.,* at 485. The case also involved an arrest warrant rather than a search warrant, but the Court said: "The language of the Fourth Amendment, that '. . . no Warrants shall issue, but upon probable cause . . .' of course applies to arrest as well as search warrants." *Id.,* at 485–486. See *Ex parte Burford,* 3 Cranch 448; *McGrain* v. *Daugherty,* 273 U. S. 135, 154–157. The principles announced in *Giordenello* derived, therefore, from the Fourth Amendment, and not from our supervisory power. Compare *Jencks* v. *United States,* 353 U. S. 657. Accordingly, under *Ker* v. *California,* 374 U. S. 23, they may properly guide our determination of "probable cause" under the Fourteenth Amendment.

> tached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States,* 333 U. S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate . . . to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion . . . ." 357 U. S., at 486.

The Court, applying these principles to the complaint in that case, stated that:

> "it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination . . . that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made." *Ibid.*

The vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello.* Here the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in peti-

tioner's possession.[4] The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." He necessarily accepted "without question" the informant's "suspicion," "belief" or "mere conclusion."

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States,* 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States,* 376 U. S. 528, was "credible"or his information "reliable." [5] Other-

[4] To approve this affidavit would open the door to easy circumvention of the rule announced in *Nathanson* and *Giordenello.* A police officer who arrived at the "suspicion," "belief" or "mere conclusion" that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had "received reliable information from a credible person" that the narcotics were in someone's possession.

[5] Such an affidavit was sustained by this Court in *Jones* v. *United States,* 362 U. S. 257. The affidavit in that case reads as follows:

"Affidavit in Support of a U. S. Commissioners Search Warrant for Premises 1436 Meridian Place, N. W., Washington, D. C., apartment 36, including window spaces of said apartment. Occupied by Cecil Jones and Earline Richardson.

"In the late afternoon of Tuesday, August 20, 1957, I, Detective Thomas Didone, Jr. received information that Cecil Jones and Earline Richardson were involved in the illicit narcotic traffic and that they kept a ready supply of heroin on hand in the above mentioned apartment. The source of information also relates that the two aforementioned persons kept these same narcotics either on their person, under a pillow, on a dresser or on a window ledge in said apartment. The source of information goes on to relate that on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above mentioned persons and that the nar-

wise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," *Giordenello* v. *United States, supra,* at 486; *Johnson* v. *United States, supra,* at 14, or, as in this case, by an unidentified informant.

We conclude, therefore, that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause and that

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cotics were secreated [*sic*] in the above mentioned places. The last time being August 20, 1957.

"Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.

"This same information, regarding the illicit narcotic traffic, conducted by Cecil Jones and Earline Richardson, has been given to the undersigned and to other officers of the narcotic squad by other sources of information.

"Because the source of information mentioned in the opening paragraph has given information to the undersigned on previous occasion and which was correct, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated [*sic*] in the above apartment by Cecil Jones and Earline Richardson.

"Det. Thomas Didone, Jr., Narcotic Squad, MPDC.

"Subscribed and sworn to before me this 21 day of August, 1957.

"James F. Splain, U. S. Commissioner, D. C." *Id.*, at 267–268, n. 2.

Compare, *e. g., Hernandez* v. *People,* —— Colo. ——, 385 P. 2d 996, where the Supreme Court of Colorado, accepting a confession of error by the State Attorney General, held that a search warrant similar to the one here in issue violated the Fourth Amendment. The court said:

"Before the issuing magistrate can properly perform his official function he must be apprised of the underlying facts and circumstances which show that there is probable cause . . . ." *Id.*, at ——, 385 P. 2d, at 999.

the evidence obtained as a result of the search warrant was inadmissible in petitioner's trial.

The judgment of the Texas Court of Criminal Appeals is reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring.

But for *Ker* v. *California,* 374 U. S. 23, I would have voted to affirm the judgment of the Texas court. Given *Ker,* I cannot escape the conclusion that to do so would tend to "relax Fourth Amendment standards . . . in derogation of law enforcement standards in the *federal* system . . ." (my concurring opinion in *Ker, supra,* at 45–46, emphasis added). Contrary to what is suggested in the dissenting opinion of my Brother CLARK in the present case (*post,* p. 118, note 1), the standards laid down in *Giordenello* v. *United States,* 357 U. S. 480, did in my view reflect constitutional requirements. Being unwilling to relax those standards for federal prosecutions, I concur in the opinion of the Court.

MR. JUSTICE CLARK, whom MR. JUSTICE BLACK and MR. JUSTICE STEWART join, dissenting.

First, it is well to point out the information upon which the search warrant in question was based: About January 1, 1960, Officers Strickland and Rogers from the narcotics division of the Houston Police Department received reliable information from a credible person that petitioner Aguilar had heroin and other narcotic drugs and narcotic paraphernalia in his possession at his residence, 509 Pinckney Street, Houston, Texas; after receiving this information the officers, the record indicates, kept the premises of petitioner under surveillance for about a week.

On January 8, 1960, the two officers applied for a search warrant and executed an affidavit before a justice

of the peace in which they alleged under oath that petitioner's residence at 509 Pinckney Street "is a place where we each have reason to believe and do believe that [Aguilar] . . . has in his possession therein narcotic drugs . . . for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold." In addition and in support of their belief, the officers included in the affidavit the further allegation that they "have received reliable information from a credible person and do believe that heroin . . . and other narcotics and narcotic paraphernalia are being kept at . . . [petitioner's] premises for the purpose of sale and use contrary to the provisions of the law."

Upon executing the warrant issued on the strength of this affidavit, the officers knocked on the door of Aguilar's house. Someone inside asked who was there and the officers replied that they were police and that they had a search warrant. At this they heard someone "scuffle and start to run inside of the house." The officers entered and pursued the petitioner, who ran into a back bathroom. Petitioner threw a packet of heroin into the commode, but an officer retrieved the packet before it could be flushed down the drain.

I.

At trial petitioner objected to the introduction into evidence of the heroin obtained through execution of the search warrant on the ground that the affidavit was "nothing more than hearsay." The Court holds the affidavit insufficient and sets aside the conviction on the basis of two cases, neither of which is controlling.

First is *Nathanson* v. *United States,* 290 U. S. 41 (1933). In that case the affidavit stated that the affiant had "cause to suspect and [did] believe that certain merchandise" was in the premises described. There was nothing in *Nathanson,* either in the affidavit or in the other proof introduced at trial, to suggest that any facts

had been brought out to support a reasonable belief or even a suspicion. Accordingly, the Court held that "[m]ere affirmance of belief or suspicion is not enough." At 47. But in Fourth Amendment cases findings of reasonableness or of probable cause necessarily rest on the facts and circumstances of each particular case. In *Aguilar,* the affidavit was based not only on "affirmance of belief" but in addition upon *"reliable information from a credible person"* plus a week's surveillance by the affiants. (Emphasis supplied.) *Nathanson* is, therefore, *not* apposite.

The second case the Court relies on is *Giordenello* v. *United States,* 357 U. S. 480 (1958). There the affidavit alleged that "Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation . . . ." The opinion of the Court, by MR. JUSTICE HARLAN, after discussing Rules 3 and 4 of the Federal Rules of Criminal Procedure, held that the defect in the complaint was that it "does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed." At 486. The dissent in the case, in commenting on the Court's holding that the complaint was invalid, said: "The Court does not strike down this complaint directly on the Fourth Amendment, but merely on an extension of Rule 4." At 491. Since *Giordenello* was a federal case, decided under our supervisory powers (Rules 3 and 4 of the Federal Rules of Criminal Procedure), it does not control here.[1] As we said in *Ker* v. *California,* 374 U. S. 23, 33 (1963), "the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and

[1] MR. JUSTICE BLACK, who joined the Court's opinion in *Giordenello,* joins this dissent on the basis of his belief that *Giordenello* was based on Rule 4 and not on the less exacting requirements of the Fourth Amendment.

that held inadmissible because prohibited by the United States Constitution."

Even if *Giordenello* was rested on the Constitution, it would not be controlling here because of the significant differences in the facts of the two cases. In *Giordenello* the Court said: "The complaint . . . does not indicate any sources for the complainant's belief; and it does not set forth any *other* sufficient basis upon which a finding of probable cause could be made." 357 U. S., at 486. (Emphasis supplied.) Here, in Aguilar's case, the affidavit did allege a source for the complainant's belief, *i. e.*, "reliable information from a credible person . . . that heroin . . . and other narcotics . . . are being kept" in petitioner's premises "for the purpose of sale and use contrary to the provisions of the law." This takes the affidavit here entirely outside the *Giordenello* holding. In *Giordenello* no source of information was stated, whereas here there was a reliable one. The affidavit thus shows "probable cause" within the meaning of the Fourth Amendment, as that Amendment was interpreted by this Court in *Draper* v. *United States,* 358 U. S. 307 (1959), where it was contended that the information given by an informant to an officer was inadmissible because it was hearsay. The Court in *Draper* held that petitioner was "entirely in error. *Brinegar* v. *United States* . . . has settled the question the other way." At 311. In the following year this was reaffirmed in *Jones* v. *United States,* 362 U. S. 257, 271 (1960): "We conclude therefore that hearsay may be the basis for a warrant." [2]

[2] The affidavit in *Jones* was more detailed, including a statement of where the heroin might be found, *viz.*, "on their person, under a pillow, on a dresser or on a window ledge in said apartment." But this detail adds nothing to the reliability of the information furnished. Likewise, the allegation in *Jones* that the informer had "on previous occasion" given information "which was correct" was contained in substance in the *Aguilar* affidavit.

Furthermore, in the case of *Rugendorf* v. *United States,* decided only this Term, we held an affidavit good based on information that an informer had seen certain furs in Rugendorf's basement. 376 U. S. 528. In the *Aguilar* affidavit the informer told the officers that narcotics were actually "kept at the above described premises for the purpose of sale . . . ." The Court seems to hold that what the informer says is the test of his reliability. I submit that this has nothing to do with it. The officer's experience with the informer is the test and here the two officers swore that the informer was credible and the information reliable. At the hearing on the motion to supress Officer Strickland testified that he delayed getting the search warrant for a week in order to "set up surveillance on the house." The informant's statement, Officer Strickland said, was "the first information" received and was only "some of" that which supported the application for the warrant. The totality of the circumstances upon which the officer relied is certainly pertinent to the validity of the warrant. See the use of such testimony in *Giordenello, supra,* at 485, 486. And, just as in that case, there is nothing in the record here to show what the officers verbally told the magistrate. The surveillance of Aguilar's house, which is confirmed by the State's brief, apparently gave the officers further evidence upon which they based their personal belief. Hence the affidavit here is a far cry from "suspicion" or "affirmance of belief." It was based on reliable information from a credible informant plus personal surveillance by the officers.

Furthermore, the Courts of Appeals have often approved affidavits similar to the one here. See, *e. g., United States* v. *Eisner,* 297 F. 2d 595 (C. A. 6th Cir.); *Evans* v. *United States,* 242 F. 2d 534 (C. A. 6th Cir.); *United States* v. *Ramirez,* 279 F. 2d 712, 715 (C. A. 2d Cir.) (dictum); and *United States* v. *Meeks,* 313 F. 2d 464

(C. A. 6th Cir.). We denied certiorari in *Eisner,* 369 U. S. 859, although the affidavit there stated only that "[i]nformation has been obtained by S. A. Clifford Anderson . . . which he believes to be reliable . . . ," 297 F. 2d, at 596, and in *Evans,* 353 U. S. 976, where the affiant was a man who "came to the headquarters of the federal liquor law enforcement officers and stated that he wished to give information . . . ," 242 F. 2d, at 535.

In summary, the information must be more than mere wholly unsupported suspicion but less than "would justify condemnation," as Chief Justice Marshall said in *Locke* v. *United States,* 7 Cranch 339, 348 (1813). As Chief Justice Taft said in *Carroll* v. *United States,* 267 U. S. 132, 162 (1925): Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] . . . sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. And as Mr. Justice Rutledge so well stated in *Brinegar* v. *United States,* 338 U. S. 160, 176 (1949):

> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.

> Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

Believing that the Court has substituted a rigid, academic formula for the unrigid standards of reasonableness and "probable cause" laid down by the Fourth Amendment itself—a substitution of technicality for practicality—and believing that the Court's holding will tend to obstruct the administration of criminal justice throughout the country, I respectfully dissent.

VIKING THEATRE CORP. *v.* PARAMOUNT FILM DISTRIBUTING CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 481. Argued April 27, 1964.—Decided June 15, 1964.

Judgment affirmed by an equally divided Court.
Reported below: 320 F. 2d 285.

Edward Bennett Williams argued the cause for petitioner. With him on the briefs were *Harold Ungar* and *Henry W. Sawyer III.*

Louis Nizer and *Morris Wolf* argued the cause for respondents. With *Mr. Nizer* on the brief for respondent Paramount Film Distributing Corp. et al. were *W. Bradley Ward* and *Louis J. Goffman.* With *Mr. Wolf* on the brief for respondent Stanley Company of America et al. was *Franklin Poul. Ralph Earle II, Arthur Littleton, Frederick W. R. Pride* and *Charles F. Young* filed a brief for Twentieth Century-Fox Film Corp., et al., and *Edwin P. Rome* and *Morris L. Weisberg* filed a brief for William Goldman Theatres, Inc., respondents.

Herman M. Levy filed a brief for the Theatre Owners of America, Inc., et al., as *amici curiae,* urging affirmance.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE DOUGLAS took no part in the decision of this case.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL FOR CALIFORNIA ET AL. *v.* AMMEX WAREHOUSE CO. OF SAN YSIDRO, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 919. Decided June 15, 1964.

224 F. Supp. 546, affirmed.

Stanley Mosk, Attorney General of California, *E. G. Funke,* Assistant Attorney General, and *Felice R. Cutter* and *Warren H. Deering,* Deputy Attorneys General, for appellants.

George D. Byfield for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324.

MR. JUSTICE BLACK and MR. JUSTICE GOLDBERG dissent for the reasons stated in the dissenting opinion in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra.*

MITCHELL BROS. TRUCK LINES *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

No. 993. Decided June 15, 1964.

225 F. Supp. 755, affirmed.

William F. White for appellant.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Robert W. Ginnane, Francis A. Silver and *Betty Jo Christian* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

DUNNE LEASES CARS & TRUCKS, INC., *v.* LUSSIER, REGISTRAR OF MOTOR VEHICLES FOR RHODE ISLAND.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND, PROVIDENCE COUNTY.

No. 1029. Decided June 15, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: See —— R. I. ——, 196 A. 2d 728.

Abraham Belilove and *Samuel J. Kolodney* for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

BENKO *v.* HARTFORD ACCIDENT & INDEMNITY CO. ET AL.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 1345, Misc. Decided June 15, 1964.

Appeal dismissed and certiorari denied.
Reported below: 231 Md. 419, 190 A. 2d 638.

Appellant *pro se.*

Cornelius H. Doherty for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ELFBRANDT *v.* RUSSELL ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 553, Misc. Decided June 15, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 94 Ariz. 1, 381 P. 2d 554.

W. Edward Morgan for petitioner.

Robert W. Pickrell, Attorney General of Arizona, *Philip M. Haggerty,* Assistant Attorney General, and *Norman E. Green* for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Arizona for further consideration in light of *Baggett* v. *Bullitt,* 377 U. S. 360.

CURTIS, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 1033. Decided June 15, 1964.

225 F. Supp. 894, affirmed.

Duane W. Acklie, Donald E. Leonard and *Anthony F. Zarlengo* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Robert W. Ginnane and *Arthur J. Cerra* for the United States and the Interstate Commerce Commission.

Thomas F. Kilroy for Denver-Albuquerque Motor Transport, Inc., et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

ZOUMAH *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1130, Misc. Decided June 15, 1964.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Theodore George Gilinsky* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals in light of the recommendation of the Solicitor General and upon examination of all the papers filed in the case.

GRIFFIN ET AL. *v.* MARYLAND.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 6. Argued November 5, 7, 1962.—Restored to the calendar for reargument May 20, 1963.—Reargued October 14–15, 1963.—Decided June 22, 1964.

Petitioners, who are Negroes, entered a privately owned amusement park which then had a policy of excluding Negroes. They were ordered to leave by a park employee who was instructed to enforce the racial policy and who was acting under his authority as a deputy sheriff. They refused to leave and were arrested by the deputy sheriff and taken to the police station where he filed charges of criminal trespass and secured warrants. Petitioners were tried and convicted of criminal trespass in a state court. *Held:*

1. The action of an individual who, as a deputy sheriff possessing state authority, purports to act pursuant to that authority, is state action. It is immaterial that he could have taken the same action in a purely private capacity or that his action was not authorized by state law. *Screws* v. *United States,* 325 U. S. 91, followed. P. 135.

2. When a State undertakes to enforce a private policy of racial segregation it violates the Equal Protection Clause of the Fourteenth Amendment. *Pennsylvania* v. *Board of Trusts,* 353 U. S. 230, followed. Pp. 135–137.

225 Md. 422, 171 A. 2d 717, reversed.

Joseph L. Rauh, Jr. and *Jack Greenberg* argued the cause for petitioners on the reargument. With them on the brief were *John Silard, Daniel H. Pollitt, Joseph H. Sharlitt* and *James M. Nabrit III.* *Mr. Rauh* argued the cause for petitioners on the original argument. With him on the brief were *Messrs. Silard, Sharlitt, Greenberg* and *Nabrit.*

Robert C. Murphy, Deputy Attorney General of Maryland, and *Russell R. Reno, Jr.,* Assistant Attorney General, argued the cause for respondent on the reargument. With *Mr. Murphy* on the brief were *Thomas B. Finan,*

Attorney General of Maryland, and *Loring E. Hawes,* Assistant Attorney General. *Mr. Murphy,* then Assistant Attorney General of Maryland, and *Joseph S. Kaufman,* then Deputy Attorney General, argued the cause for respondent on the original argument. With them on the brief was *Mr. Finan.*

Ralph S. Spritzer, by special leave of Court, argued the cause for the United States on the reargument, as *amicus curiae,* urging reversal. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Marshall, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *David Rubin. Mr. Cox,* by special leave of Court, argued the cause for the United States on the original argument, as *amicus curiae,* urging reversal. With him on the brief were *Messrs. Marshall, Claiborne* and *Greene.*

Mr. Chief Justice Warren delivered the opinion of the Court.

Petitioners were convicted of criminal trespass for refusing to leave a privately owned and operated amusement park in the State of Maryland at the command of an employee of the amusement park acting under color of his authority as a deputy sheriff. For the reasons set forth hereinafter we hold that these convictions are violative of the Fourteenth Amendment and must be set aside.

The Glen Echo Amusement Park is located in Montgomery County, Maryland, near Washington, D. C. Though the park through its advertisements sought the patronage of the general public, it was (until recently) the park's policy to exclude Negroes who wished to patronize its facilities. No signs at the park apprised persons of this policy or otherwise indicated that all comers were not welcome. No tickets of admission were required. In protest against the park's policy of segre-

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gation a number of whites and Negroes picketed the park on June 30, 1960. The petitioners, five young Negroes, were participating in the protest. Hopeful that the management might change its policy, they entered the park, and encountering no resistance from the park employees, boarded the carousel. They possessed transferrable tickets, previously purchased by others, entitling the holder to ride on the carousel.

At that time the park employed one Collins as a special policeman by arrangement with the National Detective Agency. Although Collins was formally retained and paid by the agency and wore its uniform, he was subject to the control and direction of the park management. Apparently at the request of the park, Collins had been deputized as a sheriff of Montgomery County.[1] He wore, on the outside of his uniform, a deputy sheriff's badge.

When Collins saw the petitioners sitting on the carousel waiting for the ride to begin, he reported their presence to the park manager. The manager told Collins that petitioners were to be arrested for trespassing if they would not leave the park. Collins then went up to the petitioners and told them that it was the park's policy "not to have colored people on the rides, or in the park." He ordered petitioners to leave within five minutes. They declined to do so, pointing out that they had tickets for the carousel. There was no evidence that any of the

[1] The Maryland Court of Appeals opinion below stated that Collins was deputized at the request of the park management pursuant to § 2–91 of the Montgomery County Code of 1955 which provides that the sheriff "on application of any corporation or individual, may appoint special deputy sheriffs for duty in connection with the property of . . . such corporation or individual; such special deputy sheriffs to be paid wholly by the corporation or person on whose account their appointments are made. Such special deputy sheriffs . . . shall have the same power and authority as deputy sheriffs possess within the area to which they are appointed and in no other area." 225 Md. 422, 430, 171 A. 2d 717, 721.

petitioners were disorderly. At the end of the five-minute period Collins, as he testified, "went to each defendant and told them that the time was up and that they were under arrest for trespassing." Collins transported the petitioners to the Montgomery County police station. There he filled out a form titled "Application for Warrant by Police Officer." The application stated:

> "Francis J. Collins, being first duly sworn, on oath doth depose and say: That he is a member of the Montgomery *deputy sheriff* Department and as such, on the 30th day of June, 1960, at about the hour of 8:45 P. M. he did observe the defendant William L. Griffin in Glen Echo Park which is private property[.] [O]n order of Kebar Inc. owners of Glen Echo Park the def[endant] was asked to leave the park and after giving him reasonable time to comply the def[endant] refused to leave [and] he was placed under arrest for trespassing . . . .
>
> "Whereas, Francis J. Collins doth further depose and say that he, as a member of the Montgomery County Police Department believes that ———— ———— is violating Sec. 577 Article 27 of the Annotated Code of Maryland.
>
> "Francis J. Collins."

Md. Ann. Code, 1957 (Cum. Supp. 1961), Art. 27, § 577, is a criminal trespass statute.[2] On the same day a Mary-

[2] That section provides:

"Any person . . . who shall enter upon or cross over the land, premises or private property of any person . . . after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor . . . provided . . . [however] that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others."

land Justice of the Peace issued a warrant which charged that petitioner Griffin "[d]id enter upon and pass over the land and premises of Glen Echo Park . . . after having been told by the Deputy Sheriff for Glen Echo Park, to leave the Property, and after giving him a reasonable time to comply, he did not leave . . . contrary to the . . . [Maryland criminal trespass statute] and against the peace, government and dignity of the State." The warrant recited that the complaint had been made by "Collins Deputy Sheriff." An amended warrant was later filed. It stated that the complaint had been made by "Collins, Deputy Sheriff" but charged Griffin with unlawfully entering the park after having been told not to do so by "an Agent" of the corporation which operated the park. Presumably identical documents were filed with respect to the other petitioners.

Petitioners were tried and convicted of criminal trespass in the Circuit Court of Montgomery County. Each was sentenced to pay a fine of $100. The Maryland Court of Appeals affirmed the convictions. 225 Md. 422, 171 A. 2d 717. That court, rejecting the petitioners' constitutional claims, reasoned as follows:

> "[T]he appellants in this case . . . were arrested for criminal trespass committed in the presence of a special deputy sheriff of Montgomery County (who was also the agent of the park operator) after they had been duly notified to leave but refused to do so. It follows—since the offense for which these appellants were arrested was a misdemeanor committed in the presence of the park officer who had a right to arrest them, either in his private capacity as an agent or employee of the operator of the park or in his limited capacity as a special deputy sheriff in the amusement park . . .—the arrest of these appellants for a criminal trespass in this manner was no more than if a regular police officer had been called upon

> to make the arrest for a crime committed in his presence . . . . [T]he arrest and conviction of these appellants for a criminal trespass as a result of the enforcement by the operator of the park of its lawful policy of segregation, did not constitute such action as may fairly be said to be that of the State." 225 Md., at 431, 171 A. 2d, at 721.

We granted certiorari, 370 U. S. 935, and set the case for reargument. 373 U. S. 920.

Collins—in ordering the petitioners to leave the park and in arresting and instituting prosecutions against them—purported to exercise the authority of a deputy sheriff. He wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park. Though an amended warrant was filed stating that petitioners had committed an offense because they entered the park after an "agent" of the park told them not to do so, this change has little, if any, bearing on the character of the authority which Collins initially purported to exercise. If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law. See, *e. g.*, *Screws* v. *United States,* 325 U. S. 91. Thus, it is clear that Collins' action was state action. See *Williams* v. *United States,* 341 U. S. 97; see also *Labor Board* v. *Jones & Laughlin Steel Corp.,* 331 U. S. 416, 429. The only question remaining in this case is whether Collins' action denied petitioners the equal protection of the laws secured to them by the Fourteenth Amendment. If it did, these convictions are invalid.

It cannot be disputed that if the State of Maryland had operated the amusement park on behalf of the owner thereof, and had enforced the owner's policy of racial seg-

regation against petitioners, petitioners would have been deprived of the equal protection of the laws. *Pennsylvania* v. *Board of Trusts,* 353 U. S. 230; cf. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715. In the *Board of Trusts* case we were confronted with the following situation. Stephen Girard by will had left a fund in trust to establish a college. He had provided in his will, in effect, that only "poor white male orphans" were to be admitted. The fund was administered by the Board of Directors of City Trusts of the City of Philadelphia as trustee. In accord with the provisions of the will it denied admission to two Negro applicants who were otherwise qualified. We held:

> "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. *Brown* v. *Board of Education,* 347 U. S. 483." 353 U. S., at 231.

The *Board of Trusts* case must be taken to establish that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment.

It is argued that the State may nevertheless constitutionally enforce an owner's desire to exclude particular persons from his premises even if the owner's desire is in turn motivated by a discriminatory purpose. The State, it is said, is not really enforcing a policy of segregation since the owner's ultimate purpose is immaterial to the State. In this case it cannot be said that Collins was simply enforcing the park management's desire to exclude designated individuals from the premises. The president

of the corporation which owned and managed the park testified that he had instructed Collins to enforce the park's policy of racial segregation. Collins was told to exclude Negroes from the park and escort them from the park if they entered. He was instructed to arrest Negroes for trespassing if they did not leave the park when he ordered them to do so. In short, Collins, as stated by the Maryland Court of Appeals, was "then under contract to protect and enforce . . . [the] racial segregation policy of the operator of the amusement park . . . ." 225 Md., at 430, 171 A. 2d, at 720. Pursuant to this obligation Collins ordered petitioners to leave and arrested them, as he testified, because they were Negroes. This was state action forbidden by the Fourteenth Amendment.

Reversed.

MR. JUSTICE DOUGLAS would reverse for the reasons stated in his opinion in *Bell* v. *Maryland, post,* p. 242.

MR. JUSTICE CLARK, concurring.

I join the Court's opinion with the understanding that it merely holds, under the peculiar facts here, that the State "must be recognized as a joint participant in the challenged activity." See *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 725 (1961). Deputy Sheriff Collins, an agent of the State, was regularly employed by Glen Echo in the enforcement of its segregation policy. I cannot, therefore, say, as does my Brother HARLAN, that the situation "is no different from what it would have been had the arrests been made by a regular policeman dispatched from police headquarters." Here Collins, the deputy sheriff, ordered petitioners to leave the park before any charges were filed. Upon refusal, Collins, the deputy sheriff, made the arrest and then took petitioners to the police station where he filed the charges and secured the warrant. If

Collins had not been a police officer, if he had ordered the petitioners off the premises and filed the charges of criminal trespass, and if then, for the first time, the police had come on the scene to serve a warrant issued in due course by a magistrate, based on the charges filed, that might be a different case. That case we do not pass upon.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK and MR. JUSTICE WHITE join, dissenting.

The pivotal issue in this case is whether petitioners' exclusion from Glen Echo, a private amusement park, was the product of state action. I accept the premise that in arresting these petitioners Collins was exercising his authority as deputy sheriff rather than his right as an individual under Maryland law, see 225 Md., at 431, 171 A. 2d, at 721, to arrest them for a misdemeanor being committed in his presence. It seems clear to me, however, that the involvement of the State is no different from what it would have been had the arrests been made by a regular policeman dispatched from police headquarters.

I believe, therefore, that this case is controlled by the principles discussed in MR. JUSTICE BLACK's opinion in *Bell* v. *Maryland, post,* p. 318, decided today, and accordingly would affirm the judgment below.

FALLEN *v.* UNITED STATES.

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

No. 210. Argued April 30, 1964.—Decided June 22, 1964.

Petitioner appeared for sentencing on January 15, 1962, with his court-appointed attorney. After sentences aggregating 20 years were imposed, petitioner asked the court if he could appeal "as an insolvent" and was advised that he could. His attorney then withdrew from the case, and petitioner was transported to hospital facilities away from the place of trial. On January 29, 14 days after sentencing, the clerk received letters from petitioner asking for a new trial and for an appeal. The letters were dated January 23 by petitioner and if actually mailed by him on that date would in the normal course of events have been received by the clerk within the 10-day requirement of Rule 37 (a) of the Federal Rules of Criminal Procedure. The Court of Appeals dismissed petitioner's appeal, however, because the letters were not actually received within that time. *Held:*

1. The Federal Rules of Criminal Procedure should not be inflexibly applied without regard to the circumstances. P. 142.

2. As far as this record discloses, petitioner, who was without the benefit of counsel, did all that could reasonably be expected to file his appeal within the allotted time, and accordingly he should not be barred from having his appeal heard on the merits. Pp. 142–144.

306 F. 2d 697, reversed and case remanded.

Isaac N. Groner, by appointment of the Court, 376 U. S. 940, argued the cause and filed a brief for petitioner.

Philip B. Heymann argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude.*

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

At issue in this case is whether petitioner's notice of appeal was filed within the time specified by Rule 37(a)(2) of the Federal Rules of Criminal Procedure.

Petitioner was convicted on January 11, 1962, of violations of the postal laws.[1] Four days later—on January 15—he appeared for sentencing with the attorney who had been appointed to represent him at trial. Consecutive sentences aggregating 20 years were imposed, after which the defendant asked if he could appeal the case "as an insolvent." The sentencing judge replied:

> "Oh, yes, you always have a right to appeal; the Government provides for that.
>
> "So that will be all. We are through with this case.
>
> "Mr. Marshal, you may take charge of the defendant."

Before he was taken out of the building, petitioner was given an opportunity to consult with his court-appointed attorney. According to the attorney's later recollection, petitioner asked him at that time if he would be interested in representing him on an appeal. The attorney responded that his firm did not want him to undertake any further criminal matters, and that it would thus be best for petitioner to secure another attorney promptly so as not to forfeit his right to appeal. The attorney recalled that this conference lasted for about an hour and a half—petitioner, that it lasted for only a few minutes. In any event, petitioner was then taken back to the medical center at which he had been quartered during the trial.[2] Early the next morning, he was transferred to hospital facilities at Atlanta to commence his sentence. At neither place was he permitted to have visitors.

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[1] Specifically, 18 U. S. C. §§ 371, 641, 2115.

[2] As the result of an automobile accident in 1951, petitioner is a paraplegic confined to a wheelchair. In addition to complications which have resulted from his affliction, petitioner was at the time of sentencing suffering from the flu. He was kept in medical facilities, it appears, more because of his flu than his more permanent condition.

On January 29, 14 days after sentencing, the clerk of the court in which petitioner had been convicted received letters from petitioner asking for a new trial and for an appeal. The letters were dated January 23 by petitioner, and were mailed in a single envelope which bore a government frank but no postmark. No communications had been received in the interim from either petitioner or his court-appointed counsel.

The chief judge of the district then reappointed the same attorney for the purpose of presenting the motion for a new trial to the trial judge at a hearing which was set for that purpose. In due course the motion was denied on the merits, the time question having been argued but not decided. On the same day, petitioner's reappointed attorney filed a notice of appeal and petitioner was granted leave to appeal *in forma pauperis*. Thereafter a new attorney was appointed to represent petitioner before the Court of Appeals and the case was set for hearing on the Government's motion to dismiss the appeal because the notice was not timely filed.

A divided Court of Appeals held, first, that petitioner's motion for a new trial was not timely filed, and that the consideration of the motion on the merits by the trial judge was in error and thus could not serve to extend the time for filing a notice of appeal.[3] It then held that the time for filing the notice began on January 15 when petitioner was sentenced, and expired when on January 25 the clerk had not received the notice. 306 F. 2d 697. We granted certiorari, 374 U. S. 826, to consider whether the restrictive reading of the Rules by the court below was justified under the circumstances of this case. We have concluded that it was not, and accordingly remand

[3] Rule 37 (a)(2) provides that if a motion for new trial is made within the 10 days during which an appeal must be taken, the appeal from the judgment of conviction may be taken within 10 days from the denial of the motion.

the case for a disposition of petitioner's appeal on the merits.

Rule 37 (a) provides that "[a]n appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from . . ." and that an appeal is taken "by filing with the clerk of the district court a notice of appeal . . . ." The Court of Appeals has read this to mean that, irrespective of the reason for the delay, the notice of appeal must actually be in the hands of the clerk on or before the 10th day. Since the timely filing of a notice of appeal is a jurisdictional prerequisite to the hearing of the appeal, the court thus felt powerless to do anything but to dismiss.

Overlooked, in our view, was the fact that the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances. Rule 2 begins with the admonition that "[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." That the Rules were not approached with sympathy for their purpose is apparent when the circumstances of this case are examined.

In the first place, in spite of the promise of the Rule,[4] petitioner was forced to take his appeal without the assistance of counsel. He was whisked away from the place of trial (Jacksonville, Florida) on the day after he was sentenced, and, as he tells it without contradiction in the

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[4] Rule 37 (a)(2) provides that "[w]hen a court after trial imposes sentence upon a defendant not *represented* by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant." (Emphasis added.) Although counsel was physically present at sentencing, it is an open question whether petitioner was "represented" by counsel within the meaning and purpose of the Rule.

record, not permitted to have visitors, nor afforded the opportunity to secure another attorney. In addition to his normal physical problems, he was ill,[5] and was thus confined in a hospital both in Jacksonville and in Atlanta.

It was not until January 23, as he tells it, again without contradiction in the record, that he felt well enough to write. Acting without advice as to the requirements of time, except that which he could acquire from other inmates, he then wrote two letters asking for a new trial and for the appeal which the trial judge promised that "the Government provides." These letters were promptly mailed on January 23, for all the record shows, and by coincidence, no doubt, would thus in the normal course of events have been received by the clerk within the 10 days.[6]

That they were not received within 10 days, however, is perhaps explained by the Government's disclosure at oral argument that mail pickups at Atlanta at that time occurred only twice a week, on Tuesdays and Fridays. Thus, if petitioner deposited the letters with prison authorities after the hour of pickup on January 23, a Tuesday—and there is nothing in the record to show that anyone took the trouble to tell him about such mailing delays—his letters would not have been placed in the mail by prison authorities until Friday. They thus probably would not have been received by the clerk's office until Monday the 29th, the day on which they were actually marked received by the clerk.

But whether or not this in fact occurred, there is no reason on the basis of what this record discloses to doubt that petitioner's date at the top of the letter was an accurate one and that subsequent delays were not charge-

[5] See note 2, *supra*.

[6] January 23 was the eighth day after sentencing, and the parties are agreed that a letter mailed on the 23d in Atlanta would normally be received in Jacksonville by the 25th.

able to him. Cf. *Rosenbloom* v. *United States,* 355 U. S. 80. There is no postmark on the envelope, nor any indication of the time at which the envelope came into the hands of prison officials. Other letters also mailed by petitioner from the prison took an equally long time to get to their destination. And although the Government had the opportunity, it introduced no evidence—and admitted on oral argument that it had none—to dispute the record facts that petitioner had done all that could reasonably be expected to get the letter to its destination within the required 10 days. Since petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits.

The judgment of the Court of Appeals is reversed, and the case remanded for a prompt disposition of the appeal on the merits.

It is so ordered.

MR. JUSTICE STEWART, whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN join, concurring.

I think that for purposes of Rule 37 (a)(2), a defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if, within the 10-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court. In other words, in such a case the jailer is in effect the clerk of the District Court within the meaning of Rule 37. If all we had to go on in this case was the date the petitioner wrote at the top of his letter, I think we should remand the case for resolution of the factual question as to when the letter was actually delivered to the prison authorities for mailing. But government counsel expressly conceded during oral argument that the petitioner in fact entrusted his notice of appeal

to the prison authorities within the 10-day period. Moreover, we were advised by counsel that procedures have now been inaugurated at the federal prisons to make certain that the exact time of receipt will be marked on all papers that are filed with the authorities for mailing. For these reasons I concur in the judgment of the Court, remanding the case for a prompt disposition of the appeal on the merits.

BARR ET AL. *v.* CITY OF COLUMBIA.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 9. Argued October 14–15, 1963.—Decided June 22, 1964.

Petitioners, Negro "sit-in" demonstrators, were arrested by police officers for criminal trespass and breach of the peace following their peaceful refusal to leave a Columbia, South Carolina, drug store lunch counter where they had been refused service. In appealing convictions for breach of the peace, the petitioners took general exceptions which, though the same as those the State Supreme Court held adequate to raise questions of the sufficiency of the evidence in other recent cases, were held by that court which affirmed lower court convictions on both charges in this case, to be inadequate for that purpose here. *Held:*

1. State procedural requirements not strictly or regularly followed cannot deprive this Court of the right to review. P. 149.

2. This Court will not assume that the State Supreme Court on the merits would have held petitioners punishable for both trespass and breach of the peace based on their peacefully remaining at the lunch counter after they had been asked to leave. P. 150.

3. The breach-of-peace convictions cannot stand, there having been no evidence to support them. *Thompson* v. *City of Louisville*, 362 U. S. 199, followed. P. 151.

Judgments of conviction in 239 S. C. 395, 123 S. E. 2d 521, for breach of the peace reversed and remanded; and for criminal trespass reversed and remanded *per curiam* for reasons stated in *Bouie* v. *City of Columbia*, *post*, p. 347.

Matthew J. Perry, Constance Baker Motley and *Jack Greenberg* argued the cause for petitioners. With them on the brief were *James M. Nabrit III, Charles L. Black, Jr., Juanita Jackson Mitchell, Tucker R. Dearing, Lincoln C. Jenkins, Derrick A. Bell, Jr., William T. Coleman, Jr., Louis H. Pollak, Richard R. Powell, Joseph L. Rauh, Jr.* and *John Silard.*

David W. Robinson II and *John W. Sholenberger* argued the cause for respondent. With them on the

briefs was *David W. Robinson. Daniel R. McLeod,* Attorney General of South Carolina, entered his appearance for respondent.

Ralph S. Spritzer, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Marshall, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *David Rubin.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Like *Bouie* v. *City of Columbia, post,* p. 347, this case involves a "sit-in" demonstration in Columbia, South Carolina, this one at the Taylor Street Pharmacy. Negroes and whites alike are invited to come and buy goods in all the store's departments, but the lunch counter, while it sells food to Negroes to take out, has a policy of refusing to let them sit there and eat. Petitioners, five Negro college students, entered the store and after some of them had made purchases in the front part proceeded to the lunch counter at the rear, where they sat down and waited for service. The store manager had arranged the day before for the police to come and arrest any "sit-in" demonstrators who might refuse to leave after being requested to do so. As a result, three officers were waiting at the store when petitioners arrived. The manager announced to petitioners that he would not serve them and that they would have to leave; then, at the request of one of the officers, he went with the officer to each petitioner and asked each petitioner individually to leave. When petitioners remained seated at the counter, they were arrested and charged with criminal trespass [1] and

[1] Section 16–386, Code of Laws of South Carolina, 1952 (1960 Supp.).

breach of the peace.[2] The Recorder's Court convicted them on both charges, the County Court affirmed in an unreported opinion, and the Supreme Court of South Carolina also affirmed. 239 S. C. 395, 123 S. E. 2d 521. Like the petitioners in *Bouie, post,* these petitioners claim that their convictions violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and as in *Bouie* we granted certiorari. 374 U. S. 804.

We consider first the question whether petitioners' convictions for breach of the peace are constitutionally valid. Apart from the fact that petitioners remained in the store after having been asked to leave, there is a complete and utter lack of any evidence, and no suggestion in the opinions of any of the courts below, that any of the petitioners did anything disorderly or did anything other than politely ask for service. Petitioners argue that either the breach-of-peace statute as applied to their conduct was unconstitutionally vague for failure to give fair warning, cf. *Lanzetta* v. *New Jersey,* 306 U. S. 451, or there was no evidence to support convictions for violation of that statute, cf. *Thompson* v. *City of Louisville,* 362 U. S. 199.

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[2] Section 15–909, Code of Laws of South Carolina, 1952, provides:

"*Disorderly conduct, etc.*—The mayor or intendant and any alderman, councilman or warden of any city or town in this State may in person arrest or may authorize and require any marshal or constable especially appointed for that purpose to arrest any person who, within the corporate limits of such city or town, may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness or any other conduct grossly indecent or dangerous to the citizens of such city or town or any of them. Upon conviction before the mayor or intendant or city or town council such person may be committed to the guardhouse which the mayor or intendant or city or town council is authorized to establish or to the county jail or to the county chaingang for a term not exceeding thirty days and if such conviction be for disorderly conduct such person may also be fined not exceeding one hundred dollars; *provided,* that this section shall not be construed to prevent trial by jury."

The city replies that, because the Supreme Court of South Carolina refused to pass on objections to the breach-of-peace conviction on the ground that the exceptions taken below were "too general to be considered," [3] we are precluded from considering petitioners' constitutional objections. The exceptions on this point read:

> "1. The Court erred in refusing to hold that the City failed to prove a *prima facie* case.
>
> "2. The Court erred in refusing to hold that the City failed to establish the corpus delicti."

We cannot accept the city's argument, since in *City of Columbia* v. *Bouie,* 239 S. C. 570, 124 S. E. 2d 332, rev'd on another point, *post,* p. 347, decided only a few weeks after the present case, the State Supreme Court had before it the identical two exceptions, and relying on them reversed for insufficiency of evidence the conviction of a peaceful and quiet sit-in demonstrator who had been convicted on a charge of resisting arrest. In three other cases decided in the two-month period preceding the present decision it likewise considered these same exceptions enough to raise the question of sufficiency of evidence, and in one of those three cases, decided the day before the present one, it reversed on that ground a conviction for interfering with an officer.[4] We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review. See, *e. g., NAACP* v. *Alabama ex rel. Flowers,* 377 U. S. 288; *Shuttlesworth* v. *City of Birmingham,* 376 U. S. 339; *Wright* v. *Georgia,* 373 U. S. 284;

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[3] 239 S. C., at 399, 123 S. E. 2d, at 523.

[4] *City of Charleston* v. *Mitchell,* 239 S. C. 376, 123 S. E. 2d 512, rev'd on another point, *post,* p. 551. See also *State* v. *Edwards,* 239 S. C. 339, 123 S. E. 2d 247, rev'd on another point *sub nom. Edwards* v. *South Carolina,* 372 U. S. 229; *City of Greenville* v. *Peterson,* 239 S. C. 298, 122 S. E. 2d 826, rev'd on another point, 373 U. S. 244 (allegation of failure to establish *corpus delicti* only).

NAACP v. *Alabama ex rel. Patterson,* 357 U. S. 449. We conclude that there is no adequate state ground barring our review of the breach-of-peace convictions.

Turning to the merits, the only evidence to which the city refers to justify the breach-of-peace convictions here, and the only possibly relevant evidence which we have been able to find in the record, is a suggestion that petitioners' mere presence seated at the counter might possibly have tended to move onlookers to commit acts of violence. As we pointed out above, it is undisputed in the record that petitioners were polite, quiet, and peaceful from the time they entered the store to the time they left. And as the city concedes, "it cannot be said that the South Carolina Supreme Court has, upon proper presentation and proper briefing, held that the acts of the Petitioners are clearly within the prohibitions of the statutes involved." Accordingly, we are unwilling to assume and find it hard to believe that the State Supreme Court if it had passed on the point [5] would have held that petitioners could be punished for trespass and for breach of the peace as well, based on the single fact that they had remained after they had been ordered to leave. And further, because of the frequent occasions on which we have reversed under the Fourteenth Amendment convictions of peaceful individuals who were convicted of breach of the peace because of the acts of hostile onlookers, we are reluctant to assume that the breach-of-peace statute covers petitioners' conduct here. Cf., *e. g., Henry* v. *City of Rock Hill,* 376 U. S. 776; *Wright* v. *Georgia, supra; Edwards* v. *South Carolina,* 372 U. S. 229; *Taylor* v. *Louisiana,* 370 U. S. 154; *Garner* v. *Louisiana,* 368 U. S.

[5] The city cites no decision of the Supreme Court of South Carolina which supports its position on this issue. *State* v. *Edwards,* 239 S. C. 339, 123 S. E. 2d 247, rev'd *sub nom. Edwards* v. *South Carolina,* 372 U. S. 229, from which the city quotes, did not involve this statute and is not otherwise persuasive.

157; *Terminiello* v. *Chicago,* 337 U. S. 1. Since there was no evidence to support the breach-of-peace convictions, they should not stand. *Thompson* v. *City of Louisville,* 362 U. S. 199.[6]

The judgments of conviction for breach of the peace are reversed and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

PER CURIAM.

With respect to the criminal trespass convictions, those judgments are also reversed and the case remanded for the reasons stated in *Bouie* v. *City of Columbia, post,* p. 347.

MR. JUSTICE DOUGLAS would reverse for the reasons stated in his opinion in *Bell* v. *Maryland, post,* p. 242.

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE joins, would, while joining in the opinion and judgments of the Court, also reverse for the reasons stated in the concurring opinion of MR. JUSTICE GOLDBERG in *Bell* v. *Maryland, post,* p. 286.

MR. JUSTICE BLACK, with whom MR. JUSTICE HARLAN and MR. JUSTICE WHITE join, dissenting from the reversal of the trespass convictions.

We have stated in our opinions in *Bouie* v. *City of Columbia, post,* p. 363, and *Bell* v. *Maryland, post,* p. 318, our belief that the mere fact that police responded to the call of a storekeeper and arrested people who were remaining in the store over his protest was not enough to constitute "state action" within the meaning of the Fourteenth

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[6] We do not reach petitioners' contention that their breach-of-peace convictions were void for vagueness under the doctrine of *Lanzetta* v. *New Jersey,* 306 U. S. 451.

Amendment. A review of the evidence in the case before us convinces us that the officers here did nothing which would justify a holding that they were acting for the State in any capacity except to arrest people who violated the trespass statute by remaining on the property of another after having been asked to leave. Petitioners' other objections relating to vagueness of the trespass statute and alleged absence of evidence to support the trespass convictions are identical to those which we considered and rejected in our opinion in *Bouie*. We believe therefore that the trespass convictions should stand.

ROBINSON ET AL. *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 60. Argued October 15, 1963.—Decided June 22, 1964.

Following refusal by appellants, Negroes and whites, to leave a Miami, Florida, restaurant, they were arrested and convicted under a state misdemeanor statute proscribing a guest's remaining at a restaurant after having been asked to leave by the management. The State Supreme Court affirmed, holding the statute did not deny equal protection of the laws. At the time of the arrest a State Health Board regulation applicable to restaurants and adopted under the legislature's authority required segregated rest rooms and the State had issued a manual based on state regulations requiring segregated facilities. *Held:* The regulations embodying a state policy which discouraged serving the two races together, involved the State so significantly in causing restaurant segregation as to violate the Equal Protection Clause of the Fourteenth Amendment. *Peterson* v. *City of Greenville,* 373 U. S. 244, followed. Pp. 153–157.

144 So. 2d 811, reversed.

Alfred I. Hopkins and *Jack Greenberg* argued the cause for appellants. With *Mr. Hopkins* on the briefs were *Tobias Simon* and *Howard W. Dixon.*

George R. Georgieff, Assistant Attorney General of Florida, argued the cause for appellee. With him on the briefs were *Richard W. Ervin,* former Attorney General of Florida, and *James W. Kynes,* Attorney General of Florida.

Ralph S. Spritzer, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Marshall, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *David Rubin.*

MR. JUSTICE BLACK delivered the opinion of the Court.

A criminal information filed in a Florida state court charged that these eighteen appellants had violated

§ 509.141 of the Florida Statutes by remaining in a restaurant after the manager had requested them to leave.[1] The material facts are not in dispute and show: Shell's City Restaurant, which is one of nineteen departments in Shell's Department Store in Miami, had, at the time of appellants' arrest, a policy of refusing to serve Negroes. Appellants, Negroes and whites, went as a group into the restaurant and seated themselves at tables. In accordance with the restaurant's policy, the manager told appellants they would not be served. The manager called the police and, accompanied by one policeman, went to each table, again told appellants they would not be served, and requested them to leave. They refused. The police officers then advised them to leave, and when appellants persisted in their refusal the police placed them all under arrest.

At the trial, the Shell's City management explained that, while Negroes were welcomed as customers in the store's other departments, serving Negroes in the restaurant would be "very detrimental to our business" because of the objections of white customers. After these facts had been brought out during the examination of the State's witnesses, appellants moved for a directed verdict on the ground that their arrest, prosecution, and conviction by the State on this evidence would amount to state discrimination against them on account of color, thereby violating the Fourteenth Amendment's guarantee of equal protection of the laws. This motion was denied. The

[1] The statute says that a manager or other person in authority at a restaurant (among other places named in the statute) shall have the right to remove or cause to be removed any person "who, in the opinion of the management, is a person whom it would be detrimental" to the restaurant to serve. The management must first give notice, orally or in writing, that the guest depart. The statute then provides, "[A]ny guest who shall remain or attempt to remain in such . . . restaurant . . . after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor . . . ."

appellants calling no witnesses, the trial court stayed the adjudication of guilt and the imposition of sentence and placed appellants on probation, as authorized by § 948.01 (3) of the Florida Statutes. On appeal, after various jurisdictional rulings in the Florida appellate courts,[2] the Supreme Court of Florida affirmed, holding the statute under which appellants were convicted to be nondiscriminatory. 144 So. 2d 811. The case is properly here on appeal under 28 U. S. C. § 1257 (2), and we noted probable jurisdiction. 374 U. S. 803.

In this case we do not reach the broad question whether the Fourteenth Amendment of its own force forbids a State to arrest and prosecute those who, having been asked to leave a restaurant because of their color, refuse to do so. For here there are additional circumstances which, we think, call for reversal because of our holding in *Peterson* v. *City of Greenville,* 373 U. S. 244. The petitioners in *Peterson* were convicted of trespass in violation of a city ordinance after they had seated themselves at a lunch counter and remained there over the manager's protest. At that time, however, there existed another Greenville ordinance which made it unlawful for restaurants to serve meals to white persons and colored persons in the same room or at the same table or counter. In *Peterson* the city argued that the manager's refusal to serve Negroes was based on his own personal preference, which did not amount to "state action" forbidden by the Fourteenth Amendment. But we held that the case must be decided on the basis of what the ordinance required people to do, not on the basis of what the manager wanted to do. We said:

> "When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are em-

[2] See 132 So. 2d 3 (Supreme Court of Florida); 132 So. 2d 771 (District Court of Appeal of Florida).

> ployed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators." 373 U. S., at 248.

See also *Lombard* v. *Louisiana,* 373 U. S. 267.

In the present case, when appellants were arrested and tried the Florida Board of Health had in effect a regulation, adopted under "authority of the Florida Legislature" and applicable to restaurants, which provided that "where colored persons are employed or accommodated" separate toilet and lavatory rooms must be provided.[3] A month before petitioners were arrested, the State of Florida had issued a "Food and Drink Services" manual, based on state regulations. The manual said that as a "basic requirement,"

> "Separate facilities shall be provided for each sex and for each race whether employed or served in the establishment."

While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together. Of course, state action, of the kind that falls within the proscription of the Equal Protection Clause of the Fourteenth Amendment, may be brought about through the State's administrative and regulatory agencies just as through its legislature. Cf. *Lombard* v. *Louisiana, supra,* 373 U. S., at 273. Here as in *Peterson* v. *City of Greenville, supra,* we conclude that the State through its regulations has become involved to such a

[3] Florida State Sanitary Code, c. VII, § 6. The substance of this regulation was reissued on June 26, 1962, and is now part of Florida Administrative Code, c. 170C, § 8.06.

significant extent in bringing about restaurant segregation that appellants' trespass convictions must be held to reflect that state policy and therefore to violate the Fourteenth Amendment.

The judgment of the Supreme Court of Florida is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS would reverse the judgment below for the reasons stated in his opinion in No. 12, *Bell* v. *Maryland, post,* p. 242.

MR. JUSTICE HARLAN, considering himself bound by *Peterson* v. *City of Greenville,* 373 U. S. 244, acquiesces in the judgment of the Court.

UNITED STATES *v.* PENN-OLIN CHEMICAL CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

No. 503. Argued April 30, 1964.—Decided June 22, 1964.

In 1960 Pennsalt Chemicals Corporation and Olin Mathieson Company signed a joint venture agreement, each acquiring 50% of the newly formed Penn-Olin Chemical Company, which began producing sodium chlorate in 1961 in Kentucky. The Government seeks to dissolve the joint venture as violating § 7 of the Clayton Act and § 1 of the Sherman Act. The parties agree that the line of commerce is sodium chlorate and that the relevant market is the southeastern part of the United States. The District Court determined that the test under the Clayton Act is whether as a matter of probability both companies would have entered the market as individual competitors if Penn-Olin had not been formed. The court found it impossible to conclude that both companies would have so entered and, finding that neither statute had been violated, dismissed the complaint. *Held:*

1. Section 7 of the Clayton Act applies to a joint venture, wherein two companies form a third to engage in a new enterprise. Pp. 167–168.

(a) The test of § 7 is the effect of the acquisition. The formation of a joint venture and the acquisition of its stock would substantially lessen competition between the owners, if both are engaged in commerce. This is true whether the competition between the joint venturers is actual or potential, or whether the new company is formed for a wholly new enterprise, because the new company is established to engage in commerce and to further the business of its parents, who are already in commerce. P. 168.

(b) The economic effects of an acquisition are determined at the time of suit, *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 607, and Penn-Olin was clearly engaged in commerce then. P. 168.

2. To carry out the national policy of preserving and promoting a free competitive economy, the same overall considerations apply to joint ventures as to mergers, although different criteria may con-

trol; and actual restraint need not be proved, only reasonable likelihood of a substantial lessening of competition. Pp. 169–172.

3. The test of whether a joint venture might substantially lessen competition, within the meaning of § 7, is not only whether both parent companies would probably have entered the market, or whether one would probably have entered alone, but also whether the joint venture eliminated the potential competition of the company that might have stayed at the edge of the market, threatening to enter. Pp. 172–174.

(a) The joint venture may well have eliminated any prospective competition between Pennsalt and Olin, just as a merger eliminates actual competition. P. 173.

(b) The presence of a potential competitor having the capability of entering an oligopolistic market may be a substantial incentive to competition. P. 174.

4. A finding should have been made by the trial court as to the reasonable probability that either Pennsalt or Olin would have built a plant while the other remained a significant potential competitor. Pp. 175–176.

5. In determining the probability of substantial lessening of competition, the trial court might take into account the following criteria: the number and power of the competitors in the market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the other's competitors; the setting in which the joint venture was formed; the reasons and necessities for its existence; the joint venture's line of commerce and the relationship thereof to its parents; the adaptability of its line of commerce to noncompetitive practices; the potential power of the joint venture in the market; an appraisal of competition in the market if one of the parents entered alone, instead of through the joint venture; in that event, the effect of the other parent's potential competition; and such other factors as might indicate potential risk to competition in the market. Pp. 176–177.

217 F. Supp. 110, judgment vacated and case remanded.

Solicitor General Cox argued the cause for the United States. With him on the brief were *Assistant Attor-*

ney General Orrick, Philip B. Heymann and *Robert B. Hummel.*

H. Francis DeLone and *Albert R. Connelly* argued the cause for appellees. With them on the brief were *William S. Potter, John W. Barnum* and *John T. Subak.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation jointly formed Penn-Olin Chemical Company to produce and sell sodium chlorate in the southeastern United States. The Government seeks to dissolve this joint venture as violative of both § 7 of the Clayton Act [1] and § 1 of the Sherman Act.[2] This direct appeal, 32 Stat. 823, 15 U. S. C. § 29, from the United States District Court for the District of Delaware, raises two questions. First, whether § 7 of the Clayton Act is applicable where two corporations form a third to engage in a new enterprise; and, second, if this question is answered in the affirmative, whether there is a violation of § 1 or § 7 under the facts of this case. The trial court found that the joint venture, on this record,

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[1] Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18, provides in part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[2] Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, provides in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

violated neither of these sections and found it unnecessary to reach the first question. 217 F. Supp. 110. In view of the importance of each of these questions in the administration of the antitrust laws, we noted probable jurisdiction. 375 U. S. 938. We have concluded that a joint venture as organized here would be subject to the regulation of § 7 of the Clayton Act and, reaching the merits, we hold that while on the present record there is no violation of § 1 of the Sherman Act, the District Court erred in dismissing the complaint as to § 7 of the Clayton Act. Accordingly, the judgment is vacated and remanded for further consideration.

1. Line of Commerce, Relevant Market, etc.

At the outset it is well to note that some of the troublesome questions ordinarily found in antitrust cases have been eliminated by the parties. First, the line of commerce is a chemical known as sodium chlorate. It is produced commercially by electrolysis of an acidified solution of sodium chloride. All sodium chlorate of like purity is usable interchangeably and is used primarily in the pulp and paper industry to bleach the pulp, making for a brighter and higher quality paper. This is done by using the sodium chlorate as a principal raw material to generate chlorine dioxide, a gaseous material which bleaches cellulose fibers to a maximum whiteness with minimum loss of strength. The pulp and paper industry consumes about 64% of total production of sodium chlorate. The chemical is also employed in the production of herbicides, agricultural chemicals and in certain derivatives, such as ammonium perchlorate. Next, the relevant market is not disputed. It is the southeastern part of the United States. Nor is the fact that Olin has never engaged in the commercial production of sodium chlorate contested. It has purchased and does purchase

amounts of the chemical for internal consumption and has acted as sales agent for Pennsalt in the southeastern territory under contracts dated in December 1957 and February 1958. Olin also owns a patented process for bleaching pulp with chlorine dioxide. This process requires sodium chlorate and has been widely used by paper manufacturers under royalty-free licenses.

In addition, the record shows that while Olin and Pennsalt are in competition in the production and sale of nonchlorate chemicals, only one was selected as a "guinea pig" in the District Court to determine if the alleged violations extended to those chemicals. This was calcium hypochlorite, used in the production of pulp and paper. The trial court found that the joint venture was limited to sodium chlorate and that the joint venture plant which was built at Calvert City was constructed to produce sodium chlorate only. In the jurisdictional statement the Government indicated that it might argue that the joint venture also had an illegal impact on the calcium hypochlorite line of commerce, but this was not raised in the brief or at argument on the merits.

2. The Companies Involved.

Pennsalt is engaged solely in the production and sale of chemicals and chemical products throughout the United States. Its assets are around a hundred million dollars and its sales are about the same amount. Its sodium chlorate production is located at Portland, Oregon, with a capacity of some 15,000 tons as of 1959. It occupied 57.8% of the market west of the Rocky Mountains. It has marketed sodium chlorate in the southeastern United States to some extent since 1957. Its shipments into that territory in 1960 were 4,186 tons of which Olin sold 3,202 tons on its sales agency contract.

Olin is a large diversified corporation, the result of a merger of Olin Industries, Inc., and Mathieson Chemical

Corporation in 1954. One of its seven divisions operates plants in 15 States and produces a wide range of chemicals and chemical products accounting for about 30% of Olin's revenues. Olin's sales in 1960 grossed some $690,000,000 and its total assets were $860,000,000.

Penn-Olin was organized in 1960 as a joint venture of Olin and Pennsalt. Each owns 50% of its stock and the officers and directors are divided equally between the parents. Its plant at Calvert City, Kentucky, was built by equal contribution of the two parents and cost $6,500,000. It has a capacity to produce 26,500 tons of sodium chlorate annually and began operations in 1961. Pennsalt operates the plant and Olin handles the sales. Penn-Olin deals in no other chemicals.

3. Background and Statistics of the Industry.

Prior to 1961 the sodium chlorate industry in the United States was made up of three producing companies. The largest producer, Hooker Chemical Corporation, entered the industry in 1956 when it acquired Oldbury Electro Chemical Company, which had been producing sodium chlorate for over half a century. Hooker now has two plants, one in the relevant marketing area at Columbus, Mississippi, which originally had a capacity of 16,000 tons but which was doubled in 1962. The other plant is at Niagara Falls, New York, with a capacity of 18,000 tons. Hooker has assets of almost $200,000,000. American Potash & Chemical Corporation entered the industry in 1955 by the acquisition of Western Electro Chemical Company. American Potash also has two plants, one located at Henderson, Nevada, with a 27,000-ton capacity and the other at Aberdeen, Mississippi (built in 1957), the capacity of which was 15,000 tons. Its assets are almost $100,000,000. The trial court found that these two corporations "had a virtual monopoly" in the relevant southeast market, holding over 90% of the market.

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A third company in the industry was Pennsalt which had a 15,392-ton plant at Portland, Oregon. It entered seriously into the relevant marketing area through a sales arrangement with Olin dated December 1957 and finalized in 1958, which was aimed at testing the availability of the southeastern market. Olin as an exclusive seller was to undertake the sale of 2,000 tons of sodium chlorate per year to pulp and paper mills in the southeast (except for Buckeye Cellulose Co., at Foley, Florida, which Pennsalt reserved to serve directly). In 1960, 4,186 tons of sodium chlorate were marketed in the relevant market with the aid of this agreement. This accounted for 8.9% of the sales in that market.

During the previous decade no new firms had entered the sodium chlorate industry, and little effort had been made by existing companies to expand their facilities prior to 1957. In 1953 Olin had made available to Pennsalt its Mathieson patented process for bleaching pulp with chlorine dioxide and the latter had installed it 100% in all of the western paper mills. This process uses sodium chlorate. At about the same time the process was likewise made available, royalty free, to the entire pulp and paper industry. By 1960 most of the chlorine dioxide generated by paper manufacturers was being produced under the Olin controlled process. This created an expanding demand for sodium chlorate and by 1960 the heaviest concentration of purchasers was located in the relevant southeastern territory. By 1957 Hooker began increasing the capacity of its Columbus plant and by 1960 it had been almost doubled. American Potash sensed the need of a plant in Mississippi to compete with Hooker and began its Aberdeen plant in 1957. It was completed to a 15,000-ton capacity in 1959, and this capacity was expanded 50% by 1961.

The sales arrangement between Pennsalt and Olin, previously mentioned, was superseded by the joint ven-

ture agreement on February 11, 1960, and the Penn-Olin plant operations at Calvert City, Kentucky, began in 1961. In the same year Pittsburgh Plate Glass Company announced that it would build a plant at Lake Charles, Louisiana, with a capacity of 15,000 tons. Pittsburgh Plate Glass had operated a sodium chlorate plant in Canada.

As a result of these expansions and new entries into the southeastern market, the projected production of sodium chlorate there more than doubled. By 1962 Hooker had 32,000 tons; American Potash, 22,500 tons; Penn-Olin, 26,500 tons; and Pittsburgh Glass, 15,000 tons—a total of 96,000 tons as contrasted to 41,150 in 1959. Penn-Olin's share of the expanded relevant market was about 27.6%. Outside the relevant southeastern market Pacific Engineering and Production Company announced in July 1961 that it would construct a 5,000-ton sodium chlorate plant at Henderson, Nevada, in a joint venture with American Cyanamid Company. Pacific would put up the "know-how" and American Cyanamid the loan of the necessary money with 50% stock options.

4. The Setting From Which the Joint Venture Emerged.

As early as 1951 Pennsalt had considered building a plant at Calvert City and starting in 1955 it initiated several cost and market studies for a sodium chlorate plant in the southeast. Three different proposals from within its own organization were rejected prior to 1957, apparently because the rate of return was so unattractive that "the expense of refining these figures further would be unwarranted." When Hooker announced in December 1956 that it was going to increase the capacity of its Columbus plant, the interest of Pennsalt management was reactivated. It appointed a "task force" to evaluate the company's future in the eastern market; it retained

management consultants to study that market and its chief engineer prepared cost estimates. However, in December 1957 the management decided that the estimated rate of return was unattractive and considered it "unlikely" that Pennsalt would go it alone. It was suggested that Olin would be a "logical partner" in a joint venture and might in the interim be interested in distributing in the East 2,000 tons of the Portland sodium chlorate production. The sales agreement with Olin, heretofore mentioned, was eventually made. In the final draft the parties agreed that "neither . . . should move in the chlorate or perchlorate field without keeping the other party informed . . ." and that one would "bring to the attention of the other any unusual aspects of this business which might make it desirable to proceed further with production plans." Pennsalt claims that it finally decided, prior to this agreement, that it should not build a plant itself and that this decision was never reconsidered or changed. But the District Court found to the contrary.

During this same period—beginning slightly earlier—Olin began investigating the possibility of entering the sodium chlorate industry. It had never produced sodium chlorate commercially, although its predecessor had done so years before. However, the electrolytic process used in making sodium chlorate is intimately related to other operations of Olin and required the same general knowledge. Olin also possessed extensive experience in the technical aspects of bleaching pulp and paper and was intimate with the pulp and paper mills of the southeast. In April 1958 Olin's chemical division wrote and circulated to the management a "Whither Report" which stated in part:

> "We have an unparalleled opportunity to move sodium chlorate into the paper industry as the result

> of our work on the installation of chlorine dioxide generators. We have a captive consumption for sodium chlorate."

And Olin's engineering supervisor concluded that entry into sodium chlorate production was "an attractive venture" since it "represents a logical expansion of the product line of the Industrial Chemicals Division . . ." with respect to "one of the major markets, pulp and paper bleaching, [with which] we have a favorable marketing position, particularly in the southeast."

The staff, however, did not agree with the engineering supervisor or the "Whither Report" and concluded "that they didn't feel that this particular project showed any merit worthy of serious consideration by the corporation at that time." They were dubious of the cost estimates and felt the need to temper their scientists' enthusiasm for new products with the uncertainties of plant construction and operation. But, as the trial court found, the testimony indicated that Olin's decision to enter the joint venture was made without determining that Olin could not or would not be an independent competitor. That question, the president of Penn-Olin testified, "never reached the point of final decision."

This led the District Court to find that "[t]he possibility of individual entry into the southeastern market had not been completely rejected by either Pennsalt or Olin before they decided upon the joint venture." 217 F. Supp. 110, 128–129.

5. Section 7 of the Clayton Act Applies to "Joint Ventures."

Appellees argue that § 7 applies only where the acquired company is "engaged" in commerce and that it would not apply to a newly formed corporation, such as Penn-Olin. The test, they say, is whether the enterprise

to be acquired is engaged in commerce—not whether a corporation formed as the instrumentality for the acquisition is itself engaged in commerce at the moment of its formation. We believe that this logic fails in the light of the wording of the section and its legislative background. The test of the section is the effect of the acquisition. Certainly the formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny. Moreover, in this case the progeny was organized to further the business of its parents, already in commerce, and the fact that it was organized specifically to engage in commerce should bring it within the coverage of § 7. In addition, long prior to trial Penn-Olin was actually engaged in commerce. To hold that it was not "would be illogical and disrespectful of the plain congressional purpose in amending § 7 . . . [for] it would create a large loophole in a statute designed to close a loophole." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 343 (1963). In any event, Penn-Olin was engaged in commerce at the time of suit and the economic effects of an acquisition are to be measured at that point rather than at the time of acquisition. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 607 (1957). The technicality could, therefore, be averted by merely refiling an amended complaint at the time of trial. This would be a useless requirement.

6. The Application of the Merger Doctrine.

This is the first case reaching this Court and on which we have written that directly involves the validity under § 7 of the joint participation of two corporations in the

creation of a third as a new domestic producing organization.[3] We are, therefore, plowing new ground. It is true, however, that some aspects of the problem might be found in *United States* v. *Terminal R. Assn.*, 224 U. S. 383 (1912), and *Associated Press* v. *United States*, 326 U. S. 1 (1945), where joint ventures with great market power were subjected to control, even prior to the amendment to § 7.

It is said that joint ventures were utilized in ancient times, according to Taubman, who traces them to Babylonian "commenda" and Roman "societas." Taubman, The Joint Venture and Tax Classification, 27–81 (1957). Their economic significance has grown tremendously in the last score of years, having been spurred on by the need for speed and size in fashioning a war machine during the early forties. Postwar use of joint subsidiaries and joint projects led to the spawning of thousands of such ventures in an effort to perform the commercial tasks confronting an expanding economy.

The joint venture, like the "merger" and the "conglomeration," often creates anticompetitive dangers. It is the chosen competitive instrument of two or more corporations previously acting independently and usually competitively with one another. The result is "a triumvirate of associated corporations."[4] If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market.

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[3] For a discussion of the problem, see Kaysen & Turner, Antitrust Policy, 136–141 (1959).

[4] See Note, Applicability of § 7 to a Joint Venture, 11 U. C. L. A. L. Rev. 393, 396.

This is not to say that the joint venture is controlled by the same criteria as the merger or conglomeration. The merger eliminates one of the participating corporations from the market while a joint venture creates a new competitive force therein. See *United States* v. *Philadelphia National Bank, supra; Brown Shoe Co.* v. *United States,* 370 U. S. 294 (1962); *United States* v. *Aluminum Co. of America,* 377 U. S. 271 (1964). The rule of *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651 (1964), where a corporation sought to protect its market by acquiring a potential competitor, would, of course, apply to a joint venture where the same intent was present in the organization of the new corporation.

Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy. In furtherance of that policy, now entering upon its 75th year, this Court has formulated appropriate criteria, first under the Sherman Act and now, also, under the Clayton Act and other antitrust legislation. The Celler-Kefauver Amendment to § 7, with which we now deal, was the answer of the Congress to a loophole found to exist in the original enactment. See *Brown Shoe Co.* v. *United States, supra,* and *United States* v. *Philadelphia National Bank, supra.* However, in an earlier case, this Court, while considering the effect of a stock acquisition under the original § 7, declared in *United States* v. *E. I. du Pont de Nemours & Co., supra,* at 592: "We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce . . . ." The grand design of the original § 7, as to stock acquisitions, as well as the Celler-Kefauver Amendment, as to the acquisition of assets, was

to arrest incipient threats to competition which the Sherman Act did not ordinarily reach. It follows that actual restraints need not be proved. The requirements of the amendment are satisfied when a "tendency" toward monopoly or the "reasonable likelihood" of a substantial lessening of competition in the relevant market is shown. Congress made it plain that the validity of such arrangements was to be gauged on a broader scale by using the words "may be substantially to lessen competition" which "indicate that its concern was with probabilities, not certainties." *Brown Shoe Co.* v. *United States, supra,* at 323. And, as we said with reference to another merger, in *United States* v. *Philadelphia National Bank, supra,* at 362:

> "Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.' See *Brown Shoe Co., supra,* at 317, 322. Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive."

And in the most recent merger case before the Court, *United States* v. *Aluminum Co. of America, supra,* the appellee had acquired a small competitor, Rome Cable Corporation. The Court noted that the acquisition gave appellee only 1.3% additional control of the aluminum conductor market. "But in this setting," the Court said,

> "that seems to us reasonably likely to produce a substantial lessening of competition within the mean-

> ing of § 7. . . . It would seem that the situation in the aluminum industry may be oligopolistic. As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors." At 280.

7. The Criteria Governing § 7 Cases.

We apply the light of these considerations in the merger cases to the problem confronting us here. The District Court found that "Pennsalt and Olin each possessed the resources and general capability needed to build its own plant in the southeast and to compete with Hooker and [American Potash] in that market. Each could have done so if it had wished." 217 F. Supp. 110, 129.[5] In addition, the District Court found that, contrary to the position of the management of Olin and Pennsalt, "the forecasts of each company indicated that a plant could be operated with profit." *Ibid.*

The District Court held, however, that these considerations had no controlling significance, except "as a factor in determining whether as a matter of probability

[5] The court explained further: "At the time when the joint venture was agreed upon Pennsalt and Olin each had an extensive background in sodium chlorate. Pennsalt had years of experience in manufacturing and selling it. Although Olin had never been a commercial manufacturer, it possessed a substantially developed manufacturing technique of its own, and also had available to it a process developed by Vickers-Krebs with whom it had been negotiating to construct a plant. Olin had contacts among the southeastern pulp and paper mills which Pennsalt lacked, but Pennsalt's own estimates indicate that in a reasonable time it would develop adequate business to support a plant if it decided to build. A suitable location for a plant was available to each company—Calvert City, Kentucky for Pennsalt, and the TVA area around Chattanooga, Tennessee for Olin. The financing required would not have been a problem for either company." *Ibid.*

both companies would have entered the market as individual competitors if Penn-Olin had not been formed. Only in this event would potential competition between the two companies have been foreclosed by the joint venture." *Id.,* at 130. In this regard the court found it "impossible to conclude that as a matter of reasonable probability *both* Pennsalt and Olin would have built plants in the southeast if Penn-Olin had not been created." *Ibid.* The court made no decision concerning the probability that one would have built "while the other continued to ponder." It found that this "hypothesized situation affords no basis for concluding that Penn-Olin had the effect of substantially lessening competition." *Ibid.* That would depend, the court said, "upon the competitive impact which Penn-Olin will have as against that which might have resulted if Pennsalt or Olin had been an individual market entrant." *Ibid.* The court found that this impact could not be determined from the record in this case. "Solely as a matter of theory," it said, ". . . no reason exists to suppose that Penn-Olin will be a less effective competitor than Pennsalt or Olin would have been. The contrary conclusion is the more reasonable." *Id.,* at 131.

We believe that the court erred in this regard. Certainly the sole test would not be the probability that *both* companies would have entered the market. Nor would the consideration be limited to the probability that one entered alone. There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter. Just as a merger eliminates actual competition, this joint venture may well foreclose any prospect of competition between Olin and Pennsalt in the relevant sodium chlorate market. The difference, of course, is that the merger's foreclosure is present while the joint ven-

ture's is prospective. Nevertheless, "[p]otential competition . . . as a substitute for . . . [actual competition] may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy. . . . Potential competition, insofar as the threat survives [as it would have here in the absence of Penn-Olin], may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets." Wilcox, Competition and Monopoly in American Industry, TNEC Monograph No. 21 (1940) 7–8. Potential competition cannot be put to a subjective test. It is not "susceptible of a ready and precise answer." As we found in *United States* v. *El Paso Natural Gas Co., supra,* at 660, the "effect on competition . . . is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on." The position of a company "as a competitive factor . . . was not disproved by the fact that it had never sold . . . there. . . . [I]t is irrelevant in a market . . . where incremental needs are booming." The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated. Witness the expansion undertaken by Hooker and American Potash as soon as they heard of the interest of Olin Mathieson and of Pennsalt in southeast territory. This same situation might well have come about had either Olin or Pennsalt entered the relevant market alone and the other remained aloof watching developments.

8. The Problem of Proof.

Here the evidence shows beyond question that the industry was rapidly expanding; the relevant southeast market was requiring about one-half of the national

production of sodium chlorate; few corporations had the inclination, resources and know-how to enter this market; both parent corporations of Penn-Olin had great resources; each had long been identified with the industry, one owning valuable patent rights while the other had engaged in sodium chlorate production for years; each had other chemicals, the production of which required the use of sodium chlorate; right up to the creation of Penn-Olin, each had evidenced a long-sustained and strong interest in entering the relevant market area; each enjoyed good reputation and business connections with the major consumers of sodium chlorate in the relevant market, *i. e.*, the pulp and paper mills; and, finally, each had the know-how and the capacity to enter that market and could have done so individually at a reasonable profit. Moreover, each company had compelling reasons for entering the southeast market. Pennsalt needed to expand its sales to the southeast, which it could not do economically without a plant in that area. Olin was motivated by "the fact that [it was] already buying and using a fair quantity [of sodium chlorate] for the production of sodium chlorite and that [it was] promoting the Mathieson process of the generation of chlorine dioxide which uses sodium chlorate." Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do.

However, despite these strong circumstances, we are not disposed to disturb the court's finding that there was not a reasonable probability that both Pennsalt and Olin would have built a plant in the relevant market area. But we have concluded that a finding should have been made as to the reasonable probability that either one of the corporations would have entered the market by building

a plant, while the other would have remained a significant potential competitor. The trial court said that this question "need not be decided." It is not clear whether this conclusion was based on the erroneous assumption that the Government could not show a lessening of competition even if such a situation existed, or upon the theory (which the court found erroneous in its final opinion) that the Government need not show the impact of such an event on competition in the relevant market as compared with the entry of Penn-Olin. The court may also have concluded that there was no evidence in the record on which to base such a finding. In any event, we prefer that the trial court pass upon this question and we venture no opinion thereon. Since the trial court might have been concerned over whether there was evidence on this point,[6] we reiterate that it is impossible to demonstrate the *precise* competitive effects of the elimination of either Pennsalt or Olin as a potential competitor. As the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) put it:

> "The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements . . . ." At 320.

There being no proof of specific intent to use Penn-Olin as a vehicle to eliminate competition, nor evidence of collateral restrictive agreements between the joint venturers, we put those situations to one side. We note generally the following criteria which the trial court might

[6] In this regard, the court should, of course, open the record for further testimony if the parties so desire.

take into account in assessing the probability of a substantial lessening of competition: the number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to noncompetitive practices; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through Penn-Olin; the effect, in the event of this occurrence, of the other joint venturer's potential competition; and such other factors as might indicate potential risk to competition in the relevant market. In weighing these factors the court should remember that the mandate of the Congress is in terms of the probability of a lessening of substantial competition, not in terms of tangible present restraint.

The judgment is therefore vacated and the case is remanded for further proceedings in conformity with this opinion.

Vacated and remanded.

MR. JUSTICE WHITE dissents.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK agrees, dissenting.

Agreements among competitors [1] to divide markets are *per se* violations of the Sherman Act.[2] The most de-

[1] *White Motor Co.* v. *United States*, 372 U. S. 253, was a vertical arrangement involving a territorial restriction whose validity we con-

[*Footnote 2 is on p. 178*]

tailed, grandiose scheme of that kind is disclosed in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, where industrialists, acting like commissars in modern communist countries, determined what tonnage should be produced by each company and what territory was "free" and what was "bonus." The Court said: "Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded." *Id.,* at 244–245.

In *United States* v. *National Lead Co.,* 332 U. S. 319,[3] a Sherman Act violation resulted from a division of world markets for titanium pigments, the key being allocation of territories through patent license agreements. A similar arrangement was struck down in *Timken Co.* v. *United States,* 341 U. S. 593, where world trade territories were allocated among an American, a British, and a French company through intercorporate arrangements called a "joint venture." *Nationwide Trailer Rental System, Inc.,* v. *United States,* 355 U. S. 10 (affirming 156 F. Supp. 800), held violative of the antitrust laws an agreement establishing exclusive territories for each member of an organization set up to regulate the one-way trailer rental industry and empowering a member to prevent any other operator from becoming a member in his area.

In the late 1950's the only producers of sodium chlorate in the United States were Pennsalt, one of the appellees

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cluded could be determined only after a trial, not on motion for summary judgment.

[2] See Oppenheim, Antitrust Booms and Boomerangs, 59 Nw. U. L. Rev. 33, 35 (1964).

[3] The findings of fact are detailed in 63 F. Supp. 513.

in this case, Hooker Chemical Corporation, and American Potash and Chemical Corporation. No new firms had entered the industry for a decade. Prices seemed to be stable and little effort had been made to expand existing uses or to develop new ones. But during the 1950's the sodium chlorate market began to grow, chiefly on account of the adoption of chlorine dioxide bleaching in the pulp industry. Domestic production more than quadrupled between 1950 and 1960. The growth was the most pronounced in the southeast. By 1960 the southeast had the heaviest concentration of sodium chlorate buyers, the largest being the pulp and paper mills; and nearly half the national sodium chlorate productive capacity. In 1960 the southeast market was divided among the three producers as follows: Hooker, 49.5%, American Potash, 41.6%, Pennsalt, 8.9%

Pennsalt, whose only sodium chlorate plant was at Portland, Oregon, became interested in establishing a plant in the rapidly growing southeast sodium chlorate market. It made cost studies as early as 1951 for such a project; and from 1955 on it gave the matter almost continuous consideration. In 1957 it decided to explore the possibility either of going it alone or doing it jointly with Olin. Pennsalt received from its staff and experts various studies in this regard and continued to have negotiations with Olin for a joint venture, and postponed its unilateral project from time to time pending receipt of word from Olin. Its final decision was in fact made when Penn-Olin was organized February 25, 1960, pursuant to a joint venture agreement between Olin and Pennsalt, dated two weeks earlier.

In the early 1950's Olin too was investigating the possibilities of entering the southeast industry. It took various steps looking toward establishment of a production plant in the southeastern United States. It received numerous reports from its staff and its experts and it went

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so far in November 1959 as to reach a tentative agreement with a British construction company for the construction of a plant. Its unilateral projects were, however, all dropped when the agreement for the joint venture with Pennsalt was reached.

During the years when Pennsalt and Olin were considering independent entry into the southeast market, they were also discussing joint entry. In order to test the southeast market the two agreed in December of 1957 that Pennsalt would make available to Olin, as exclusive seller, 2,000 tons of sodium chlorate per year for two or three years, Olin agreeing to sell the chemical only to pulp and paper companies in the southeast, except for one company which Pennsalt reserved the right to serve directly. Another agreement entered into in February 1958 provided that neither of the two companies would "move in the chlorate or perchlorate field without keeping the other party informed." And each by the agreement bound itself "to bring to the attention of the other any unusual aspects of this business which might make it desirable to proceed further with production plans." The purpose of this latter agreement, it was found, was to assure that each party would advise the other of any plans independently to enter the market before it would take any definite action on its own.

So what we have in substance is two major companies who on the eve of competitive projects in the southeastern market join forces. In principle the case is no different from one where Pennsalt and Olin decide to divide the southeastern market as was done in *Addyston Pipe* and in the other division-of-markets cases already summarized. Through the "joint venture" they do indeed divide it fifty-fifty. That division through the device of the "joint venture" is as plain and precise as though made in more formal agreements. As we saw in the *Timken* case,

"agreements between legally separate persons and companies to suppress competition among themselves and others" cannot be justified "by labeling the project a 'joint venture.'" 341 U. S., at 598. And we added, "Perhaps every agreement and combination to restrain trade could be so labeled." *Ibid.* What may not be done by two companies who decide to divide a market surely cannot be done by the convenient creation of a legal umbrella—whether joint venture or common ownership and control (see *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 215)—under which they achieve the same objective by moving in unison.

An actual division of the market through the device of "joint venture" has, I think, the effect "substantially to lessen competition" within the meaning of § 7 of the Clayton Act.[4] The District Court found that neither Pennsalt nor Olin had completely rejected the idea of independent entry into the southeast. But the court also found that it is "impossible to conclude that as a matter of reasonable probability *both* Pennsalt and Olin would have built plants in the southeast if Penn-Olin had not been created." The only hypothesis acceptable to it was that either Pennsalt or Olin—but not both—would have entered the southeastern market as an independent competitor had the "joint venture" not materialized. On that assumption the only effect of the "joint venture" was

[4] Section 7 of the Clayton Act covers the acquisition by a corporation engaged in interstate commerce of the stock or assets of another corporation also engaged in interstate commerce. An acquisition qualifies under § 7 if the firm that is acquired is either conducting business in interstate commerce or intending or preparing to do so. It seems clear from the record in this case that Penn-Olin was from its inception intended by its organizers to engage in interstate commerce; and it in fact immediately began to arrange for or conduct such business. It was therefore "engaged" in interstate commerce within the meaning of § 7 when Pennsalt and Olin acquired its stock.

"to eliminate Pennsalt or Olin, as the case may be, as a competitor." In that posture of the case, the District Court was unwilling to conclude that the creation of Penn-Olin had the effect of substantially lessening competition.

We do not, of course, know for certain what would have happened if the "joint venture" had not materialized. But we do know that § 7 deals only with probabilities, not certainties. We know that the interest of each company in the project was lively, that one if not both of them would probably have entered that market, and that even if only one had entered at the beginning the presence of the other on the periphery would in all likelihood have been a potent competitive factor. Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651,661. We also know that as between Pennsalt and Olin the "joint venture" foreclosed all future competition by dividing the market fifty-fifty. That could not have been done consistently with our decisions had the "joint venture" been created after Pennsalt and Olin had entered the market or after either had done so. To allow the joint venture to obtain antitrust immunity because it was launched at the very threshold of the entry of two potential competitors into a territory is to let § 7 be avoided by sophisticated devices.

There is no need to remand this case for a finding "as to the reasonable probability that either one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor." *Ante,* pp. 175–176. This case—now almost three years in litigation—has already produced a trial extending over a 23-day period, the introduction of approximately 450 exhibits, and a 1,600-page record. We should not require the investment of additional time, money, and effort where, as here, a case turns on one cru-

cial finding and the record is sufficient to enable this Court—which is as competent in this regard as the District Court—to supply it.

MR. JUSTICE HARLAN, dissenting.

I can see no purpose to be served by this remand except to give the Government an opportunity to retrieve an antitrust case which it has lost, and properly so. Believing that this Court should not lend itself to such a course, I would affirm the judgment of the District Court.

JACOBELLIS *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 11. Argued March 26, 1963.—Restored to the calendar for reargument April 29, 1963.—Reargued April 1, 1964.—Decided June 22, 1964.

Appellant, manager of a motion picture theater, was convicted under a state obscenity law of possessing and exhibiting an allegedly obscene film, and the State Supreme Court upheld the conviction. *Held:* The judgment is reversed. Pp. 184–198.

173 Ohio St. 22, 179 N. E. 2d 777, reversed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE GOLDBERG, concluded that:

1. Though motion pictures are within the constitutional guarantees of freedom of expression, obscenity is not within those guarantees. P. 187.

2. This Court cannot avoid making an independent judgment as to whether material condemned as obscene is constitutionally protected. Pp. 187–190.

3. The test for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth* v. *United States*, 354 U. S. 476. Pp. 191–195.

(a) A work cannot be proscribed unless it is "utterly without redeeming social importance," and hence material that deals with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be held obscene and denied constitutional protection. P. 191.

(b) The constitutional status of allegedly obscene material does not turn on a "weighing" of its social importance against its prurient appeal, for a work may not be proscribed unless it is "utterly" without social importance. P. 191.

(c) Before material can be proscribed as obscene under this test, it must be found to go substantially beyond customary limits of candor in description or representation. Pp. 191–192.

(d) The "contemporary community standards" by which the issue of obscenity is to be determined are not those of the particular

local community from which the case arises, but those of the Nation as a whole. Pp. 192–195.

4. The recognized interest in preventing dissemination of material deemed harmful to children does not justify its total suppression. This conviction, based not on the exhibition of the film to children but on its exhibition to the public at large, must be reviewed under the strict standard applicable in determining the scope of the constitutional protection. P. 195.

5. The film is not obscene under the applicable standard. P. 196.

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, concluded that a conviction for exhibiting a motion picture violates the First Amendment, which is made obligatory on the States by the Fourteenth Amendment. Pp. 196–197.

MR. JUSTICE STEWART concluded that criminal obscenity laws are constitutionally limited under the First and Fourteenth Amendments to "hard-core pornography." P. 197.

MR. JUSTICE GOLDBERG concluded that there is no justification here for making an exception to the freedom-of-expression rule, for by any arguable standard this film is not obscene. Pp. 197–198.

Ephraim London reargued the cause for appellant. With him on the briefs were *Bennet Kleinman* and *Martin Garbus.*

John T. Corrigan reargued the cause and filed a brief for appellee.

Bernard A. Berkman, Jack G. Day and *Melvin L. Wulf* filed a brief for the American and Ohio Civil Liberties Unions, as *amici curiae,* urging reversal.

Charles H. Keating, Jr. filed a brief for Citizens for Decent Literature, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE GOLDBERG joins.

Appellant, Nico Jacobellis, manager of a motion picture theater in Cleveland Heights, Ohio, was convicted on two counts of possessing and exhibiting an obscene film in

violation of Ohio Revised Code (1963 Supp.), § 2905.34.[1] He was fined $500 on the first count and $2,000 on the second, and was sentenced to the workhouse if the fines were not paid. His conviction, by a court of three judges upon waiver of trial by jury, was affirmed by an intermediate appellate court, 115 Ohio App. 226, 175 N. E. 2d 123, and by the Supreme Court of Ohio, 173 Ohio St. 22, 179 N. E. 2d 777. We noted probable jurisdiction of the appeal, 371 U. S. 808, and subsequently restored the case to the calendar for reargument, 373 U. S. 901. The dispositive question is whether the state courts properly found that the motion picture involved, a French film called *"Les Amants"* ("The Lovers"), was obscene and

[1] *"Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes.*

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

hence not entitled to the protection for free expression that is guaranteed by the First and Fourteenth Amendments. We conclude that the film is not obscene and that the judgment must accordingly be reversed.

Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press. *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495. But in *Roth* v. *United States* and *Alberts* v. *California*, 354 U. S. 476, we held that obscenity is not subject to those guarantees. Application of an obscenity law to suppress a motion picture thus requires ascertainment of the "dim and uncertain line" that often separates obscenity from constitutionally protected expression. *Bantam Books, Inc.*, v. *Sullivan*, 372 U. S. 58, 66; see *Speiser* v. *Randall*, 357 U. S. 513, 525.[2] It has been suggested that this is a task in which our Court need not involve itself. We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial

[2] It is too late in the day to argue that the location of the line is different, and the task of ascertaining it easier, when a state rather than a federal obscenity law is involved. The view that the constitutional guarantees of free expression do not apply as fully to the States as they do to the Federal Government was rejected in *Roth-Alberts, supra*, where the Court's single opinion applied the same standards to both a state and a federal conviction. Cf. *Ker* v. *California*, 374 U. S. 23, 33; *Malloy* v. *Hogan*, *ante*, pp. 1, 10–11.

supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth* v. *United States, supra,* 354 U. S., at 497–498 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no "substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case." *Id.,* at 498; see *Manual Enterprises, Inc.,* v. *Day,* 370 U. S. 478, 488 (opinion of HARLAN, J.).[3]

[3] See *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684, 708 (separate opinion):

"It is sometimes said that this Court should shun considering the particularities of individual cases in this difficult field lest the Court become a final 'board of censorship.' But I cannot understand why it should be thought that the process of constitutional judgment in this realm somehow stands apart from that involved in other fields, particularly those presenting questions of due process. . . ."

See also Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 116 (1960): "This obligation—to reach an independent judgment in applying constitutional standards and criteria to constitutional issues that may be cast by lower courts 'in the form of determinations of fact'—appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation, as is every court before which the constitutional issue is raised."

And see *id.,* at 119:

"It may be true . . . that judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation' or to decide 'what movies are good or bad for local communities.' But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, neither government censorship experts nor juries

In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. *E. g., Watts* v. *Indiana,* 338 U. S. 49, 51; *Norris* v. *Alabama,* 294 U. S. 587, 590.[4] And this has been particularly true where rights have been asserted under the First Amendment guarantees of free expression. Thus in *Pennekamp* v. *Florida,* 328 U. S. 331, 335, the Court stated:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." [5]

We cannot understand why the Court's duty should be any different in the present case, where Jacobellis has

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can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court."

[4] See also *Fiske* v. *Kansas,* 274 U. S. 380, 385–386; *Haynes* v. *Washington,* 373 U. S. 503, 515–516; *Chambers* v. *Florida,* 309 U. S. 227, 229; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659; *Lisenba* v. *California,* 314 U. S. 219, 237–238; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 147–148; *Napue* v. *Illinois,* 360 U. S. 264, 271.

[5] See also *Niemotko* v. *Maryland,* 340 U. S. 268, 271; *Craig* v. *Harney,* 331 U. S. 367, 373–374; *Bridges* v. *California,* 314 U. S. 252, 271; *Edwards* v. *South Carolina,* 372 U. S. 229, 235; *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 285.

been subjected to a criminal conviction for disseminating a work of expression and is challenging that conviction as a deprivation of rights guaranteed by the First and Fourteenth Amendments. Nor can we understand why the Court's performance of its constitutional and judicial function in this sort of case should be denigrated by such epithets as "censor" or "super-censor." In judging alleged obscenity the Court is no more "censoring" expression than it has in other cases "censored" criticism of judges and public officials, advocacy of governmental overthrow, or speech alleged to constitute a breach of the peace. Use of an opprobrious label can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments and, in doing so, to delineate the scope of constitutionally protected speech. Hence we reaffirm the principle that, in "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.[6]

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[6] This is precisely what the Court did in *Times Film Corp.* v. *City of Chicago,* 355 U. S. 35; *One, Inc.,* v. *Olesen,* 355 U. S. 371; and *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372. The obligation has been recognized by state courts as well. See, *e. g., State* v. *Hudson County News Co.,* 41 N. J. 247, 256–257, 196 A. 2d 225, 230 (1963); *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 909–911, 383 P. 2d 152, 157–158, 31 Cal. Rptr. 800, 805–806 (1963); *People* v. *Richmond County News, Inc.,* 9 N. Y. 2d 578, 580–581, 175 N. E. 2d 681, 681–682, 216 N. Y. S. 2d 369, 370 (1961). See also American Law Institute, Model Penal Code, Proposed Official Draft (May 4, 1962), § 251.4 (4).

Nor do we think our duty of constitutional adjudication in this area can properly be relaxed by reliance on a "sufficient evidence" standard of review. Even in judicial review of administrative agency determinations, questions of "constitutional fact" have been held to require *de novo* review. *Ng Fung Ho* v. *White,* 259 U. S. 276, 284–285; *Crowell* v. *Benson,* 285 U. S. 22, 54–65.

The question of the proper standard for making this determination has been the subject of much discussion and controversy since our decision in *Roth* seven years ago. Recognizing that the test for obscenity enunciated there—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," 354 U. S., at 489—is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is "utterly without redeeming social importance," and that "the portrayal of sex, *e. g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.*, at 484, 487. It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection.[7] Nor may the constitutional status of the material be made to turn on a "weighing" of its social importance against its prurient appeal, for a work cannot be proscribed unless it is "utterly" without social importance. See *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 920, 383 P. 2d 152, 165, 31 Cal. Rptr. 800, 813 (1963). It should also be recognized that the *Roth* standard requires in the first instance a finding that the material "goes substantially beyond customary limits of candor in description or representation of such matters." This was a requirement of the Model Penal Code test that we approved in *Roth,* 354 U. S., at 487, n. 20, and it is explicitly reaffirmed in the

[7] See, *e. g., Attorney General* v. *Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N. E. 2d 328 (Mass. 1962); *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 383 P. 2d 152, 31 Cal. Rptr. 800 (1963).

more recent Proposed Official Draft of the Code.[8] In the absence of such a deviation from society's standards of decency, we do not see how any official inquiry into the allegedly prurient appeal of a work of expression can be squared with the guarantees of the First and Fourteenth Amendments. See *Manual Enterprises, Inc.*, v. *Day*, 370 U. S. 478, 482–488 (opinion of HARLAN, J.).

It has been suggested that the "contemporary community standards" aspect of the *Roth* test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of *Roth*. The concept of "contemporary community standards" was first expressed by Judge Learned Hand in *United States* v. *Kennerley*, 209 F. 119, 121 (D. C. S. D. N. Y. 1913), where he said:

> "Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which *the community may have arrived here and now?* . . . To put thought in leash to the *average conscience of the time* is perhaps tolerable, but to fetter it by the

[8] American Law Institute, Model Penal Code, Proposed Official Draft (May 4, 1962), § 251.4 (1):

"Material is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . and if *in addition* it goes substantially beyond customary limits of candor in describing or representing such matters." (Italics added.)

> necessities of the lowest and least capable seems a fatal policy.
>
> "Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. . . ." (Italics added.)

It seems clear that in this passage Judge Hand was referring not to state and local "communities," but rather to "the community" in the sense of "society at large; . . . the public, or people in general." [9] Thus, he recognized that under his standard the concept of obscenity would have "a varying meaning from time to time"—not from county to county, or town to town.

We do not see how any "local" definition of the "community" could properly be employed in delineating the area of expression that is protected by the Federal Constitution. MR. JUSTICE HARLAN pointed out in *Manual Enterprises, Inc.,* v. *Day, supra,* 370 U. S., at 488, that a standard based on a particular local community would have "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf. *Butler* v. *Michigan,* 352 U. S. 380." It is true that *Manual Enterprises* dealt with the federal statute banning obscenity from the mails. But the mails are not the only means by which works of expression cross local-community lines in this country. It can hardly be assumed that all the patrons of a particular library, bookstand, or motion picture theater are residents of the

[9] Webster's New International Dictionary (2d ed. 1949), at 542.

smallest local "community" that can be drawn around that establishment. Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places. It would be a hardy person who would sell a book or exhibit a film anywhere in the land after this Court had sustained the judgment of one "community" holding it to be outside the constitutional protection. The result would thus be "to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Smith* v. *California,* 361 U. S. 147, 154.

It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation

would vary with state lines," *Pennekamp* v. *Florida*, *supra*, 328 U. S., at 335; we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in *Roth* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.[10] It is, after all, a national Constitution we are expounding.

We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to "reduce the adult population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U. S. 380, 383. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.[11] Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution.

We have applied that standard to the motion picture in question. "The Lovers" involves a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has

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[10] See *State* v. *Hudson County News Co.*, 41 N. J. 247, 266, 196 A. 2d 225, 235 (1963). Lockhart and McClure, note 3, *supra*, 45 Minn. L. Rev., at 108–112; American Law Institute, Model Penal Code, Tentative Draft No. 6 (May 6, 1957), at 45; Proposed Official Draft (May 4, 1962), § 251.4 (4)(d).

[11] See *State* v. *Settle*, 90 R. I. 195, 156 A. 2d 921 (1959).

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suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State's objections are based almost entirely upon that scene. The film was favorably reviewed in a number of national publications, although disparaged in others, and was rated by at least two critics of national stature among the best films of the year in which it was produced. It was shown in approximately 100 of the larger cities in the United States, including Columbus and Toledo, Ohio. We have viewed the film, in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enunciated in *Roth* v. *United States* and *Alberts* v. *California,* which we reaffirm here.

Reversed.

Mr. Justice White concurs in the judgment.

Opinion of Mr. Justice Black, with whom Mr. Justice Douglas joins.

I concur in the reversal of this judgment. My belief, as stated in *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684, 690, is that "If despite the Constitution . . . this Nation is to embark on the dangerous road of censorship, . . . this Court is about the most inappropriate Supreme Board of Censors that could be found." My reason for reversing is that I think the conviction of appellant or anyone else for exhibiting a motion picture abridges freedom of the press as safeguarded by the First Amendment, which is made obligatory on the States by the Fourteenth. See my concurring opinions in *Quantity of Copies of Books* v. *Kansas, post,* p. 213; *Smith* v. *California,* 361 U. S. 147, 155; *Kingsley International Pictures Corp.* v. *Regents, supra.* See also the dissenting opinion of Mr. Justice Douglas

in *Roth* v. *United States,* 354 U. S. 476, 508, and his concurring opinion in *Superior Films, Inc.,* v. *Department of Education,* 346 U. S. 587, 588, in both of which I joined.

MR. JUSTICE STEWART, concurring.

It is possible to read the Court's opinion in *Roth* v. *United States* and *Alberts* v. *California,* 354 U. S. 476, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts,*[1] that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography.[2] I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

MR. JUSTICE GOLDBERG, concurring.

The question presented is whether the First and Fourteenth Amendments permit the imposition of criminal punishment for exhibiting the motion picture entitled "The Lovers." I have viewed the film and I wish merely to add to my Brother BRENNAN'S description that the love scene deemed objectionable is so fragmentary and fleeting that only a censor's alert would make an audience

[1] *Times Film Corp.* v. *City of Chicago,* 355 U. S. 35, reversing 244 F. 2d 432; *One, Incorporated,* v. *Olesen,* 355 U. S. 371, reversing 241 F. 2d 772; *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372, reversing 101 U. S. App. D. C. 358, 249 F. 2d 114; *Manual Enterprises* v. *Day,* 370 U. S. 478 (opinion of HARLAN, J.).

[2] Cf. *People* v. *Richmond County News,* 9 N. Y. 2d 578, 175 N. E. 2d 681, 216 N. Y. S. 2d 369.

conscious that something "questionable" is being portrayed. Except for this rapid sequence, the film concerns itself with the history of an ill-matched and unhappy marriage—a familiar subject in old and new novels and in current television soap operas.

Although I fully agree with what my Brother BRENNAN has written, I am also of the view that adherence to the principles stated in *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, requires reversal. In *Burstyn* MR. JUSTICE CLARK, delivering the unanimous judgment of the Court, said:

> "[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. . . .
>
> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. . . . Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." *Id.*, at 502–503.

As in *Burstyn* "[t]here is no justification in this case for making an exception to that rule," *id.*, at 503, for by any arguable standard the exhibitors of this motion picture may not be criminally prosecuted unless the exaggerated character of the advertising rather than the obscenity of the film is to be the constitutional criterion.

THE CHIEF JUSTICE, with whom MR. JUSTICE CLARK joins, dissenting.

In this and other cases in this area of the law, which are coming to us in ever-increasing numbers, we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments. Although the Federal Government and virtually every State has had laws proscribing obscenity since the Union was formed, and although this Court has recently decided that obscenity is not within the protection of the First Amendment,[1] neither courts nor legislatures have been able to evolve a truly satisfactory definition of obscenity. In other areas of the law, terms like "negligence," although in common use for centuries, have been difficult to define except in the most general manner. Yet the courts have been able to function in such areas with a reasonable degree of efficiency. The obscenity problem, however, is aggravated by the fact that it involves the area of public expression, an area in which a broad range of freedom is vital to our society and is constitutionally protected.

Recently this Court put its hand to the task of defining the term "obscenity" in *Roth* v. *United States,* 354 U. S. 476. The definition enunciated in that case has generated much legal speculation as well as further judicial interpretation by state and federal courts. It has also been relied upon by legislatures. Yet obscenity cases continue to come to this Court, and it becomes increasingly apparent that we must settle as well as we can the question of what constitutes "obscenity" and the ques-

[1] *Roth* v. *United States,* 354 U. S. 476.

tion of what standards are permissible in enforcing proscriptions against obscene matter. This Court hears cases such as the instant one not merely to rule upon the alleged obscenity of a specific film or book but to establish principles for the guidance of lower courts and legislatures. Yet most of our decisions since *Roth* have been given without opinion and have thus failed to furnish such guidance. Nor does the Court in the instant case—which has now been twice argued before us—shed any greater light on the problem. Therefore, I consider it appropriate to state my views at this time.

For all the sound and fury that the *Roth* test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the *Roth* case to provide such a rule.

It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable "national standard," and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a "community" approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling con-

flicting rights of the diverse communities within our society and of individuals.

We are told that only "hard core pornography" should be denied the protection of the First Amendment. But who can define "hard core pornography" with any greater clarity than "obscenity"? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we now are faced with the need to define "obscenity." Meanwhile, those who profit from the commercial exploitation of obscenity would continue to ply their trade unmolested.

In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, "obscene" in the extreme when sold or displayed to children.[2]

Finally, material which is in fact obscene under the *Roth* test may be proscribed in a number of ways—for instance, by confiscation of the material or by prosecution of those who disseminate it—provided always that the proscription, whatever it may be, is imposed in accordance with constitutional standards. If the proceeding involved is criminal, there must be a right to a jury trial, a right to counsel, and all the other safeguards necessary to assure due process of law. If the proceeding is civil in nature, the constitutional requirements applicable in such a case must also be observed. There has been

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[2] In the instant case, for example, the advertisements published to induce the public to view the motion picture provide some evidence of the film's dominant theme: "When all conventions explode . . . in the most daring love story ever filmed!" "As close to authentic amour as is possible on the screen." "The frankest love scenes yet seen on film." "Contains one of the longest and most sensuous love scenes to be seen in this country."

some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do—for instance, to seize and destroy books with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity. Thus, enforcement agencies must realize that there is no royal road to enforcement; hard and conscientious work is required.

In light of the foregoing, I would reiterate my acceptance of the rule of the *Roth* case: Material is obscene and not constitutionally protected against regulation and proscription if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S., at 489. I would commit the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgments made pursuant to the *Roth* rule, limiting myself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which such a finding could be made, obviously the material involved cannot be held obscene. Cf. *Thompson* v. *City of Louisville,* 362 U. S. 199. But since a mere modicum of evidence may satisfy a "no evidence" standard, I am unwilling to give the important constitutional right of free expression such limited protection. However, protection of society's right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent *de novo* judgment on the question of obscenity. There-

fore, once a finding of obscenity has been made below under a proper application of the *Roth* test, I would apply a "sufficient evidence" standard of review—requiring something more than merely any evidence but something less than "substantial evidence on the record [including the allegedly obscene material] as a whole." Cf. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. This is the only reasonable way I can see to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation.

While in this case, I do not subscribe to some of the State's extravagant contentions, neither can I say that the courts below acted with intemperance or without sufficient evidence in finding the moving picture obscene within the meaning of the *Roth* test. Therefore, I would affirm the judgment.

MR. JUSTICE HARLAN, dissenting.

While agreeing with my Brother BRENNAN'S opinion that the responsibilities of the Court in this area are no different from those which attend the adjudication of kindred constitutional questions, I have heretofore expressed the view that the States are constitutionally permitted greater latitude in determining what is bannable on the score of obscenity than is so with the Federal Government. See my opinion in *Roth* v. *United States,* 354 U. S. 476, 496; cf. my opinion in *Manual Enterprises, Inc.,* v. *Day,* 370 U. S. 478. While, as correctly said in MR. JUSTICE BRENNAN'S opinion, the Court has not accepted that view, I nonetheless feel free to adhere to it in this still developing aspect of constitutional law.

The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between

the public interest sought to be served by obscenity laws (cf. my dissenting opinion in *Bantam Books, Inc.*, v. *Sullivan*, 372 U. S. 58, 76, 77) and protection of genuine rights of free expression.

I experience no greater ease than do other members of the Court in attempting to verbalize generally the respective constitutional tests, for in truth the matter in the last analysis depends on how particular challenged material happens to strike the minds of jurors or judges and ultimately those of a majority of the members of this Court. The application of any general constitutional tests must thus necessarily be pricked out on a case-by-case basis, but as a point of departure I would apply to the Federal Government the *Roth* standards as amplified in my opinion in *Manual Enterprises, supra.* As to the States, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.

On this basis, having viewed the motion picture in question, I think the State acted within permissible limits in condemning the film and would affirm the judgment of the Ohio Supreme Court.

Syllabus.

A QUANTITY OF COPIES OF BOOKS ET AL. *v.* KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 449. Argued April 1–2, 1964.—Decided June 22, 1964.

A state statute defined obscenity, proscribed distribution of obscene materials, and authorized their seizure before, and their destruction after, an adversary determination of their obscenity. Though the statute required the filing of a verified Information by the county attorney or attorney general stating only that there "is [an] . . . obscene book . . . located within his county," the Information filed by the attorney general went further and identified by title 59 allegedly obscene novels which were stated to have been published under a certain caption; copies of seven novels published under that caption were filed with the Information; and an *ex parte* inquiry was held by the district judge during which he "scrutinized" the seven books, concluding that they appeared obscene and afforded grounds to believe that any paper-backed novels published under the same caption were obscene. His warrant authorized seizure at the place of business of appellants' "News Service" of the novels identified by title in the Information. Thirty-one of the titles were found on appellants' premises when the warrant was executed, and all 1,715 copies of them were seized. At a hearing ten days after seizure, the court denied appellants' claim that by failing to afford a pre-seizure hearing on the question whether the books were obscene, the statutory procedure operated as an unconstitutional prior restraint. Following a final hearing held about seven weeks after seizure, the court held the 31 novels obscene and ruled that the seized copies should be destroyed on further order. The State Supreme Court affirmed the lower court's order. *Held:* The judgment of the State Supreme Court is reversed. Pp. 206–215.

191 Kan. 13, 379 P. 2d 254, reversed.

MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG, without reaching the question whether the novels were obscene, concluded that the procedure followed in issuing and executing the warrant of seizure prior to a hearing on the issue of obscenity was unconstitutional under the First Amendment made applicable to the States by the Fourteenth Amendment because (a) it authorized the sheriff to seize all copies of the specified titles and (b) it did not afford a hearing before the

warrant issued on the obscenity of even the seven novels filed with the Information. Pp. 208–213.

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, concluded that it is not necessary to consider the procedural questions since the state statute is unconstitutional under the First Amendment made applicable to the States by the Fourteenth Amendment. Pp. 213–214.

MR. JUSTICE STEWART concluded that the state statute could not constitutionally suppress the books because they were not "hard-core pornography." Pp. 214–215.

Stanley Fleishman argued the cause for appellants. With him on the briefs was *Sam Rosenwein.*

William M. Ferguson, Attorney General of Kansas, argued the cause for appellee. With him on the brief were *Robert E. Hoffman, J. Richard Foth* and *Richard H. Seaton,* Assistant Attorneys General of Kansas, and *William Clement.*

The following State Attorneys General joined in the brief for appellee: *Waggoner Carr* of Texas, *Richard W. Ervin* of Florida, *Forrest H. Anderson* of Montana, *Frank L. Farrar* of South Dakota, *Bruce Bennett* of Arkansas, *Helgi Johanneson* of North Dakota, *Frank E. Hancock* of Maine, *Robert W. Pickrell* of Arizona, *Robert Y. Thornton* of Oregon, *Thomas B. Finan* of Maryland, *David P. Buckson* of Delaware, *Bert T. Kobayashi* of Hawaii, *Robert Matthews* of Kentucky, *William Maynard* of New Hampshire, *Duke W. Dunbar* of Colorado, *Eugene Cook* of Georgia, *Allan Shepard* of Idaho, *Stanley Mosk* of California, and *J. Joseph Nugent* of Rhode Island.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG join.

Under a Kansas statute authorizing the seizure of allegedly obscene books before an adversary determina-

tion of their obscenity and, after that determination, their destruction by burning or otherwise,[1] the Attorney General of Kansas obtained an order from the District Court of Geary County directing the sheriff of the county to seize and impound, pending hearing, copies of certain

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[1] The statute is Kan. Gen. Stat. § 21–1102 *et seq.* (Supp. 1961). Section 1 of Kan. Laws 1961, c. 186 (§ 21–1102), constitutes the selling or distribution of obscene materials (obscenity is defined in § 1 (b)) a criminal misdemeanor punishable by fine or imprisonment or both. Section 4 (§ 21–1102c) provides for the search and seizure procedure here involved:

"Whenever any district, county, common pleas, or city court judge or justice of the peace shall receive an information or complaint, signed and verified upon information and belief by the county attorney or the attorney general, stating there is any prohibited lewd, lascivious or obscene book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, motion pictures, drawing, photograph, publication or other thing, as set out in section 1 [21–1102] (*a*) of this act, located within his county, it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff or any other duly constituted peace officer to seize and bring before said judge or justice such a prohibited item or items. Any peace officer seizing such item or items as hereinbefore described shall leave a copy of such warrant with any manager, servant, employee or other person appearing or acting in the capacity of exercising any control over the premises where such item or items are found or, if no person is there found, such warrant may be posted by said peace officer in a conspicuous place upon the premises where found and said warrant shall serve as notice to all interested persons of a hearing to be had at a time not less than ten (10) days after such seizure. At such hearing, the judge or justice issuing the warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the provisions of this act. If he shall so find, he shall order such item or items to be destroyed by the sheriff or any duly constituted peace officer by burning or otherwise, at such time as such judge shall order, and satisfactory return thereof made to him: *Provided, however,* Such item or items shall not be destroyed so long as they may be needed as evidence in any criminal prosecution."

paperback novels at the place of business of P–K News Service, Junction City, Kansas. After hearing, the court entered a second order directing the sheriff to destroy the 1,715 copies of 31 novels which had been seized. The Kansas Supreme Court held that the procedures met constitutional requirements and affirmed the District Court's order. 191 Kan. 13, 379 P. 2d 254. Probable jurisdiction was noted, 375 U. S. 919. We conclude that the procedures followed in issuing the warrant for the seizure of the books, and authorizing their impounding pending hearing, were constitutionally insufficient because they did not adequately safeguard against the suppression of nonobscene books. For this reason we think the judgment must be reversed. Therefore we do not reach, and intimate no view upon, the appellants' contention that the Kansas courts erred in holding that the novels are obscene.

Section 4 of the Kansas statute requires the filing of a verified Information stating only that "upon information and belief . . . there is [an] . . . obscene book . . . located within his county." The State Attorney General went further, however, and filed an Information identifying by title 59 novels, and stating that "each of said books [has] been published as 'This is an original Nightstand Book.'" He also filed with the Information copies of seven novels published under that caption, six of which were named by title in the Information; particular passages in the seven novels were marked with penciled notations or slips of paper. Although also not expressly required by the statute, the district judge, on application of the Attorney General, conducted a 45-minute *ex parte* inquiry during which he "scrutinized" the seven books; at the conclusion of this examination, he stated for the record that they "appear to be obscene literature as defined" under the Kansas statute "and give this Court reasonable grounds to believe that any paper-

backed publication carrying the following: 'This is an original Night Stand book' would fall within the same category . . . ." He issued a warrant which authorized the sheriff to seize only the particular novels identified by title in the Information. When the warrant was executed on the date it was issued, only 31 of the titles were found on P–K's premises. All copies of such titles, however, 1,715 books in all, were seized and impounded. At the hearing held 10 days later pursuant to a notice included in the warrant, P–K made a motion to quash the Information and the warrant on the ground, among others, that the procedure preceding the seizure was constitutionally deficient. The claim was that by failing first to afford P–K a hearing on the question whether the books were obscene, the procedure "operates as a prior restraint on the circulation and dissemination of books" in violation of the constitutional restrictions against abridgment of freedom of speech and press. The motion was denied, and following a final hearing held about seven weeks after the seizure (the hearing date was continued on motion of P–K), the court held that all 31 novels were obscene and ordered the sheriff to stand ready to destroy the 1,715 copies on further order.

The steps taken beyond the express requirements of the statute were thought by the Attorney General to be necessary under our decision in *Marcus* v. *Search Warrant,* 367 U. S. 717, decided a few weeks before the Information was filed. *Marcus* involved a proceeding under a strikingly similar Missouri search and seizure statute and implementing rule of court. See 367 U. S. 719, at notes 2, 3. In *Marcus* the warrant gave the police virtually unlimited authority to seize any publications which they considered to be obscene, and was issued on a verified complaint lacking any specific description of the publications to be seized, and without prior submission of any publications whatever to the judge issuing the warrant.

We reversed a judgment directing the destruction of the copies of 100 publications held to be obscene, holding that, even assuming that they were obscene, the procedures leading to their condemnation were constitutionally deficient for lack of safeguards to prevent suppression of nonobscene publications protected by the Constitution.

It is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles, and since P–K was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient.[2] This is the teaching of *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436. See *Marcus*, at pp. 734–738. The New York injunctive procedure there sustained does not afford *ex parte* relief but postpones all injunctive relief until "both sides have had an opportunity to be heard." *Tenney* v. *Liberty News Distributors*, 13 App. Div. 2d 770, 215 N. Y. S. 2d 663, 664. In *Marcus* we explicitly said that *Kingsley Books* "does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene." 367 U. S., at 735–736. A seizure of all copies of the named titles is indeed more repressive than an injunction preventing further sale of the books. State regulation of obscenity must "conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc.*, v. *Sullivan*, 372 U. S. 58, 66; the Constitution requires a procedure "designed to focus searchingly on the question of obscenity," *Marcus*, p. 732. We therefore

[2] P–K News Service also asserts that its constitutional right against unreasonable searches and seizures was violated. The result here makes it unnecessary to pass upon this contention.

conclude that in not first affording P–K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient. What we said of the Missouri procedure, *id.*, at 736–737, also fits the Kansas procedure employed to remove these books from circulation:

> ". . . there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the [sheriff] could lay [his] hands were physically removed . . . from the premises of the wholesale distributor. An opportunity . . . to circulate the [books] . . . and then raise the claim of nonobscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary [*ex parte*] judgment [pursuant to which the sheriff] . . . seizes it from him."

It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should

not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We rejected that proposition in *Marcus*. We said, 367 U. S., at 730–731:

> "The Missouri Supreme Court's assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure does not therefore answer the appellants' constitutional claim, but merely restates the issue whether obscenity may be treated in the same way. The authority to the police officers under the warrants issued in this case, broadly to seize 'obscene . . . publications,' poses problems not raised by the warrants to seize 'gambling implements' and 'all intoxicating liquors' involved in the cases cited by the Missouri Supreme Court. 334 S. W. 2d, at 125. For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications. '. . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . .' *Speiser* v. *Randall,* 357 U. S. 513, 525. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech."

See also *Smith* v. *California,* 361 U. S. 147, 152–153.

Nor is the order under review saved because, after all 1,715 copies were seized and removed from circulation, P–K News Service was afforded a full hearing on the

question of the obscenity of the novels. For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books. *Bantam Books* v. *Sullivan, supra; Roth* v. *United States,* 354 U. S. 476; *Marcus* v. *Search Warrant, supra; Smith* v. *California, supra.* Here, as in *Marcus,* "since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights" 367 U. S., at 738, the judgment resting on a finding of obscenity must be reversed.

Reversed.

Opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins.

The Kansas State Court judgment here under review orders that 1,715 copies of 31 novels be burned or otherwise destroyed. This book-burning judgment was based upon findings by the trial judge that "the core [of the books] would seem to be that of sex, with the plot, if any, being subservient thereto," that the "dominant purpose [of the books] was calculated to effectively incite sexual desires" and that "they would have this effect on the average person residing in this community . . . ." Relying on these findings and this Court's holding in *Roth* v. *United States,* 354 U. S. 476, the trial court held that the books "are not entitled to the . . . protection" of the First Amendment to the Constitution. The State Supreme Court affirmed on the same grounds.

This Court now reverses. I concur in the judgment of reversal but do not find it necessary to consider the procedural questions. Compare *Marcus* v. *Search Warrant,* 367 U. S. 717, 738 (concurring opinion). The Kansas courts may have been right to rely upon the Court's *Roth* holding in ordering these books burned or

otherwise destroyed. For reasons stated in the *Roth* case in a dissent by MR. JUSTICE DOUGLAS, 354 U. S., at 508, in which I joined, I think the *Roth* case was wrongly decided. It is my belief, as stated in that dissent by MR. JUSTICE DOUGLAS, in my concurring opinions in *Smith* v. *California,* 361 U. S. 147, 155, and *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684, 690, and in my dissent in *Beauharnais* v. *Illinois,* 343 U. S. 250, 267, which MR. JUSTICE DOUGLAS joined, that the Kansas statute ordering the burning of these books is in plain violation of the unequivocal prohibition of the First Amendment, made applicable to the States by the Fourteenth, against "abridging the freedom of speech, or of the press."

Because of my belief that both *Roth* and *Beauharnais* draw blueprints showing how to avoid the First Amendment's guarantee of freedoms of speech and press, I would overrule both those cases as well as reverse the judgment here.

MR. JUSTICE STEWART, concurring in the judgment.

If this case involved hard-core pornography, I think the procedures which were followed would be constitutionally valid, at least with respect to the material which the judge "scrutinized." This case is not like *Marcus* v. *Search Warrant,* 367 U. S. 717, where, as the Court notes, "the warrant gave the police virtually unlimited authority to seize any publications which they considered to be obscene, and was issued on a verified complaint lacking any specific description of the publications to be seized, and without prior submission of any publications whatever to the judge issuing the warrant," p. 209, *supra.* But the books here involved were not hard-core pornography. Therefore, I think Kansas could not by any procedure constitutionally suppress them, any more than

Kansas could constitutionally make their sale or distribution a criminal act. See *Jacobellis* v. *Ohio, ante,* p. 197. (STEWART, J., concurring).

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

Insofar as the judgment of the Court rests on the view of three of my Brethren that a State cannot constitutionally ban on grounds of obscenity the books involved in this case, I dissent on the basis of the views set out in my opinion in *Jacobellis* v. *Ohio, ante,* p. 203. It is quite plain that these so-called "novels" have "been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner" and that the State's criteria for judging their obscenity are rational.

I also disagree with the position taken in the opinion of my Brother BRENNAN that this Kansas procedure unconstitutionally abridged freedom of expression in that the search warrant (1) authorized seizure of *all* copies of the books in question and (2) was issued without an adversary hearing on the issue of their obsceneness. In my opinion that position is inconsistent with the thrust of prior cases and serves unnecessarily to handicap the States in their efforts to curb the dissemination of obscene material.[1]

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[1] The books before the district judge at the *ex parte* hearing were:

The Sinning Season
Backstage Sinner
Lesbian Love
Sin Hotel
Sin Song
The Wife-Swappers
Sex Circus

The front cover of *The Wife-Swappers* is typical of the 31 books seized which, with the exception of *Backstage Sinner,* included all those examined by the judge. Above a highly suggestive pictorial representation, the prospective reader is told that "Members of this Lust Club Had a Different Woman Every Night!" At the bottom

I.

The two cases on which MR. JUSTICE BRENNAN'S opinion almost entirely relies are *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436, and *Marcus* v. *Search Warrant*, 367 U. S. 717.

In *Kingsley Books*, appellants challenged the constitutionality of a New York statute that authorized the State Supreme Court to enjoin the sale and distribution of obscene prints and articles. A complaint prayed for an injunction against the further distribution of certain allegedly obscene paperback books and for the destruction by the sheriff of all copies in the appellants' possession. Appellants were ordered to show cause within four days why an injunction *pendente lite* should not be issued that would preclude distribution of the books. Although the code of criminal procedure provided that anyone sought to be enjoined was entitled to a trial one day after the joinder of issue, appellants consented to the temporary

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of the cover it is stated that "This is an Original Nightstand Book." The back cover relates in more detail the book's contents:

"PROBLEMS IN BED . . . were no problems at all to the members of Eastport's highly secret suburban switch club. Who could have problems with eight beautiful, different women to choose from? For that was the lot of each man in this fantastic sex-prowling group. Eight of the most lusty, passionate women in the town, each with her different desires, her peculiar sex habits. And with eight women so easy to reach, it was inevitable that there would be trouble . . . for the wives were very different: one was a lesbian, one was a nymphomaniac, one a masochist, another frigid, and still another erupting like a bomb at the mere touch of a man. They lived a lust-ridden, lightning-fast, terrifying and sex-crammed . . . GAME OF WIFE-SWAPPING!"

The front page of the book contains the following:

"LUST-SATED COUPLES

"In eight Eastport homes the doors opened and eight husbands returned. It's traditional in suburbia for the good wife to meet her spouse with a shaker of martinis, but it was different with these eight

injunction and delayed bringing the matter to issue. When a hearing on the question of obscenity was finally had, the books were found to be obscene; their distribution was enjoined and their destruction ordered. This Court upheld the New York procedure, stating:

> "Authorization of an injunction *pendente lite,* as part of this scheme, during the period within which the issue of obscenity must be promptly tried and adjudicated in an adversary proceeding for which '[a]dequate notice, judicial hearing, [and] fair deter-

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particular Eastport couples. These eight husbands came home on a Sunday morning and their eight wives were waiting in bed, soft and warm and sated . . . smelling of other men. And the husbands were drained and tired . . . from other women. Later in the day they would all awake, lounge around the house, eat lightly, speak softly . . . and think of the night before . . .

> "These Eight Couples Are
> Members Of A Wife-Swapping
> Mate-Switching Sex Club
> So Vile It will Stun You."

These inducements are a fair indication of the actual contents of the book. The book's back page advertises the titles of some other Nightstand Books. The other books seized were:

Born for Sin
No Longer a Virgin
Sin Girls
Miami Call Girl
Passion Trap
Sex Jungle
The Lustful Ones
Sex Model
The Lecher
Lust Goddess
Sin Camp
$20 Lust
Convention Girl
Isle of Sin
Orgy Town
Lover
Sex Spy
Trailer Trollop
Sin Cruise
Flesh Is My Undoing
Malay Mistress
Love Nest
Seeds of Sin
Passion Slave
The Sinful Ones

Each of the seized books contains exactly 192 pages, the text in each running from page 5 to pages 189, 190, 191, or 192.

> mination' are assured, . . . is a safeguard against frustration of the public interest in effectuating judicial condemnation of obscene matter." P. 440.

The State was not, we held, limited to the criminal process in attempting to protect its citizens against the circulation of pornography; it "is not for this Court thus to limit the State in resorting to various weapons in the armory of the law." P. 441. The Court pointed out that "Criminal enforcement and the proceeding under § 22–a interfere with a book's solicitation of the public precisely at the same stage," p. 442, that the threat of criminal penalties may be as effective a deterrent against expression as an injunctive civil remedy, and that an injunction against someone to forbear selling specific books may be a less stringent restraint on his freedom of expression than sending him to jail. *Near* v. *Minnesota,* 283 U. S. 697, was distinguished on the ground that the New York statute dealt with obscenity rather than matters deemed to be derogatory to a public officer and imposed no direct restraint on materials not yet published.

In *Marcus* v. *Search Warrant* warrants to seize books were issued solely on the judgment of a peace officer regarding the obscenity of certain books without any independent examination by a judicial official; the warrants authorized seizure of books by officers other than the one who had signed the complaints and in effect gave *carte blanche* to these officers to seize anything they considered obscene at the named wholesale establishment and newsstands, whether or not the material had been so evaluated by anyone prior to the issuance of the warrants. After recounting the historical distrust for systems sanctioning sweeping seizures of materials believed to be offensive to the state, the Court held that "Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the con-

stitutional protection to which it is entitled." P. 731. Relevant to this conclusion were the absence of any "scrutiny by the judge of any materials considered by the complainant to be obscene," p. 732, and the power of the enforcing officers under the warrants to make *ad hoc* decisions regarding obscenity although "They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." P. 732. *Kingsley Books* was distinguished on the grounds that in that case: (1) the court "could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place"; (2) the restraints "ran only against the named publication"; (3) no extensive restraints were imposed before an adversary proceeding; and (4) the New York code required decision within two days of the trial on the obscenity question, pp. 735–737.

In my view, the present case is governed by the principles serving to sustain the New York procedure involved in *Kingsley Books* rather than those which condemned that followed by Missouri in *Marcus*.

(1) Although the Kansas statute does not in terms require an independent judicial examination of allegedly obscene materials before authorization of seizure, the Kansas officials in this case conformed their procedures to what they believed to be the requirements of *Marcus*. The information included the titles of 59 "Original Nightstand Books." Seven of these were delivered to the district judge at 5 p. m., three hours before the 45-minute *ex parte* hearing at which the judge concluded that there were reasonable grounds to believe that all 59 books were obscene.[2] Because of the nature of the seven books examined by the judge, he could fairly reach a judgment that

[2] The record does not show how much attention the judge gave to these books before the hearing.

the remaining books were of the same character.[3] (See note 1, *supra.*)

(2) In this case, unlike *Marcus,* the officers had no discretion as to which books they might seize but could take only books specifically designated by their titles.

(3) It is true that the Kansas procedure, like that in *Marcus,* imposed a restraint before an adversary proceeding, but it would be highly artificial to consider this the controlling difference between *Kingsley Books* and *Marcus.* While the New York statute allows an almost immediate hearing on the obscenity issue, it would be unrealistic to suppose that most persons who allegedly have or sell obscene materials will be able to prepare for such a hearing in four days, the time between the issuance of the complaint and the *pendente lite* injunction in *Kingsley Books.* In practical terms, therefore, the New York scheme, as approved by this Court, does contemplate restraint before a hearing on the merits. Although the Court was uncertain in *Kingsley Books* whether New York would punish for contempt one who disseminated materials in disobedience of the temporary injunction if such materials were ultimately held to be not covered by the statute or constitutionally protected, it could hardly

[3] No one has asserted that any of these books has literary merit. The district judge contrasted them to books in which sex is subservient to the plot: "[I]n the books in question, the core would seem to be that of sex, with the plot, if any, being subservient thereto." The State Supreme Court, more succinctly, but with equal truth, stated, "They are trash." The essence of these books may be ascertained with great celerity, so replete are they with passages descriptive of sexual activities running the gamut from ordinary intercourse to lesbianism, sadism, public displays, and group orgies, and so lacking are they of any other content. Moreover, they are so standardized that a judge's estimate concerning the contents of absent books from an examination of seven books before him could be almost as surefire as a similar estimate of the character of unseen Mickey Mouse comic books based on a perusal of seven issues.

have failed to recognize the patently chilling effect such an injunction would have on the dissemination of named materials. In pragmatic terms then, the nature of the restraint imposed by the Kansas statute is not in a constitutionally significant sense different from that sustained in *Kingsley Books.*[4]

(4) The Kansas statute does not contain the safeguards for speedy disposition that were present in *Kingsley Books,* but the State Attorney General has unequivocally acknowledged the necessity of administering that statute in light of the constitutional requirements of *Marcus.* In this instance the warrant which was issued July 27 for seizure of the books contained a notice that a hearing on the merits was set for August 7. Eleven days is certainly not an undue delay; indeed, it is difficult to imagine a defense being prepared in less time. The district judge's decision was issued four days after the termination of the trial on the obscenity question, which had been postponed because of motions made by appellants. On the basis of this case, we have every reason to believe that the prosecuting authorities and judges of Kansas are aware that prehearing restraints may not be magnified by delay and we have no reason to think the Kansas statute

[4] What the courts of the State have subsequently said in dictum about the operation of the New York statute is hardly relevant to this Court's understanding of the import of the section at the time of *Kingsley Books,* and the constitutional principle for which that case stands. At any rate, *Tenney* v. *Liberty News Distributors,* 13 App. Div. 2d 770, 215 N. Y. S. 2d 663, states only that an injunction cannot be issued *ex parte;* this certainly does not mean that a court is forbidden to do what it did in *Kingsley Books,* grant an injunction before there is an adversary hearing on the *obscenity issue itself.* Surely the right to be heard on the subsidiary question of the wisdom of granting a *pendente lite* injunction would not save an otherwise unconstitutional scheme; and the failure to accord such a right does not render the Kansas procedure unconstitutional if it is otherwise valid.

will be applied in a manner any less fair in this regard to those restricted than the provision of the New York code sustained in *Kingsley Books*.

II.

Since there may be lurking in my Brother BRENNAN'S opinion the unarticulated premise that this Kansas procedure is impermissible because it operates as a "prior restraint," I deem it appropriate to make a few observations on that score. The doctrine of prior restraint is not a "self-wielding sword" or a "talismanic test" (*Kingsley Books, supra,* at 441) but one whose application in any instance requires "particularistic analysis." *Id.,* at 442; Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539; cf. *Times Film Corp.* v. *Chicago,* 365 U. S. 43. That the Kansas procedure, as applied in this case, falls within permissible limits of the Fourteenth Amendment will appear from contrasting some of the reasons for the historic distrust in common law jurisprudence of any kind of censorship of writings, see *Near* v. *Minnesota,* 283 U. S. 697, 713–718,[5] with what was done here.

In the typical censorship situation material is brought as a matter of course before some administrative authority, who then decides on its propriety. This means that the State establishes an administrative structure whereby all writings are reviewed before publication. By contrast, if the State uses its penal system to punish expression outside permissible bounds, the State does not comprehensively review any form of expression; it merely considers after the event utterances it has reason to suppose may be prohibited. The breadth of its review of expression is therefore much narrower and the danger that

[5] See generally, *e. g.,* Emerson, The Doctrine of Prior Restraint, 20 Law and Contemp. Prob. 648 (1955); Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 537–545 (1951).

protected expression will be repressed is less. The operation of the Kansas statute resembles the operation of a penal rather than a licensing law in this regard since books are not as a matter of course subjected to prepublication state sanctioning but are reviewed only when the State has reason to believe they are obscene.

There are built-in elements in any system of licensing or censorship, the tendency of which is to encourage restrictions of expression. The State is not compelled to make an initial decision to pursue a course of action, since the original burden is on the citizen to bring a piece of writing before it. The censor is a part of the executive structure, and there is at least some danger that he will develop an institutionalized bias in favor of censorship because of his particular responsibility. In a criminal proceeding, however, the burden is on the State to act, the decision-maker belongs to an independent branch of the government, and neither a judge nor a juror has any personal interest in active censorship. The Kansas practice is thus analogous to a system of penal sanctions rather than censorship in all three of these respects.

One danger of a censorship system is that the public may never be aware of what an administrative agent refuses to permit to be published or distributed. A penal sanction assures both that some overt thing has been done by the accused and that the penalty is imposed for an activity that is not concealed from the public. In this case, the information charged that obscene books were possessed or kept for sale and distribution; presumably such possession, if knowing, could, as a constitutional matter, support a criminal prosecution. The procedure adopted by the State envisions that a full judicial hearing will be held on the obscenity issue. Finally, the federal system makes it highly unlikely that the citizenry of one State will be unaware of the kind of material that is being restricted by its own government when there is great

divergence among the policies of the various States and a high degree of communication across state lines. Cf. my opinion in *Roth* v. *United States,* 354 U. S. 476, 496, and my dissenting opinion in *Jacobellis* v. *Ohio, ante,* p. 203, decided today.

Any system of censorship, injunction, or seizure may of course to some extent serve to trammel, by delaying distribution or otherwise, freedom of expression; yet so may the threat of criminal prosecution, as this Court noted in *Kingsley Books.* The bringing of a criminal charge may result in a cessation of distribution during litigation, since even an accused relatively confident of the unlikelihood or impermissibility of conviction may well refuse to take the added risk of further criminal penalties that might obtain if he guesses wrong and continues to disseminate the questionable materials. More fundamentally, the delay argument seems artificial in the context of this case and in the area of obscenity generally. Both the incentive for officials to promote delay and the adverse consequences of delay are considerably less in this area than in the field of political and social expression. If controversial political writings attack those in power, government officials may benefit from suppression although society may suffer. In the area of obscenity, there is less chance that decision-makers will have interests which may affect their estimate of what is constitutionally protected and what is not. It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the subject of sex is of constant but rarely particularly topical interest.[6]

[6] Reasons such as these may explain in part why the Court in *Near* v. *Minnesota,* 283 U. S. 697, 716, apparently believed that the whole prior restraint doctrine was inapplicable in the area of obscenity.

Distribution of *Ulysses* may be thought by some to be more important for society than distribution of the daily newspaper, but a one- or two-month delay in circulation of the former would be of small significance whereas such a delay might be effective suppression of the latter.

Finally, it may be said that any system of civil enforcement allows expression to be limited without the strict safeguards of criminal procedures and rules of evidence. The contention that such protections are essential is perhaps weaker in the area of obscenity than with regard to other kinds of expression for reasons outlined above. A substantial restriction on freedom of expression is undoubtedly provided by civil remedies for defamation, and there is no reason for foreclosing a State from reasonable civil means of preventing the distribution of obscene materials.

The opinion of MR. JUSTICE BRENNAN, in my view, straitjackets the legitimate attempt of Kansas to protect what it considers an important societal interest. It does so in contradiction of a sensible reading of the precedents and without contributing in any genuine way to the furtherance of freedom of expression that our Constitution protects.

For the foregoing reasons I would affirm the judgment of the Kansas Supreme Court.

BELL ET AL. *v.* MARYLAND.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 12. Argued October 14–15, 1963.—Decided June 22, 1964.

Petitioners, Negro "sit-in" demonstrators, were asked to leave a Baltimore restaurant solely because of their race, refused to do so, and were convicted of violating Maryland's criminal trespass law. The convictions were affirmed by the highest state court. Subsequent to that affirmance, and prior to disposition of the case on writ of certiorari in this Court, the City of Baltimore and the State of Maryland enacted "public accommodations" laws, applicable to Baltimore, making it unlawful for restaurants to deny their services to any person because of his race. *Held:* The judgments of the Maryland Court of Appeals are vacated and reversed and the case is remanded to that court, so that it may consider whether the convictions should be nullified in view of the supervening change in state law. Pp. 227–242.

(a) The effect of the public accommodations laws appears to be that petitioners' conduct in refusing to leave the restaurant after being asked to do so because of their race would not be a crime today; that conduct is now recognized as the exercise of a right, and the law's prohibition is directed not at them but at the restaurant proprietor who would deny them service because of their race. P. 230.

(b) The common-law rule, followed in Maryland, requires the dismissal of pending criminal proceedings charging conduct which, because of a supervening change in state law, is no longer deemed criminal; that rule would apparently apply to this case, which was pending in this Court at the time of the supervening legislation. Pp. 230–232.

(c) Although Maryland has a "saving clause" statute which in certain circumstances saves state convictions from the effect of that rule, there is reason to doubt that the statute would be held applicable to this case. Pp. 232–237.

(d) When a change in the applicable state law intervenes between decision of a case by the highest state court and decision on review here, the Court's practice is to vacate and reverse the judgment and remand the case to the state court, so that it may

reconsider it in the light of the change in state law; that practice should be followed here. Pp. 237–242.

227 Md. 302, 176 A. 2d 771, vacated, reversed, and remanded.

Jack Greenberg argued the cause for petitioners. With him on the brief were *Constance Baker Motley, James M. Nabrit III, Charles L. Black, Jr., Juanita Jackson Mitchell, Tucker R. Dearing, Matthew J. Perry, Lincoln C. Jenkins, Derrick A. Bell, Jr., William T. Coleman, Jr., Louis H. Pollak, Richard R. Powell, Joseph L. Rauh, Jr.* and *John Silard.*

Loring E. Hawes and *Russell R. Reno, Jr.,* Assistant Attorneys General of Maryland, argued the cause for respondent. With *Mr. Hawes* on the brief were *Thomas B. Finan,* Attorney General of Maryland, and *Robert C. Murphy,* Deputy Attorney General.

Ralph S. Spritzer, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Marshall, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *David Rubin.*

Mr. Justice Brennan delivered the opinion of the Court.

Petitioners, 12 Negro students, were convicted in a Maryland state court as a result of their participation in a "sit-in" demonstration at Hooper's restaurant in the City of Baltimore in 1960. The convictions were based on a record showing in summary that a group of 15 to 20 Negro students, including petitioners, went to Hooper's restaurant to engage in what their counsel describes as a "sit-in protest" because the restaurant would not serve Negroes. The "hostess," on orders of Mr. Hooper, the president of the corporation owning the restaurant, told them, "solely on the basis of their color," that they would

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not be served. Petitioners did not leave when requested to by the hostess and the manager; instead they went to tables, took seats, and refused to leave, insisting that they be served. On orders of Mr. Hooper the police were called, but they advised that a warrant would be necessary before they could arrest petitioners. Mr. Hooper then went to the police station and swore out warrants, and petitioners were accordingly arrested.

The statute under which the convictions were obtained was the Maryland criminal trespass law, § 577 of Art. 27 of the Maryland Code, 1957 edition, under which it is a misdemeanor to "enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so." The convictions were affirmed by the Maryland Court of Appeals, 227 Md. 302, 176 A. 2d 771 (1962), and we granted certiorari. 374 U. S. 805.

We do not reach the questions that have been argued under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. It appears that a significant change has taken place in the applicable law of Maryland since these convictions were affirmed by the Court of Appeals. Under this Court's settled practice in such circumstances, the judgments must consequently be vacated and reversed and the case remanded so that the state court may consider the effect of the supervening change in state law.

Petitioners' convictions were affirmed by the Maryland Court of Appeals on January 9, 1962. Since that date, Maryland has enacted laws that abolish the crime of which petitioners were convicted. These laws accord petitioners a right to be served in Hooper's restaurant, and make unlawful conduct like that of Hooper's president and hostess in refusing them service because of their race. On June 8, 1962, the City of Baltimore enacted its Ordinance No. 1249, adding § 10A to Art. 14A of the

Baltimore City Code (1950 ed.). The ordinance, which by its terms took effect from the date of its enactment, prohibits owners and operators of Baltimore places of public accommodation, including restaurants, from denying their services or facilities to any person because of his race. A similar "public accommodations law," applicable to Baltimore City and Baltimore County though not to some of the State's other counties, was adopted by the State Legislature on March 29, 1963. Art. 49B Md. Code § 11 (1963 Supp.). This statute went into effect on June 1, 1963, as provided by § 4 of the Act, Acts 1963, c. 227. The statute provides that:

> "It is unlawful for an owner or operator of a place of public accommodation or an agent or employee of said owner or operator, because of the race, creed, color, or national origin of any person, to refuse, withhold from, or deny to such person any of the accommodations, advantages, facilities and privileges of such place of public accommodation. For the purpose of this subtitle, a place of public accommodation means any hotel, restaurant, inn, motel or an establishment commonly known or recognized as regularly engaged in the business of providing sleeping accommodations, or serving food, or both, for a consideration, and which is open to the general public . . . ." [1]

[1] Another public accommodations law was enacted by the Maryland Legislature on March 14, 1964, and signed by the Governor on April 7, 1964. This statute re-enacts the quoted provision from the 1963 enactment and gives it statewide application, eliminating the county exclusions. The new statute was scheduled to go into effect on June 1, 1964, but its operation has apparently been suspended by the filing of petitions seeking a referendum. See Md. Const., Art. XVI; Baltimore Sun, May 31, 1964, p. 22, col. 1. Meanwhile, the Baltimore City ordinance and the 1963 state law, both of which are applicable to Baltimore City, where Hooper's restaurant is located, remain in effect.

It is clear from these enactments that petitioners' conduct in entering or crossing over the premises of Hooper's restaurant after being notified not to do so because of their race would not be a crime today; on the contrary, the law of Baltimore and of Maryland now vindicates their conduct and recognizes it as the exercise of a right, directing the law's prohibition not at them but at the restaurant owner or manager who seeks to deny them service because of their race.

An examination of Maryland decisions indicates that under the common law of Maryland, the supervening enactment of these statutes abolishing the crime for which petitioners were convicted would cause the Maryland Court of Appeals at this time to reverse the convictions and order the indictments dismissed. For Maryland follows the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it. Thus, in *Keller* v. *State,* 12 Md. 322 (1858), the statute under which the appellant had been indicted and convicted was repealed by the legislature after the case had been argued on appeal in the Court of Appeals but before that court's decision, although the repeal was not brought to the notice of the court until after the judgment of affirmance had been announced. The appellant's subsequent motion to correct the judgment was granted, and the judgment was reversed. The court explained, *id.,* at 325–327:

> "It is well settled, that a party cannot be convicted, after the law under which he may be prosecuted has been repealed, although the offence may have been

> committed before the repeal. . . . The same principle applies where the law is repealed, or expires pending an appeal on a writ of error from the judgment of an inferior court. . . . The judgment in a criminal cause cannot be considered as final and conclusive to every intent, notwithstanding the removal of the record to a superior court. If this were so, there would be no use in taking the appeal or suing out a writ of error. . . . And so if the law be repealed, pending the appeal or writ of error, the judgment will be reversed, because the decision must be in accordance with the law at the time of final judgment."

The rule has since been reaffirmed by the Maryland court on a number of occasions. *Beard* v. *State,* 74 Md. 130, 135, 21 A. 700, 702 (1891); *Smith* v. *State,* 45 Md. 49 (1876); *State* v. *Gambrill,* 115 Md. 506, 513, 81 A. 10, 12 (1911); *State* v. *Clifton,* 177 Md. 572, 574, 10 A. 2d 703, 704 (1940).[2]

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[2] The rule has also been consistently recognized and applied by this Court. Thus in *United States* v. *Schooner Peggy,* 1 Cranch 103, 110, Chief Justice Marshall held:

"It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

See also *Yeaton* v. *United States,* 5 Cranch 281, 283; *Maryland* v. *Baltimore & O. R. Co.,* 3 How. 534, 552; *United States* v. *Tynen,* 11 Wall. 88, 95; *United States* v. *Reisinger,* 128 U. S. 398, 401; *United States* v. *Chambers,* 291 U. S. 217, 222–223; *Massey* v. *United States,* 291 U. S. 608.

It is true that the present case is factually distinguishable, since here the legislative abolition of the crime for which petitioners were convicted occurred after rather than before the decision of the Maryland Court of Appeals. But that fact would seem irrelevant. For the purpose of applying the rule of the Maryland common law, it appears that the only question is whether the legislature acts before the affirmance of the conviction becomes final. In the present case the judgment is not yet final, for it is on direct review in this Court. This would thus seem to be a case where, as in *Keller,* the change of law has occurred "pending an appeal on a writ of error from the judgment of an inferior court," and hence where the Maryland Court of Appeals upon remand from this Court would render its decision "in accordance with the law at the time of final judgment." It thus seems that the Maryland Court of Appeals would take account of the supervening enactment of the city and state public accommodations laws and, applying the principle that a statutory offense which has "ceased to exist is no longer punishable at all," *Beard* v. *State, supra,* 74 Md. 130, 135, 21 A. 700, 702 (1891), would now reverse petitioners' convictions and order their indictments dismissed.

The Maryland common law is not, however, the only Maryland law that is relevant to the question of the effect of the supervening enactments upon these convictions. Maryland has a general saving clause statute which in certain circumstances "saves" state convictions from the common-law effect of supervening enactments. It is thus necessary to consider the impact of that clause upon the present situation. The clause, Art. 1 Md. Code § 3 (1957), reads as follows:

> "The repeal, or the repeal and re-enactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute,

> civil or criminal, shall not have the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, section or part thereof, unless the repealing, repealing and re-enacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and re-enacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability."

Upon examination of this clause and of the relevant state case law and policy considerations, we are far from persuaded that the Maryland Court of Appeals would hold the clause to be applicable to save these convictions. By its terms, the clause does not appear to be applicable at all to the present situation. It applies only to the "repeal," "repeal and re-enactment," "revision," "amendment," or "consolidation" of any statute or part thereof. The effect wrought upon the criminal trespass statute by the supervening public accommodations laws would seem to be properly described by none of these terms. The only two that could even arguably apply are "repeal" and "amendment." But neither the city nor the state public accommodations enactment gives the slightest indication that the legislature considered itself to be "repealing" or "amending" the trespass law. Neither enactment refers in any way to the trespass law, as is characteristically done when a prior statute is being

repealed or amended.[3] This fact alone raises a substantial possibility that the saving clause would be held inapplicable, for the clause might be narrowly construed—especially since it is in derogation of the common law and since this is a criminal case—as requiring that a "repeal" or "amendment" be designated as such in the supervening statute itself.[4]

The absence of such terms from the public accommodations laws becomes more significant when it is recognized that the effect of these enactments upon the trespass statute was quite different from that of an "amendment"

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[3] Thus the statewide public accommodations law enacted in 1964, see note 1, *supra*, is entitled "An Act to repeal and re-enact, with amendments . . . ," the 1963 Act, and provides expressly at several points that certain portions of the 1963 Act—none of which is here relevant—are "hereby repealed." But the 1964 enactment, like the 1963 enactment and the Baltimore City ordinance, contains no reference whatever to the trespass law, much less a statement that that law is being in any respect "repealed" or "amended."

[4] The Maryland case law under the saving clause is meager and sheds little if any light on the present question. The clause has been construed only twice since its enactment in 1912, and neither case seems directly relevant here. *State* v. *Clifton*, 177 Md. 572, 10 A. 2d 703 (1940); *State* v. *Kennerly*, 204 Md. 412, 104 A. 2d 632 (1954). In two other cases, the clause was ignored. *State* v. *American Bonding Co.*, 128 Md. 268, 97 A. 529 (1916); *Green* v. *State*, 170 Md. 134, 183 A. 526 (1936). The failure to apply the clause in these cases was explained by the Court of Appeals in the *Clifton* case, *supra*, 177 Md., at 576–577, 10 A. 2d, at 705, on the basis that "in neither of those proceedings did it appear that any penalty, forfeiture, or liability had actually been incurred." This may indicate a narrow construction of the clause, since the language of the clause would seem to have applied to both cases. Also indicative of a narrow construction is the statement of the Court of Appeals in the *Kennerly* case, *supra*, that the saving clause is "merely an aid to interpretation, stating the general rule against repeals by implication in more specific form." 204 Md., at 417, 104 A. 2d, at 634. Thus, if the case law has any pertinence, it supports a narrow construction of the saving clause and hence a conclusion that the clause is inapplicable here.

or even a "repeal" in the usual sense. These enactments do not—in the manner of an ordinary "repeal," even one that is substantive rather than only formal or technical—merely erase the criminal liability that had formerly attached to persons who entered or crossed over the premises of a restaurant after being notified not to because of their race; they go further and confer upon such persons an affirmative right to carry on such conduct, making it unlawful for the restaurant owner or proprietor to notify them to leave because of their race. Such a substitution of a right for a crime, and vice versa, is a possibly unique phenomenon in legislation; it thus might well be construed as falling outside the routine categories of "amendment" and "repeal."

Cogent state policy considerations would seem to support such a view. The legislative policy embodied in the supervening enactments here would appear to be much more strongly opposed to that embodied in the old enactment than is usually true in the case of an "amendment" or "repeal." It would consequently seem unlikely that the legislature intended the saving clause to apply in this situation, where the result of its application would be the conviction and punishment of persons whose "crime" has been not only erased from the statute books but officially vindicated by the new enactments. A legislature that passed a public accommodations law making it unlawful to deny service on account of race probably did not desire that persons should still be prosecuted and punished for the "crime" of seeking service from a place of public accommodations which denies it on account of race. Since the language of the saving clause raises no barrier to a ruling in accordance with these policy considerations, we should hesitate long indeed before concluding that the Maryland Court of Appeals would definitely hold the saving clause applicable to save these convictions.

Moreover, even if the word "repeal" or "amendment" were deemed to make the saving clause prima facie applicable, that would not be the end of the matter. There would remain a substantial possibility that the public accommodations laws would be construed as falling within the clause's exception: "unless the repealing . . . act shall expressly so provide." Not only do the policy considerations noted above support such an interpretation, but the operative language of the state public accommodations enactment affords a solid basis for a finding that it does "expressly so provide" within the terms of the saving clause. Whereas most criminal statutes speak in the future tense—see, for example, the trespass statute here involved, Art. 27 Md. Code § 577: "Any person or persons who *shall* enter upon or cross over . . ."—the state enactment here speaks in the present tense, providing that "it *is* unlawful for an owner or operator . . . ." In this very context, the Maryland Court of Appeals has given effect to the difference between the future and present tense. In *Beard* v. *State, supra,* 74 Md. 130, 21 A. 700, the court, in holding that a supervening statute did not implicitly repeal the former law and thus did not require dismissal of the defendant's conviction under that law, relied on the fact that the new statute used the word "shall" rather than the word "is." From this the court concluded that "The obvious intention of the Legislature in passing it was, not to interfere with *past* offences, but merely to fix a penalty for *future* ones." 74 Md., at 133, 21 A., at 701. Conversely here, the use of the present instead of the more usual future tense may very possibly be held by the Court of Appeals, especially in view of the policy considerations involved, to constitute an "express provision" by the legislature, within the terms of the saving clause, that it did intend its new enactment to apply to past as well as future conduct—that it did not intend the saving clause to be applied, in derogation of

the common-law rule, so as to permit the continued prosecution and punishment of persons accused of a "crime" which the legislature has now declared to be a right.

As a matter of Maryland law, then, the arguments supporting a conclusion that the saving clause would not apply to save these convictions seem quite substantial. It is not for us, however, to decide this question of Maryland law, or to reach a conclusion as to how the Maryland Court of Appeals would decide it. Such a course would be inconsistent with our tradition of deference to state courts on questions of state law. Nor is it for us to ignore the supervening change in state law and proceed to decide the federal constitutional questions presented by this case. To do so would be to decide questions which, because of the possibility that the state court would now reverse the convictions, are not necessarily presented for decision. Such a course would be inconsistent with our constitutional inability to render advisory opinions, and with our consequent policy of refusing to decide a federal question in a case that might be controlled by a state ground of decision. See *Murdock* v. *Memphis,* 20 Wall. 590, 634–636. To avoid these pitfalls—to let issues of state law be decided by state courts and to preserve our policy of avoiding gratuitous decisions of federal questions—we have long followed a uniform practice where a supervening event raises a question of state law pertaining to a case pending on review here. That practice is to vacate and reverse the judgment and remand the case to the state court, so that it may reconsider it in the light of the supervening change in state law.

The rule was authoritatively stated and applied in *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n,* 273 U. S. 126, a case where the supervening event was—as it is here—enactment of new state legislation asserted to change the law under which the case had been decided

by the highest state court. Speaking for the Court, Mr. Justice Stone said:

> "Ordinarily this Court on writ of error to a state court considers only federal questions and does not review questions of state law. But where questions of state law arising after the decision below are presented here, our appellate powers are not thus restricted. Either because new facts have supervened since the judgment below, or because of a change in the law, this Court, in the exercise of its appellate jurisdiction, may consider the state questions thus arising and either decide them or remand the cause for appropriate action by the state courts. The meaning and effect of the state statute now in question are primarily for the determination of the state court. While this Court may decide these questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court. In order that the state court may be free to consider the question and make proper disposition of it, the judgment below should be set aside, since a dismissal of this appeal might leave the judgment to be enforced as rendered. The judgment is accordingly reversed and the cause remanded for further proceedings." (Citations omitted.) 273 U. S., at 131.

Similarly, in *Patterson* v. *Alabama,* 294 U. S. 600, Mr. Chief Justice Hughes stated the rule as follows:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact

> or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case." 294 U. S., at 607.

For other cases applying the rule, see *Gulf, C. & S. F. R. Co.* v. *Dennis,* 224 U. S. 503, 505–507; *Dorchy* v. *Kansas,* 264 U. S. 286, 289; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 155–156.[5]

The question of Maryland law raised here by the supervening enactment of the city and state public accommodations laws clearly falls within the rule requiring us to vacate and reverse the judgment and remand the case to the Maryland Court of Appeals. Indeed, we have followed this course in other situations involving a state saving clause or similar provision, where it was considerably more probable than it is here that the State would desire its judgment to stand despite the supervening change of law. In *Roth* v. *Delano,* 338 U. S. 226, the Court vacated and remanded the judgment in light of the State's supervening repeal of the applicable statute despite the presence in the repealer of a saving clause which, unlike the one here, was clearly applicable in terms. In *Dorchy* v. *Kansas, supra,* 264 U. S. 286, the supervening event was a holding by this Court that an-

[5] See also *Metzger Motor Car Co.* v. *Parrott,* 233 U. S. 36; *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511; *Roth* v. *Delano,* 338 U. S. 226, 231; *Williams* v. *Georgia,* 349 U. S. 375, 390–391; *Trunkline Gas Co.* v. *Hardin County,* 375 U. S. 8.

other portion of the same state statute was unconstitutional, and the question was whether Dorchy's conviction could stand nevertheless. The state statute had a severability provision which seemingly answered the question conclusively, providing that "If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision . . . ." Nevertheless, a unanimous Court vacated and reversed the judgment and remanded the case, so that the question could be decided by the state court. Mr. Justice Brandeis said, 264 U. S., at 290–291:

> "Whether § 19 [the criminal provision under which Dorchy stood convicted] is so interwoven with the system held invalid that the section cannot stand alone, is a question of interpretation and of legislative intent. . . . Section 28 of the act [the severability clause] . . . provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command.
>
> "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court. . . . In cases coming from the state courts, this Court, in the absence of a controlling state decision, may, in passing upon the claim under the federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court. We think that course should be followed in this case.
>
> ". . . In order that the state court may pass upon this question, its judgment in this case, which was

> rendered before our decision in [the other case], should be vacated. . . . To this end the judgment is *"Reversed."*

Except for the immaterial fact that a severability clause rather than a saving clause was involved, the holding and the operative language of the *Dorchy* case are precisely in point here. Indeed, the need to set aside the judgment and remand the case is even more compelling here, since the Maryland saving clause is not literally applicable to the public accommodations laws and since state policy considerations strengthen the inference that it will be held inapplicable. Here, as in *Dorchy,* the applicability of the clause to save the conviction "is a question of interpretation and of legislative intent," and hence it is "appropriate to leave the determination of the question to the state court." Even if the Maryland saving clause were literally applicable, the fact would remain that, as in *Dorchy,* the clause "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." The Maryland Court of Appeals has stated that the Maryland saving clause is likewise "merely an aid to interpretation." *State* v. *Kennerly,* note 4, *supra,* 204 Md., at 417, 104 A. 2d, at 634.

In short, this case involves not only a question of state law but an open and arguable one. This Court thus has a "duty to recognize the changed situation," *Gulf, C. & S. F. R. Co.* v. *Dennis, supra,* 224 U. S., at 507, and, by vacating and reversing the judgment and remanding the case, to give effect to the principle that "the meaning and effect of the state statute now in question are primarily for the determination of the state court." *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n, supra,* 273 U. S., at 131.

Accordingly, the judgment of the Maryland Court of Appeals should be vacated and the case remanded to that court, and to this end the judgment is

Reversed and remanded.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE GOLDBERG concurs as respects Parts II–V, for reversing and directing dismissal of the indictment.

I.

I reach the merits of this controversy. The issue is ripe for decision and petitioners, who have been convicted of asking for service in Hooper's restaurant, are entitled to an answer to their complaint here and now.

On this the last day of the Term, we studiously avoid decision of the basic issue of the right of public accommodation under the Fourteenth Amendment, remanding the case to the state court for reconsideration in light of an issue of state law.

This case was argued October 14 and 15, 1963—over eight months ago. The record of the case is simple, the constitutional guidelines well marked, the precedents marshalled. Though the Court is divided, the preparation of opinions laying bare the differences does not require even two months, let alone eight. Moreover, a majority reach the merits of the issue. Why then should a minority prevent a resolution of the differing views?

The laws relied on for vacating and remanding were enacted June 8, 1962, and March 29, 1963—long before oral argument. We did indeed not grant certiorari until June 10, 1963. Hence if we were really concerned with this state law question, we would have vacated and remanded for reconsideration in light of those laws on June 10, 1963. By now we would have had an answer and been able to put our decision into the mainstream of the law at this critical hour. If the parties had been con-

cerned, they too might have asked that we follow that course. Maryland adverted to the new law merely to show why certiorari should not be granted. At the argument and at our conferences we were not concerned with that question, the issue being deemed frivolous. Now it is resurrected to avoid facing the constitutional question.

The whole Nation has to face the issue; Congress is conscientiously considering it; some municipalities have had to make it their first order of concern; law enforcement officials are deeply implicated, North as well as South; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue in other words consumes the public attention. Yet we stand mute, avoiding decision of the basic issue by an obvious pretense.

The clash between Negro customers and white restaurant owners is clear; each group claims protection by the Constitution and tenders the Fourteenth Amendment as justification for its action. Yet we leave resolution of the conflict to others, when, if our voice were heard, the issues for the Congress and for the public would become clear and precise. The Court was created to sit in troubled times as well as in peaceful days.

There is a school of thought that our adjudication of a constitutional issue should be delayed and postponed as long as possible. That school has had many stout defenders and ingenious means have at times been used to avoid constitutional pronouncements. Yet judge-made rules, fashioned to avoid decision of constitutional questions, largely forget what Chief Justice Marshall wrote in *Fletcher* v. *Peck*, 6 Cranch 87, 137–138:

> "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the

> United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state."

Much of our history has shown that what Marshall said of the encroachment of legislative power on the rights of the people is true also of the encroachment of the judicial branch, as where state courts use unconstitutional procedures to convict people or make criminal what is beyond the reach of the States. I think our approach here should be that of Marshall in *Marbury* v. *Madison*, 1 Cranch 137, 177–178, where the Court spoke with authority though there was an obviously easy way to avoid saying anything:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

We have in this case a question that is basic to our way of life and fundamental in our constitutional scheme. No question preoccupies the country more than this one;

it is plainly justiciable; it presses for a decision one way or another; we should resolve it. The people should know that when filibusters occupy other forums, when oppressions are great, when the clash of authority between the individual and the State is severe, they can still get justice in the courts. When we default, as we do today, the prestige of law in the life of the Nation is weakened.

For these reasons I reach the merits; and I vote to reverse the judgments of conviction outright.

II.

The issue in this case, according to those who would affirm, is whether a person's "personal prejudices" may dictate the way in which he uses his property and whether he can enlist the aid of the State to enforce those "personal prejudices." With all respect, that is not the real issue. The corporation that owns this restaurant did not refuse service to these Negroes because "it" did not like Negroes. The reason "it" refused service was because "it" thought "it" could make more money by running a segregated restaurant.

In the instant case, G. Carroll Hooper, president of the corporate chain owning the restaurant here involved, testified concerning the episode that gave rise to these convictions. The reasons were wholly commercial ones:

> "I set at the table with him and two other people and reasoned and talked to him why my policy was not yet one of integration and told him that I had two hundred employees and half of them were colored. I thought as much of them as I did the white employees. I invited them back in my kitchen if they'd like to go back and talk to them. *I wanted to prove to them it wasn't my policy, my personal prejudice,* we were not, that I had valuable colored employees and I thought just as much of them. I

tried to reason with these leaders, told them that *as long as my customers were the deciding who they want to eat with, I'm at the mercy of my customers. I'm trying to do what they want. If they fail to come in, these people are not paying my expenses, and my bills.* They didn't want to go back and talk to my colored employees because every one of them are in sympathy with me and that is we're in sympathy with what their objectives are, with what they are trying to abolish . . . ." (Italics added.)

Here, as in most of the sit-in cases before us, the refusal of service did not reflect "personal prejudices" but business reasons.[1] Were we today to hold that segregated restaurants, whose racial policies were enforced by a State, violated the Equal Protection Clause, all restaurants would be on an equal footing and the reasons given in this and most of the companion cases for refusing service to Negroes would evaporate. Moreover, when corporate restaurateurs are involved, whose "personal prejudices" are being protected? The stockholders'? The directors'? The officers'? The managers'? The truth is, I think, that the corporate interest is in making money, not in protecting "personal prejudices."

III.

I leave those questions to another part of this opinion [2] and turn to an even more basic issue.

I now assume that the issue is the one stated by those who would affirm. The case in that posture deals with a relic of slavery—an institution that has cast a long shadow across the land, resulting today in a second-class citizenship in this area of public accommodations.

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[1] See Appendix II.

[2] See Appendix I.

The Thirteenth, Fourteenth, and Fifteenth Amendments had "one pervading purpose . . . we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Slaughter-House Cases,* 16 Wall. 36, 71.

Prior to those Amendments, Negroes were segregated and disallowed the use of public accommodations except and unless the owners chose to serve them. To affirm these judgments would remit those Negroes to their old status and allow the States to keep them there by the force of their police and their judiciary.

We deal here with public accommodations—with the right of people to eat and travel as they like and to use facilities whose only claim to existence is serving the public. What the President said in his State of the Union Message on January 8, 1964, states the constitutional right of all Americans, regardless of race or color, to be treated equally by all branches of government:

> "Today Americans of all races stand side by side in Berlin and in Vietnam.
>
> "They died side by side in Korea.
>
> "Surely they can work and eat and travel side by side in their own country."

The Black Codes were a substitute for slavery; segregation was a substitute for the Black Codes; [3]

[3] For accounts of the Black Codes see Fleming, The Sequel of Appomattox (1919), pp. 94–98; Sen. Ex. Doc. No. 6, 39th Cong., 2d Sess.; I Oberholtzer, A History of the United States Since the Civil War (1917), pp. 126–127, 136–137, 175. They are summarized as follows by Morison and Commager, The Growth of the American Republic (1950), pp. 17–18:

"These black codes provided for relationships between the whites and the blacks in harmony with realities—as the whites understood them—rather than with abstract theory. They conferred upon the

the discrimination in these sit-in cases is a relic of slavery.[4]

The Fourteenth Amendment says "No State shall make or enforce any law which shall abridge the privileges or

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freedmen fairly extensive privileges, gave them the essential rights of citizens to contract, sue and be sued, own and inherit property, and testify in court, and made some provision for education. In no instance were the freedmen accorded the vote or made eligible for juries, and for the most part they were not permitted to testify against white men. Because of their alleged aversion to steady work they were required to have some steady occupation, and subjected to special penalties for violation of labor contracts. Vagrancy and apprenticeship laws were especially harsh, and lent themselves readily to the establishment of a system of peonage. The penal codes provided harsher and more arbitrary punishments for blacks than for whites, and some states permitted individual masters to administer corporal punishment to 'refractory servants.' Negroes were not allowed to bear arms or to appear in all public places, and there were special laws governing the domestic relations of the blacks. In some states laws closing to the freedmen every occupation save domestic and agricultural service, betrayed a poor-white jealousy of the Negro artisan. Most codes, however, included special provisions to protect the Negro from undue exploitation and swindling. On the whole the black codes corresponded fairly closely to the essential fact that nearly four million ex-slaves needed special attention until they were ready to mingle in free society on more equal terms. But in such states as South Carolina and Mississippi there was clearly evident a desire to keep the freedmen in a permanent position of tutelage, if not of peonage."

[4] Other "relics of slavery" have recently come before this Court. In *Hamilton* v. *Alabama*, 376 U. S. 650, we reversed a judgment of contempt imposed on a Negro witness under these circumstances:

"Cross examination by Solicitor Rayburn:

"Q. What is your name, please?

"A. Miss Mary Hamilton.

"Q. Mary, I believe—you were arrested—who were you arrested by?

"A. My name is Miss Hamilton. Please address me correctly.

"Q. Who were you arrested by, Mary?

"A. I will not answer a question—

[*Footnote 4 continued on p. 249*]

immunities of citizens of the United States." The Fourteenth Amendment also makes every person who is born here a citizen; and there is no second or third or fourth class of citizenship. See, *e. g., Schneider* v. *Rusk,* 377 U. S. 163, 168.

We deal here with incidents of national citizenship. As stated in the *Slaughter-House Cases,* 16 Wall. 36, 71–72, concerning the *federal rights* resting on the Thirteenth, Fourteenth, and Fifteenth Amendments:

> ". . . no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

"By Attorney Amaker: The witness's name is Miss Hamilton.

"A. —your question until I am addressed correctly.

"The Court: Answer the question.

"The Witness: I will not answer them unless I am addressed correctly.

"The Court: You are in contempt of court—

"Attorney Conley: Your Honor—your Honor—

"The Court: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine."

Additional relics of slavery are mirrored in recent decisions: *Brown* v. *Board of Education,* 347 U. S. 483 (segregated schools); *Johnson* v. *Virginia,* 373 U. S. 61 (segregated courtroom); *Peterson* v. *Greenville,* 373 U. S. 244, and *Lombard* v. *Louisiana,* 373 U. S. 267 (segregated restaurants); *Wright* v. *Georgia,* 373 U. S. 284, and *Watson* v. *Memphis,* 373 U. S. 526 (segregated public parks).

When we deal with Amendments touching the liberation of people from slavery, we deal with rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*, at 79. We are not in the field of exclusive municipal regulation where federal intrusion might "fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character." *Id.*, at 78.

There has been a judicial reluctance to expand the content of national citizenship beyond racial discrimination, voting rights, the right to travel, safe custody in the hands of a federal marshal, diplomatic protection abroad, and the like. See *Slaughter-House Cases, supra; Logan* v. *United States,* 144 U. S. 263; *United States* v. *Classic,* 313 U. S. 299; *Edwards* v. *California,* 314 U. S. 160; *Kent* v. *Dulles,* 357 U. S. 116. The reluctance has been due to a fear of creating constitutional refuges for a host of rights historically subject to regulation. See *Madden* v. *Kentucky,* 309 U. S. 83, overruling *Colgate* v. *Harvey,* 296 U. S. 404. But those fears have no relevance here, where we deal with Amendments whose dominant purpose was to guarantee the freedom of the slave race and establish a regime where national citizenship has only one class.

The manner in which the right to be served in places of public accommodations is an incident of national citizenship and of the right to travel is summarized in H. R. Rep. No. 914, Pt. 2, 88th Cong., 1st Sess., pp. 7–8:

> "An official of the National Association for the Advancement of Colored People, testified before the Senate Commerce Subcommittee as follows:
>
> " 'For millions of Americans this is vacation time. Swarms of families load their automobiles and trek across country. I invite the members of this com-

mittee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va., to the gulf coast of Mississippi, say, to Biloxi. Or one from Terre Haute, Ind., to Charleston, S. C., or from Jacksonville, Fla., to Tyler, Tex.

" 'How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white?'

"In response to Senator Pastore's question as to what the Negro must do, there was the reply:

" 'Where you travel through what we might call hostile territory you take your chances. You drive and you drive and you drive. You don't stop where there is a vacancy sign out at a motel at 4 o'clock in the afternoon and rest yourself; you keep on driving until the next city or the next town where you know somebody or they know somebody who knows somebody who can take care of you.

" 'This is the way you plan it.

" 'Some of them don't go.'

"Daily we permit citizens of our Nation to be humiliated and subjected to hardship and abuse solely because of their color."

As stated in the first part of the same Report, p. 18:

"Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens."

When one citizen because of his race, creed, or color is denied the privilege of being treated as any other citizen in places of public accommodation, we have classes of citizenship, one being more degrading than the other. That is at war with the one class of citizenship created by the Thirteenth, Fourteenth, and Fifteenth Amendments.

As stated in *Ex parte Virginia,* 100 U. S. 339, 344–345, where a federal indictment against a state judge for discriminating against Negroes in the selection of jurors was upheld:

> "One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress."

IV.

The problem in this case, and in the other sit-in cases before us, is presented as though it involved the situation of "a private operator conducting his own business on his own premises and exercising his own judgment" [5] as to whom he will admit to the premises.

The property involved is not, however, a man's home or his yard or even his fields. Private property is involved, but it is property that is serving the public. As my Brother GOLDBERG says, it is a "civil" right, not a "social" right, with which we deal. Here it is a restaurant refusing service to a Negro. But so far as principle and law are concerned it might just as well be a hospital re-

[5] Wright, The Sit-in Movement: Progress Report and Prognosis, 9 Wayne L. Rev. 445, 450 (1963).

fusing admission to a sick or injured Negro (cf. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959), or a drugstore refusing antibiotics to a Negro, or a bus denying transportation to a Negro, or a telephone company refusing to install a telephone in a Negro's home.

The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public. Some businesses, like the classical country store where the owner lives overhead or in the rear, make the store an extension, so to speak, of the home. But such is not this case. The facts of these sit-in cases have little resemblance to any institution of property which we customarily associate with privacy.

Joseph H. Choate, who argued the Income Tax Cases (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 534), said:

> "I have thought that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was at stake and in danger. That is what Mr. Webster said in 1820, at Plymouth, and I supposed that all educated, civilized men believed in that."

Charles A. Beard had the theory that the Constitution was "an economic document drawn with superb skill by men whose property interests were immediately at stake." An Economic Interpretation of the Constitution of the United States (1939), p. 188. That school of thought would receive new impetus from an affirmance of these judgments. Seldom have modern cases (cf. the ill-starred *Dred Scott* decision, 19 How. 393) so exalted property in suppression of individual rights. We would

reverse the modern trend were we to hold that property voluntarily serving the public can receive state protection when the owner refuses to serve some solely because they are colored.

There is no specific provision in the Constitution which protects rights of privacy and enables restaurant owners to refuse service to Negroes. The word "property" is, indeed, not often used in the Constitution, though as a matter of experience and practice we are committed to free enterprise. The Fifth Amendment makes it possible to take "private property" for public use only on payment of "just compensation." The ban on quartering soldiers in any home in time of peace, laid down by the Third Amendment, is one aspect of the right of privacy. The Fourth Amendment in its restrictions on searches and seizures also sets an aura of privacy around private interests. And the Due Process Clauses of the Fifth and Fourteenth Amendments lay down the command that no person shall be deprived "of life, liberty, or *property,* without due process of law." (Italics added.) From these provisions those who would affirm find emanations that lead them to the conclusion that the private owner of a restaurant serving the public can pick and choose whom he will serve and restrict his dining room to *whites* only.

Apartheid, however, is barred by the common law as respects innkeepers and common carriers. There were, to be sure, criminal statutes that regulated the common callings. But the civil remedies were made by judges who had no written constitution. We, on the other hand, live under a constitution that proclaims equal protection under the law. Why then, even in the absence of a statute, should *apartheid* be given constitutional sanction in the restaurant field? That was the question I asked in *Lombard* v. *Louisiana,* 373 U. S. 267. I repeat it here. Constitutionally speaking, why should Hooper Food Co., Inc.,

or Peoples Drug Stores—or any other establishment that dispenses food or medicines—stand on a higher, more sanctified level than Greyhound Bus when it comes to a constitutional right to pick and choose its customers?

The debates on the Fourteenth Amendment show, as my Brother GOLDBERG points out, that one of its purposes was to grant the Negro "the rights and guarantees of the good old common law." *Post,* at 294. The duty of common carriers to carry all, regardless of race, creed, or color, was in part the product of the inventive genius of judges. See *Lombard* v. *Louisiana,* 373 U. S., at 275–277. We should make that body of law the common law of the Thirteenth and Fourteenth Amendments so to speak. Restaurants in the modern setting are as essential to travelers as inns and carriers.

Are they not as much affected with a public interest? Is the right of a person to eat less basic than his right to travel, which we protected in *Edwards* v. *California,* 314 U. S. 160? Does not a right to travel in modern times shrink in value materially when there is no accompanying right to eat in public places?

The right of any person to travel *interstate* irrespective of race, creed, or color is protected by the Constitution. *Edwards* v. *California, supra.* Certainly his right to travel *intrastate* is as basic. Certainly his right to eat at public restaurants is as important in the modern setting as the right of mobility. In these times that right is, indeed, practically indispensable to travel either interstate or intrastate.

V.

The requirement of equal protection, like the guarantee of privileges and immunities of citizenship, is a constitutional command directed to each State.

State judicial action is as clearly "state" action as state administrative action. Indeed, we held in *Shelley* v. *Kraemer,* 334 U. S. 1, 20, that "State action, as that

phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."

That case involved suits in state courts to enforce restrictive covenants in deeds of residential property whereby the owner agreed that it should not be used or occupied by any person except a Caucasian. There was no state statute regulating the matter. That is, the State had not authorized by legislative enactment the use of restrictive covenants in residential property transactions; nor was there any administrative regulation of the matter. Only the courts of the State were involved. We held without dissent in an opinion written by Chief Justice Vinson that there was nonetheless state action within the meaning of the Fourteenth Amendment:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." *Id.*, at 18.

At the time of the *Shelley* case there was to be sure a Congressional Civil Rights Act that guaranteed all citizens the same right to purchase and sell property "as is enjoyed by white citizens." *Id.*, at 11. But the existence of that statutory right, like the existence of a right under

the Constitution, is no criterion for determining what is or what is not "state" action within the meaning of the Fourteenth Amendment. The conception of "state" action has been considered in light of the degree to which a State has participated in depriving a person of a right. "Judicial" action alone has been considered ample in hundreds of cases. Thus, "state action" took place *only by judicial action* in cases involving the use of coerced confessions (*e. g., Chambers* v. *Florida,* 309 U. S. 227), the denial to indigents of equal protection in judicial proceedings (*e. g., Griffin* v. *Illinois,* 351 U. S. 12), and the action of state courts in punishing for contempt by publication (*e. g., Bridges* v. *California,* 314 U. S. 252).

Maryland's action against these Negroes was as authoritative as any case where the State in one way or another puts its full force behind a policy. The policy here was segregation in places of public accommodation; and Maryland enforced that policy with her police, her prosecutors, and her courts.

The owners of the residential property in *Shelley* v. *Kraemer* were concerned, as was the corporate owner of this Maryland restaurant, over a possible decrease in the value of the property if Negroes were allowed to enter. It was testified in *Shelley* v. *Kraemer* that white purchasers got better bank loans than Negro purchasers:

> "A. Well, I bought 1238 north Obert, a 4-family flat, about a year ago through a straw party, and I was enabled to secure a much larger first deed of trust than I would have been able to do at the present home on Garfield.
>
> "The Court: I understand what you mean: it's easier to finance?
>
> "A. Yes, easier to finance through white. That's common knowledge.

"Q. You mean if property is owned by a white person it's easier to finance it?

"A. White can secure larger loans, better loans. I have a 5% loan."

In *McGhee* v. *Sipes,* a companion case to *Shelley* v. *Kraemer,* a realtor testified:

"I have seen the result of influx of colored people moving into a white neighborhood. There is a depression of values to start with, general run down of the neighborhood within a short time afterwards. I have, however, seen one exception. The colored people on Scotten, south of Tireman have kept up their property pretty good and enjoyed them. As a result of this particular family moving in the people in the section are rather panic-stricken and they are willing to sell—the only thing that is keeping them from throwing their stuff on the market and giving it away is the fact that they think they can get one or two colored people in there out of there. My own sales have been affected by this family. . . .

"I am familiar with the property at 4626 Seebaldt, and the value of it with a colored family in it is fifty-two hundred, and if there was no colored family in it I would say sixty-eight hundred. I would say seven thousand is a fair price for that property."

While the purpose of the restrictive covenant is in part to protect the commercial values in a "closed" community (see *Hundley* v. *Gorewitz,* 77 U. S. App. D. C. 48, 132 F. 2d 23, 24), it at times involves more. The sale to a Negro may bring a higher price than a sale to a white. See *Swain* v. *Maxwell,* 355 Mo. 448, 454, 196 S. W. 2d 780, 785. Yet the resistance to having a Negro as a neighbor is often strong. All-white or all-Caucasian residential communities are often preferred by the owners.

An occupant of a "white" area testified in *Hurd* v. *Hodge,* 334 U. S. 24, another companion case to *Shelley* v. *Kraemer:*

> ". . . we feel bitter towards you for coming in and breaking up our block. We were very peaceful and harmonious there and we feel that you bought that property just to transact it over to colored people and we don't like it, and naturally we feel bitter towards you . . . ."

This witness added:

> "A. The complexion of the person doesn't mean anything.
>
> "Q. The complexion does not?
>
> "A. It is a fact that he is a negro.
>
> "Q. I see, so no matter how brown a negro may be, no matter how white they are, you object to them?
>
> "A. I would say yes, Mr. Houston. . . . I want to live with my own color people."

The preferences involved in *Shelley* v. *Kraemer* and its companion cases were far more personal than the motivations of the corporate managers in the present case when they declined service to Negroes. Why should we refuse to let state courts enforce *apartheid* in residential areas of our cities but let state courts enforce *apartheid* in restaurants? If a court decree is state action in one case, it is in the other. Property rights, so heavily underscored, are equally involved in each case.

The customer in a restaurant is transitory; he comes and may never return. The colored family who buys the house next door is there for keeps—night and day. If "personal prejudices" are not to be the criterion in one case they should not be in the other. We should put these restaurant cases in line with *Shelley* v. *Kraemer,* holding that what the Fourteenth Amendment requires in restrictive covenant cases it also requires from restaurants.

Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship. It is a denial of a privilege and immunity of national citizenship and of the equal protection guaranteed by the Fourteenth Amendment against abridgment by the States. When the state police, the state prosecutor, and the state courts unite to convict Negroes for renouncing that relic of slavery, the "State" violates the Fourteenth Amendment.

I would reverse these judgments of conviction outright, as these Negroes in asking for service in Hooper's restaurant were only demanding what was their constitutional right.

APPENDIX I TO OPINION OF MR. JUSTICE DOUGLAS.

In the sit-in cases involving eating places last Term and this Term, practically all restaurant or lunch counter owners whose constitutional rights were vindicated below are corporations. Only two out of the 20 before us are noncorporate, as Appendix III shows. Some of these corporations are small, privately owned affairs. Others are large, national or regional businesses with many stockholders:

S. H. Kress & Co., operating 272 stores in 30 States, its stock being listed on the New York Stock Exchange; McCrory Corporation, with 1,307 stores, its stock being listed on the New York Stock Exchange; J. J. Newberry Co., with 567 stores of which 371 serve food, its stock being listed on the New York Stock Exchange; F. W. Woolworth Co., with 2,130 stores, its stock also being listed on the New York Stock Exchange; Eckerd Drugs, having 17 stores with its stock traded over-the-counter. F. W. Woolworth has over 90,000 stockholders; J. J. Newberry about 8,000; McCrory over 24,000; S. H. Kress over 8,000; Eckerd Drugs about 1,000.

At the national level most "eating places," as Appendix IV shows, are individual proprietorships or partnerships. But a substantial number are corporate in form; and even though in numbers they are perhaps an eighth of the others, in business done they make up a much larger percentage of the total.

Those living in the Washington, D. C., metropolitan area know that it is true in that area—the hotels are incorporated; Howard Johnson Co., listed on the New York Stock Exchange, has 650 restaurants and over 15,000 stockholders; Hot Shoppes, Inc., has 4,900 stockholders; Thompson Co. (involved in *District of Columbia* v. *Thompson Co.*, 346 U. S. 100) has 50 restaurants in this country with over 1,000 stockholders and its stock is listed on the New York Stock Exchange; Peoples Drug Stores, with a New York Stock Exchange listing, has nearly 5,000 stockholders. See Moody's Industrial Manual (1963 ed.).

All the sit-in cases involve a contest in a criminal trial between Negroes who sought service and state prosecutors and state judges who enforced trespass laws against them. The corporate beneficiaries of these convictions, those whose constitutional rights were vindicated by these convictions, are not parties to these suits. The beneficiary in the present case was Hooper Food Co., Inc., a Maryland corporation; and as seen in Appendix IV, "eating places" in Maryland owned by corporations, though not a fourth in number of those owned by individuals or partnerships, do nearly as much business as the other two combined.

So far as the corporate owner is concerned, what constitutional right is vindicated? It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases—the stockholders—are unidentified members of the public at large, who probably never saw these petitioners, who may never have fre-

quented these restaurants. What personal rights of theirs would be vindicated by affirmance? Why should a stockholder in Kress, Woolworth, Howard Johnson, or any other corporate owner in the restaurant field have standing to say that any associational rights personal to him are involved? Why should his interests—his associational rights—make it possible to send these Negroes to jail?

Who, in this situation, is the corporation? Whose racial prejudices are reflected in "its" decision to refuse service to Negroes? The racial prejudices of the manager? Of the stockholders? Of the board of directors?

The Court in *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394, interrupted counsel on oral argument to say, "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." 118 U. S., at 396. Later the Court held that corporations are "persons" within the meaning of the Due Process Clause of the Fourteenth Amendment. *Minneapolis R. Co.* v. *Beckwith,* 129 U. S. 26, 28. While that view is the law today, it prevailed only over dissenting opinions. See the dissent of MR. JUSTICE BLACK in *Connecticut General Co.* v. *Johnson,* 303 U. S. 77, 85; and my dissent in *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 576. MR. JUSTICE BLACK said of that doctrine and its influence:

> ". . . of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent. invoked it in protection of the negro race, and more than fifty per cent. asked that its benefits be extended to corporations." *Connecticut General Co.* v. *Johnson,* 303 U. S., at 90.

A corporation, like any other "client," is entitled to the attorney-client privilege. See *Radiant Burners, Inc.*, v. *American Gas Assn.*, 320 F. 2d 314. A corporation is protected as a publisher by the Freedom of the Press Clause of the First Amendment. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244; *New York Times Co.* v. *Sullivan*, 376 U. S. 254. A corporation, over the dissent of the first Mr. Justice Harlan, was held entitled to protection against unreasonable searches and seizures by reason of the Fourth Amendment. *Hale* v. *Henkel*, 201 U. S. 43, 76–77. On the other hand the privilege of self-incrimination guaranteed by the Fifth Amendment cannot be utilized by a corporation. *United States* v. *White*, 322 U. S. 694. "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." *Id.*, at 698.

We deal here, we are told, with personal rights—the rights pertaining to property. One need not share his home with one he dislikes. One need not allow another to put his foot upon his private domain for any reason he desires—whether bigoted or enlightened. In the simple agricultural economy that Jefferson extolled, the conflicts posed were highly personal. But how is a "personal" right infringed when a corporate chain store, for example, is forced to open its lunch counters to people of all races? How can that so-called right be elevated to a constitutional level? How is that corporate right more "personal" than the right against self-incrimination?

The revolutionary change effected by an affirmance in these sit-in cases would be much more damaging to an open and free society than what the Court did when it gave the corporation the sword and the shield of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Affirmance finds in the Constitution a corporate right to refuse service to anyone "it" chooses and to get the State to put people in jail who defy "its" will.

More precisely, affirmance would give corporate management vast dimensions for social planning.[1]

Affirmance would make corporate management the arbiter of one of the deepest conflicts in our society: corporate management could then enlist the aid of state police, state prosecutors, and state courts to force *apartheid* on the community they served, if *apartheid* best suited the corporate need; or, if its profits would be better served by lowering the barriers of segregation, it could do so.

Veblen, while not writing directly about corporate management and the racial issue, saw the danger of leaving fundamental, governmental decisions to the managers or absentee owners of our corporate enterprises:

> "Absentee ownership and absentee management on this grand scale is immune from neighborly personalities and from sentimental considerations and scruples.
>
> "It takes effect through the colorless and impersonal channels of corporation management, at the

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[1] The conventional claims of corporate management are stated in Ginzberg and Berg, Democratic Values and the Rights of Management (1963), pp. 153–154:

"The founding fathers, despite some differences of opinion among them, were of one mind when it came to fundamentals—the best guarantee of freedom was the retention by the individual of the broadest possible scope for decision-making. And early in the nation's history, when the Supreme Court decided that the corporation possessed many of the same rights as individuals, continuity was maintained in basic structure; the corporate owner as well as the individual had wide scope for decision-making. In recent decades, another extension of this trend became manifest. The agents of owners—the managers—were able to subsume for themselves the authorities inherent in ownership. The historical record, then, is clear. The right to do what one likes with his property lies at the very foundation of our historical experience. This is a basis for management's growing concern with the restrictions and limitations which have increasingly come to characterize an arena where the widest scope for individual initiative previously prevailed."

> hands of businesslike officials whose discretion and responsibility extend no farther than the procuring of a reasonably large—that is to say the largest obtainable—net gain in terms of price. The absentee owners are removed out of all touch with the working personnel or with the industrial work in hand, except such remote, neutral and dispassionate contact by proxy as may be implied in the continued receipt of a free income; and very much the same is true for the business agents of the absentee owners, the investment-bankers and the staff of responsible corporation officials. Their relation to what is going on, and to the manpower by use of which it is going on, is a fiscal relation. As industry, as a process of workmanship and a production of the means of life, the work in hand has no meaning for the absentee owners sitting in the fiscal background of these vested interests. Personalities and tangible consequences are eliminated and the business of governing the rate and volume of the output goes forward in terms of funds, prices, and percentages." Absentee Ownership (1923), pp. 215–216.

The point is that corporate motives in the retail field relate to corporate profits, corporate prestige, and corporate public relations.[2] Corporate motives have no tinge of

[2] "Fred Harvey, president of Harvey's Department Store in Nashville, says that when his store desegregated its lunch counters in 1960 only 13 charge accounts were closed out of 60,000. 'The greatest surprise I ever had was the apparent "so-what" attitude of white customers,' says Mr. Harvey.

"Even where business losses occur, they usually are only temporary. At the 120-room Peachtree Manor Hotel in Atlanta, owner Irving H. Goldstein says his business dropped off 15% when the hotel desegregated a year ago. 'But now we are only slightly behind a year ago and we can see we are beginning to recapture the business we initially lost,' declares Mr. Goldstein.

"William F. Davoren, owner of the Brownie Drug Co. in Huntsville, Ala., reports that though his business fell a bit for several weeks after

an individual's choice to associate only with one class of customers, to keep members of one race from his "property," to erect a wall of privacy around a business in the manner that one is erected around the home.

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lunch counters were desegregated, he's now picked up all that he lost. Says he: 'I could name a dozen people who regarded it as a personal affront when I started serving Negroes, but have come back as if nothing had happened.'

"Even a segregation-minded businessman in Huntsville agrees that white customers frequently have short memories when it comes to the race question. W. T. Hutchens, general manager of three Walgreen stores there, says he held out when most lunch counter operators gave in to sit-in pressures last July. In one shopping center where his competition desegregated, Mr. Hutchens says his business shot up sharply and the store's lunch counter volume registered a 12% gain for the year. However, this year business has dropped back to pre-integration levels 'because a lot of people have forgotten' the defiant role his stores played during the sit-ins, he adds.

"Some Southern businessmen who have desegregated say they have picked up extra business as a result of the move.

"At Raleigh, N. C., where Gino's Restaurant was desegregated this year, owner Jack Griffiths reports only eight whites have walked out after learning the establishment served Negroes, and he says, 'we're getting plenty of customers to replace the hard-headed ones.'

"In Dallas, integration of hotels and restaurants has 'opened up an entirely new area of convention prospects,' according to Ray Bennison, convention manager of the Chamber of Commerce. 'This year we've probably added $8 million to $10 million of future bookings because we're integrated,' Mr. Bennison says." Wall Street Journal, July 15, 1963, pp. 1, 12.

As recently stated by John Perry:

"The manager has become accustomed to seeing well-dressed Negroes in good restaurants, on planes and trains, in church, in hotel lobbies, at United Fund meetings, on television, at his university club. Only a few years ago, if he met a Negro at some civic or political meeting, he understood that the man was there because he was a Negro; he was a kind of exhibit. Today it is much more likely that the Negro is there because of his position or profession. It makes a difference that everyone feels.

"The manager is aware that companies other than his are changing. He sees it happening. He reads about it. It is talked about, usually

At times a corporation has standing to assert the constitutional rights of its members, as otherwise the rights peculiar to the members as individuals might be lost or impaired. Thus in *NAACP* v. *Alabama,* 357 U. S. 449, the question was whether the N. A. A. C. P., a membership corporation, could assert on behalf of its members a right personal to them to be protected from compelled disclosure by the State of their affiliation with it. In that context we said the N. A. A. C. P. was "the appropriate party to assert these rights, because it and its members are in every practical sense identical." *Id.,* at 459. We felt, moreover, that to deny the N. A. A. C. P. standing to raise the question and to require it to be claimed by the members themselves "would result in nullification of the right at the very moment of its assertion." *Ibid.* Those were the important reasons governing our decision, the adverse effect of disclosure on the N. A. A. C. P. itself being only a make-weight. *Id.,* at 459–460.

The corporate owners of a restaurant, like the corporate owners of streetcars, buses, telephones, and electric light and gas facilities, are interested in balance sheets and in profit and loss statements. "It" does not stand at the door turning Negroes aside because of "its" feelings of antipathy to black-skinned people. "It" does not have any associational rights comparable to the classic individual store owner at a country crossroads whose store, in the dichotomy of an Adam Smith, was indeed no different from his home. "It" has been greatly transformed, as Berle and Means, The Modern Corporation and Private Property (1932), made clear a generation ago; and "it" has also transformed our economy. Separation of power

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off the record and informally, at business gatherings. So, in due course, questions are shaped in his mind: 'How can we keep in step? How can we change, without making a big deal of it? Can we do it without a lot of uproar?'" Business—Next Target for Integration, March-April, 1963, Harvard Business Rev., pp. 104, 111.

or control from beneficial ownership was part of the phenomenon of change:

> "This dissolution of the atom of property destroys the very foundation on which the economic order of the past three centuries has rested. Private enterprise, which has molded economic life since the close of the middle ages, has been rooted in the institution of private property. Under the feudal system, its predecessor, economic organization grew out of mutual obligations and privileges derived by various individuals from their relation to property which no one of them owned. Private enterprise, on the other hand, has assumed an owner of the instruments of production with complete property rights over those instruments. Whereas the organization of feudal economic life rested upon an elaborate system of binding customs, the organization under the system of private enterprise has rested upon the self-interest of the property owner—a self-interest held in check only by competition and the conditions of supply and demand. Such self-interest has long been regarded as the best guarantee of economic efficiency. It has been assumed that, if the individual is protected in the right both to use his own property as he sees fit and to receive the full fruits of its use, his desire for personal gain, for profits, can be relied upon as an effective incentive to his efficient use of any industrial property he may possess.
>
> "In the quasi-public corporation, such an assumption no longer holds. . . . it is no longer the individual himself who uses his wealth. Those in control of that wealth, and therefore in a position to secure industrial efficiency and produce profits, are no longer, as owners, entitled to the bulk of such profits. Those who control the destinies of the typi-

> cal modern corporation own so insignificant a fraction of the company's stock that the returns from running the corporation profitably accrue to them in only a very minor degree. The stockholders, on the other hand, to whom the profits of the corporation go, cannot be motivated by those profits to a more efficient use of the property, since they have surrendered all disposition of it to those in control of the enterprise. The explosion of the atom of property destroys the basis of the old assumption that the quest for profits will spur the owner of industrial property to its effective use. It consequently challenges the fundamental economic principle of individual initiative in industrial enterprise." *Id.*, at 8–9.

By like token the separation of the atom of "property" into one unit of "management" and into another of "absentee ownership" has in other ways basically changed the relationship of that "property" to the public.

A corporation may exclude Negroes if "it" thinks "it" can make more money doing so. "It" may go along with community prejudices when the profit and loss statement will benefit; "it" is unlikely to go against the current of community prejudice when profits are endangered.[3]

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[3] The New York Times stated the idea editorially in an analogous situation on October 31, 1963. P. 32:

"When it comes to speaking out on business matters, Roger Blough, chairman of the United States Steel Corporation, does not mince words.

"Mr. Blough is a firm believer in freedom of action for corporate management, a position he made clear in his battle with the Administration last year. But he also has put some severe limits on the exercise of corporate responsibility, for he rejects the suggestion that U. S. Steel, the biggest employer in Birmingham, Ala., should use its economic influence to erase racial tensions. Mr. Blough feels that U. S. Steel has fulfilled its responsibilities by following a non-discriminatory hiring policy in Birmingham, and looks upon any other

Veblen stated somewhat the same idea in Absentee Ownership (1923), p. 107:

> ". . . the arts of business are arts of bargaining, effrontery, salesmanship, make-believe, and are directed to the gain of the business man at the cost of the community, at large and in detail. Neither tangible performance nor the common good is a business proposition. Any material use which his traffic may serve is quite beside the business man's purpose, except indirectly, in so far as it may serve to influence his clientele to his advantage."

By this standard the bus company could refuse service to Negroes if "it" felt "its" profits would increase once *apartheid* were allowed in the transportation field.

In the instant case, G. Carroll Hooper, president of the corporate chain owning the restaurant here involved, testified concerning the episode that gave rise to these convictions. His reasons were wholly commercial ones, as we have already seen.

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measures as both 'repugnant' and 'quite beyond what a corporation should do' to improve conditions.

"This hands-off strategy surely underestimates the potential influence of a corporation as big as U. S. Steel, particularly at the local level. It could, without affecting its profit margins adversely or getting itself directly involved in politics, actively work with those groups in Birmingham trying to better race relations. Steel is not sold on the retail level, so U. S. Steel has not been faced with the economic pressure used against the branches of national chain stores.

"Many corporations have belatedly recognized that it is in their own self-interest to promote an improvement in Negro opportunities. As one of the nation's biggest corporations, U. S. Steel and its shareholders have as great a stake in eliminating the economic imbalances associated with racial discrimination as any company. Corporate responsibility is not easy to define or to measure, but in refusing to take a stand in Birmingham, Mr. Blough appears to have a rather narrow, limited concept of his influence."

There are occasions when the corporation is little more than a veil for man and wife or brother and brother; and disregarding the corporate entity often is the instrument for achieving a just result. But the relegation of a Negro customer to second-class citizenship is not just. Nor is fastening *apartheid* on America a worthy occasion for tearing aside the corporate veil.

APPENDIX II TO OPINION OF MR. JUSTICE DOUGLAS.

A. In *Green* v. *Virginia, post,* p. 550, the purpose or reason for not serving Negroes was ruled to be immaterial to the issues in the case.

B. In the following cases, the testimony of corporate officers shows that the reason was either a commercial one or, which amounts to the same thing, that service to Negroes was not in accord with local custom:

1. *Bouie* v. *City of Columbia, post,* p. 347.

Dr. Guy Malone, the manager of the Columbia branch of Eckerd Drugs of Florida, Inc., testified:

"Q. Mr. Malone, is the public generally invited to do business with Eckerd's?

"A. Yes, I would say so.

"Q. Does that mean all of the public of all races?

"A. Yes.

"Q. Are Negroes welcome to do business with Eckerd's?

"A. Yes.

"Q. Are Negroes welcome to do business at the lunch counter at Eckerd's?

"A. Well, we have never served Negroes at the lunch counter department.

"Q. According to the present policy of Eckerd's, the lunch counter is closed to members of the Negro public?

"A. I would say yes.

"Q. And all other departments of Eckerd's are open to members of the Negro public, as well as to other members of the public generally?

"A. Yes.

"Q. Mr. Malone, on the occasion of the arrest of these young men, what were they doing in your store, if you know?

"A. Well, it was four of them came in. Two of them went back and sat down at the first booth and started reading books, and they sat there for about fifteen minutes. Of course, we had had a group about a week prior to that, of about fifty, who came into the store.

"Mr. Perry: Your Honor, I ask, of course, that the prior incident be stricken from the record. That is not responsive to the question which has been asked, and is not pertinent to the matter of the guilt or innocence of these young men.

"The Court: All right, strike it.

"Mr. Sholenberger: Your Honor, this is their own witness.

"Mr. Perry: We announced at the outset that Mr. Malone would, in a sense, be a hostile witness.

. . . . .

"Q. And so, when a person comes into Eckerd's and seats himself at a place where food is ordinarily served, what is the practice of your employees in that regard?

"A. Well, it's to take their order.

"Q. Did anyone seek to take the orders of these young men?

"A. No, they did not.

"Q. Why did they not do so?

"A. Because we didn't want to serve them.

"Q. Why did you not want to serve them?

"A. I don't think I have to answer that.

"Q. Did you refuse to serve them because they were Negroes?

"A. No.

"Q. You did say, however, that Eckerd's has the policy of not serving Negroes in the lunch counter section?

"A. I would say that all stores do the same thing.

"Q. We're speaking specifically of Eckerd's?

"A. Yes.

"Q. Did you or any of your employees, Mr. Malone, approach these defendants and take their order for food?

"A. No."

2. *Robinson* v. *Florida, ante,* p. 153.

A Vice President of Shell's City, Inc., testified:

"Q. Why did you refuse to serve these defendants?

"A. Because I feel, definitely, it is very detrimental to our business to do so.

"Q. What do you mean 'detrimental'?

"A. Detrimental because it would mean a loss of business to us to serve mixed groups."

Another Vice President of Shell's City, Inc., testified:

"Q. You have several departments in your store, do you not?

"A. Yes. Nineteen, I believe. Maybe twenty.

"Q. Negroes are invited to participate and make purchases in eighteen of these departments?

"A. Yes, sir.

"Q. Can you distinguish between your feeling that it is not detrimental to have them served in eighteen departments and it is detrimental to have them served in the nineteenth department, namely, the lunch counter?

"A. Well, it goes back to what is the custom, that is, the tradition of what is basically observed in Dade County would be the bottom of it. We have—

. . . . .

"Q. Would you tell me what this custom is, that you are making reference to, that would prevent you from serving Negroes at your lunch counter?

"A. I believe I already answered that, that it is the customs and traditions and practice in this county—not only in this county but in this part of the state and elsewhere, not to serve whites and colored people seated in the same restaurant. That's my answer.

"Q. Was that the sole reason, the sole basis, for your feeling that this was detrimental to your business?

"A. Well, that is the foundation of it, yes, but we feel that at this time if we went into a thing of trying to break that barrier, we might have racial trouble, which we don't want. We have lots of good friends among colored people and will have when this case is over.

"Q. Are you familiar with the fact that the Woolworth Stores in this community have eliminated this practice?

"Mr. Goshgarian: To which the State objects. It is irrelevant and immaterial.

"The Court: The objection is sustained."

3. *Fox* v. *North Carolina, post,* p. 587.

Mr. Claude M. Breeden, the manager of the McCrory branch in Raleigh, testified:

"I just don't serve colored. I don't have the facilities for serving colored. Explaining why I don't serve colored. I don't have the facilities for serving colored. I have the standard short order lunch, but I don't serve colored. I don't serve colored because I don't have the facilities for serving colored.

"Counsel for Defendant: What facilities would be necessary for serving colored?

"Solicitor for State: Objection.

"The Court: Sustained.

"Witness Continues: It is not the policy of my store to discriminate and not serve Negroes. We have no policy against discrimination. I do not discriminate and it is not the custom in the Raleigh Store to discriminate. I do not have the facilities for serving colored and that is why I don't serve colored."

4. *Mitchell* v. *City of Charleston, post,* p. 551.

Mr. Albert C. Watts, the manager of the S. H. Kress & Co. outlet in Charleston, testified:

"Q. . . . What type of business is Kress's?

"A. Five and Ten Cent variety store.

"Q. Could you tell us briefly something about what commodities it sells—does it sell just about every type of commodity that one might find in this type establishment?

"A. Strictly variety store merchandise—no appliances or anything like that.

"Q. I see. Kress, I believe it invites members of the public generally into its premises to do business, does it not?

"A. Yes.

"Q. It invites Negroes in to do business, also?

"A. Right.

"Q. Are Negroes served in all of the departments of Kress's except your lunch counter?

"A. We observe local custom.

"Q. In Charleston, South Carolina, the store that you manage, sir, does Kress's serve Negroes at the lunch counter?

"A. No. It is not a local custom.

"Q. To your knowledge, does the other like businesses serve Negroes at their lunch counters? What might happen at Woolworth's or some of the others?

"A. They observe local custom—I say they wouldn't.

"Q. Then you know of your own knowledge that they do not serve Negroes? Are you speaking of other business such as your business?

"A. I can only speak in our field, yes.

"Q. In your field, so that the other stores in your field do not serve Negroes at their lunch counters?

"A. Yes, sir."

5. *Hamm* v. *City of Rock Hill,* 377 U. S. 988.

Mr. H. C. Whiteaker, the manager of McCrory's in Rock Hill, testified:

"Q. All right. Now, how many departments do you have in your store?

"A. Around twenty.

"Q. Around twenty departments?

"A. Yes, sir.

"Q. All right, sir, is one of these departments considered a lunch counter or establishment where food is served?

"A. Yes, sir. That is a separate department.

. . . . . .

"Q. Now, I believe, is it true that you invite members of the public to come into your store?

"A. Yes, it is for the public.

"Q. And is it true, too, that the public to you means everybody, various races, religions, nationalities?

"A. Yes, sir.

"Q. The policy of your store as manager is not to exclude anybody from coming in and buying these three thousand items on account of race, nationality or religion, is that right?

"A. The only place where there has been exception, where there is an exception, is at our lunch counter.

"Q. Oh, I see. Is that a written policy you get from headquarters in New York?

"A. No, sir.

"Q. It is not. You don't have any memorandum in your store that says that is a policy?

"A. No, sir.

. . . . . .

"Q. Is it true, then, that if, that, well, even if a man was quiet enough, and a Communist, that he could sit at your lunch counter and eat, according to the policy of your store right now? Whether you knew he was a Com-

munist or not, so his political beliefs would not have anything to do with it, is that right?

"A. No.

"Q. Now, sir, you said that there was a policy there as to Negroes sitting. Am I to understand that you do serve Negroes or Americans who are Negroes, standing up?

"A. To take out, at the end of the counter, we serve take-outs, yes, sir.

"Q. In other words, you have a lunch counter at the end of your store?

"A. No, I said at the end, they can wait and get a package or a meal or order a coke or hamburger and take it out.

"Q. Oh, to take out. They don't normally eat it on the premises?

"A. They might, but usually it is to take out.

. . . . .

"Q. Of course, you probably have some Negro employees in your store, in some capacity, don't you?

"A. Yes, sir.

"Q. They eat on the premises, is that right?

"A. Yes, sir.

"Q. But not at the lunch counter?

"A. No, sir.

. . . . .

"Q. Oh, I see, but generally speaking, you consider the American Negro as part of the general public, is that right, just generally speaking?

"A. Yes, sir.

"Q. You don't have any objections for him spending any amount of money he wants to on these 3,000 items, do you?

"A. That's up to him to spend if he wants to spend.

"Q. This is a custom, as I understand it, this is a custom instead of a law that causes you not to want him to ask for service at the lunch counter?

"A. There is no law to my knowledge, it is merely a custom in this community."

C. The testimony in the following cases is less definitive with respect to why Negroes were refused service.

In *Griffin* v. *Maryland, ante,* p. 130, the president of the corporations which own and operate Glen Echo Amusement Park said he would admit Chinese, Filipinos, Indians and, generally, anyone but Negroes. He did not elaborate, beyond stating that a private property owner has the right to make such a choice.

In *Barr* v. *City of Columbia, ante,* p. 146, the co-owner and manager of the Taylor Street Pharmacy said Negroes could purchase in other departments of his store and that whether for business or personal reasons, he felt he had a right to refuse service to anyone.

In *Williams* v. *North Carolina, post,* p. 548, the president of Jones Drug Company said Negroes were not permitted to take seats at the lunch counter. He did say, however, that Negroes could purchase food and eat it on the premises so long as they *stood* some distance from the lunch counter, such as near the back door.

In *Lupper* v. *Arkansas,* 377 U. S. 989, and *Harris* v. *Virginia, post,* p. 552, the record discloses only that the establishment did not serve Negroes.

APPENDIX III TO OPINION OF MR. JUSTICE DOUGLAS.

Corporate [1] Business Establishments Involved In The "Sit-in" Cases Before This Court During The 1962 Term And The 1963 Term. Reference (other than the record in each case): Moody's Industrial Manual (1963 ed.).

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[1] The only "sit-in" cases not involving a corporation are *Barr* v. *City of Columbia, ante,* p. 146, and *Daniels* v. *Virginia,* 374 U. S. 500. In *Barr,* the business establishment was the Taylor Street Pharmacy, which apparently is a partnership; in *Daniels,* it was the 403 Restaurant in Alexandria, Virginia, an individual proprietorship.

1. Gus Blass & Co. Department Store.
   Case: *Lupper* v. *Arkansas,* 377 U. S. 989.
   Location: Little Rock, Arkansas.
   Ownership: Privately owned corporation.
2. Eckerd Drugs of Florida, Inc.
   Case: *Bouie* v. *City of Columbia, post,* p. 347.
   Location: 17 retail drugstores throughout Southern States.
   Ownership: Publicly owned corporation.
   Number of shareholders: 1,000.
   Stock traded: Over-the-counter market.
3. George's Drug Stores, Inc.
   Case: *Harris* v. *Virginia, post,* p. 552.
   Location: Hopewell, Virginia.
   Ownership: Privately owned corporation.
4. Gwynn Oak Park, Inc.
   Case: *Drews* v. *Maryland, post,* p. 547.
   Location: Baltimore, Maryland.
   Ownership: Privately owned corporation.
5. Hooper Food Company, Inc.
   Case: *Bell* v. *Maryland, supra,* p. 226.
   Location: Several restaurants in Baltimore, Maryland.
   Ownership: Privately owned corporation.
6. Howard Johnson Co.
   Case: *Henry* v. *Virginia,* 374 U. S. 98.
   Location: 650 restaurants in 25 States.
   Ownership: Publicly owned corporation.
   Number of shareholders: 15,203.
   Stock traded: New York Stock Exchange.
7. Jones Drug Company, Inc.
   Case: *Williams* v. *North Carolina, post,* p. 548.
   Location: Monroe, North Carolina.
   Ownership: Privately owned corporation.

8. Kebar, Inc. (lessee from Rakad, Inc.).

   Case: *Griffin* v. *Maryland, ante,* p. 130.
   Location: Glen Echo Amusement Park, Maryland.
   Ownership: Privately owned corporation.

9. S. H. Kress & Company.

   Cases: *Mitchell* v. *City of Charleston, post,* p. 551; *Avent* v. *North Carolina,* 373 U. S. 375; *Gober* v. *City of Birmingham,* 373 U. S. 374; *Peterson* v. *City of Greenville,* 373 U. S. 244.
   Location: 272 stores in 30 States.
   Ownership: Publicly owned corporation.
   Number of shareholders: 8,767.
   Stock traded: New York Stock Exchange.

10. Loveman's Department Store (food concession operated by Price Candy Company of Kansas City).

    Case: *Gober* v. *City of Birmingham, supra.*
    Location: Birmingham, Alabama.
    Ownership: Privately owned corporation.

11. McCrory Corporation.

    Cases: *Fox* v. *North Carolina, post,* p. 587; *Hamm* v. *City of Rock Hill,* 377 U. S. 988; *Lombard* v. *Louisiana,* 373 U. S. 267.
    Location: 1,307 stores throughout the United States.
    Ownership: Publicly owned corporation.
    Number of shareholders: 24,117.
    Stock traded: New York Stock Exchange.

12. National White Tower System, Incorporated.

    Case: *Green* v. *Virginia, post,* p. 550.
    Location: Richmond, Virginia, and other cities (number unknown).
    Ownership: Apparently a privately owned corporation.

13. J. J. Newberry Co.

Case: *Gober* v. *City of Birmingham, supra.*
Location: 567 variety stores in 46 States; soda fountains, lunch bars, cafeterias and restaurants in 371 stores.
Ownership: Publicly owned corporation.
Number of shareholders: 7,909.
Stock traded: New York Stock Exchange.

14. Patterson Drug Co.

Cases: *Thompson* v. *Virginia,* 374 U. S. 99; *Wood* v. *Virginia,* 374 U. S. 100.
Location: Lynchburg, Virginia.
Ownership: Privately owned corporation.

15. Pizitz's Department Store.

Case: *Gober* v. *City of Birmingham, supra.*
Location: Birmingham, Alabama.
Ownership: Privately owned corporation.

16. Shell's City, Inc.

Case: *Robinson* v. *Florida, ante,* p. 153.
Location: Miami, Florida.
Ownership: Privately owned corporation.

17. Thalhimer Bros., Inc., Department Store.

Case: *Randolph* v. *Virginia,* 374 U. S. 97.
Location: Richmond, Virginia.
Ownership: Privately owned corporation.

18. F. W. Woolworth Company.

Case: *Gober* v. *City of Birmingham, supra.*
Location: 2,130 stores (primarily variety stores) throughout the United States.
Ownership: Publicly owned corporation.
Number of shareholders: 90,435.
Stock traded: New York Stock Exchange.

APPENDIX IV TO OPINION OF MR. JUSTICE DOUGLAS.

Legal form of organization—by kind of business.

Reference: United States Census of Business, 1958, Vol. I.

Retail trade—Summary Statistics (1961).

A. UNITED STATES.

	Establishments (*number*)	*Sales* (*$1,000*)
Eating places:		
Total	229,238	$11,037,644
Individual proprietorships	166,003	5,202,308
Partnerships	37,756	2,062,830
Corporations	25,184	3,723,295
Cooperatives	231	13,359
Other legal forms	64	35,852
Drugstores with fountain:		
Total	24,093	$3,535,637
Individual proprietorships	13,549	1,294,737
Partnerships	4,368	602,014
Corporations	6,140	1,633,998
Cooperatives	9	(withheld)
Other legal forms	27	Do.
Proprietary stores with fountain:		
Total	2,601	132,518
Individual proprietorships	1,968	85,988
Partnerships	446	(withheld)
Corporations	185	21,090
Cooperatives	.....	.....
Other legal forms	2	(withheld)
Department stores:		
Total	3,157	13,359,467
Individual proprietorships	19	(withheld)
Partnerships	64	85,273
Corporations	3,073	13,245,916
Cooperatives	1	(withheld)
Other legal forms	.....	.....

B. STATE OF MARYLAND.[1]

	Establishments (*number*)	*Sales* (*$1,000*)
Eating places:		
Total	3,223	175,546
Individual proprietorships	2,109	72,816
Partnerships	456	30,386
Corporations	628	71,397
Other legal forms	30	947
Drugstores, proprietary stores:		
Total	832	139,943
Individual proprietorships	454	42,753
Partnership	139	(withheld)
Corporations	235	76,403
Other legal forms	4	(withheld)
Department stores:		
Total	43	247,872
Individual proprietorships	.....	.....
Partnerships	.....	.....
Corporations	43	247,872
Other legal forms	.....	.....

[For Appendix V to opinion of DOUGLAS, J., see p. 284.]

[1] A division into stores with or without fountains, furnished for the United States, is not furnished for individual States.

APPENDIX V TO OPINION OF MR. JUSTICE DOUGLAS.

STATE ANTIDISCRIMINATION LAWS.

(As of March 18, 1964.)

(PREPARED BY THE UNITED STATES COMMISSION ON CIVIL RIGHTS.)

State	*Privately owned public accommodations*	*Private employment*	*Private housing*	*Private schools*	*Private hospitals*
Alaska	[1] 1959	[1] 1959	1962	----	[2] 1962
California	1897	1959	1963	----	[2] 1959
Colorado	1885	1957	1959	----	----
Connecticut	1884	1947	1959	----	[2] 1953
Delaware	1963	1960	----	----	----
Hawaii	----	1963	----	----	----
Idaho	1961	1961	----	----	----
Illinois	1885	1961	----	[3] 1963	[4] 1927
Indiana	1885	1945	----	----	[2] 1963
Iowa	1884	1963	----	----	----
Kansas	1874	1961	----	----	----
Kentucky [5]	----	----	----	----	----
Maine	1959	----	----	----	[2] 1959
Maryland [6]	1963	----	----	----	----
Massachusetts	1865	1946	1959	1949	1953
Michigan [7]	1885	1955	----	----	----
Minnesota	1885	1955	1961	----	[2] 1943
Missouri	----	1961	----	----	----
Montana	1955	----	----	----	----
Nebraska	1885	----	----	----	----
New Hampshire	1961	----	1961	----	[2] 1961
New Jersey	1884	1945	1961	1945	1951
New Mexico	1955	1949	----	----	1957
New York	1874	1945	1961	1945	1945
North Dakota	1961	----	----	----	----
Ohio	1884	1959	----	----	[2] 1961
Oregon	1953	1949	[8] 1959	[9] 1951	[2] 1961
Pennsylvania	1887	1955	1961	1939	1939
Rhode Island	1885	1949	----	----	[2] 1957
South Dakota	1963	----	----	----	----
Vermont	1957	1963	----	----	[2] 1957
Washington [10]	1890	1949	----	1957	[2] 1957
Wisconsin	1895	1957	----	----	----
Wyoming	1961	----	----	----	[2] 1961

[*Footnotes to Appendix V are on p. 285*]

The dates are those in which the law was first enacted; the underlining means that the law is enforced by a commission. In addition to the above, the following cities in States without pertinent laws have enacted antidiscrimination ordinances: Albuquerque, N. Mex. (housing); Ann Arbor, Mich. (housing); Baltimore, Md. (employment); Beloit, Wis. (housing); Chicago, Ill. (housing); El Paso, Tex. (public accommodations); Ferguson, Mo. (public accommodations); Grand Rapids, Mich. (housing); Kansas City, Mo. (public accommodations); Louisville, Ky. (public accommodations); Madison, Wis. (housing); Oberlin, Ohio (housing); Omaha, Nebr. (employment); Peoria, Ill. (housing); St. Joseph, Mo. (public accommodations); St. Louis, Mo. (housing and public accommodations); Toledo, Ohio (housing); University City, Mo. (public accommodations); Yellow Springs, Ohio (housing); and Washington, D.C. (public accommodations and housing).

[1] Alaska was admitted to the Union in 1959 with these laws on its books.

[2] Hospitals are not enumerated in the law; however, a reasonable interpretation of the broad language contained in the public accommodations law could include various health facilities.

[3] The law appears to be limited to business schools.

[4] Hospitals where operations (surgical) are performed are required to render emergency or first aid to any applicant if the accident or injury complained of could cause death or severe injury.

[5] In 1963, the Governor issued an executive order requiring all executive departments and agencies whose functions relate to the supervising or licensing of persons or organizations doing business to take all lawful action necessary to prevent racial or religious discrimination.

[6] In 1963, the law exempted 11 counties; in 1964, the coverage was extended to include all of the counties. See *ante*, p. 229, n. 1.

[7] See 1963 Mich. Atty. Gen. opinion holding that the State Commission on Civil Rights has plenary authority in housing.

[8] The statute does not cover housing *per se* but it prohibits persons engaged in the business from discriminating.

[9] The statute relates to vocational, professional, and trade schools.

[10] In 1962, a Washington lower court held that a real estate broker is within the public accommodations law.

[For concurring opinion of GOLDBERG, J., see p. 286.]

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE joins, and with whom MR. JUSTICE DOUGLAS joins as to Parts II–V, concurring.

I.

I join in the opinion and the judgment of the Court and would therefore have no occasion under ordinary circumstances to express my views on the underlying constitutional issue. Since, however, the dissent at length discusses this constitutional issue and reaches a conclusion with which I profoundly disagree, I am impelled to state the reasons for my conviction that the Constitution guarantees to all Americans the right to be treated as equal members of the community with respect to public accommodations.

II.

The Declaration of Independence states the American creed: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." This ideal was not fully achieved with the adoption of our Constitution because of the hard and tragic reality of Negro slavery. The Constitution of the new Nation, while heralding liberty, in effect declared all men to be free and equal—except black men who were to be neither free nor equal. This inconsistency reflected a fundamental departure from the American creed, a departure which it took a tragic civil war to set right. With the adoption, however, of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, freedom and equality were guaranteed expressly to all regardless "of race, color, or previous condition of servitude." [1] *United States* v. *Reese*, 92 U. S. 214, 218.

[1] See generally Flack, The Adoption of the Fourteenth Amendment (1908); Harris, The Quest for Equality (1960).

In light of this American commitment to equality and the history of that commitment, these Amendments must be read not as "legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government." *United States* v. *Classic,* 313 U. S. 299, 316. The cases following the 1896 decision in *Plessy* v. *Ferguson,* 163 U. S. 537, too often tended to negate this great purpose. In 1954 in *Brown* v. *Board of Education,* 347 U. S. 483, this Court unanimously concluded that the Fourteenth Amendment commands equality and that racial segregation by law is inequality. Since *Brown* the Court has consistently applied this constitutional standard to give real meaning to the Equal Protection Clause "as the revelation" of an enduring constitutional purpose.[2]

The dissent argues that the Constitution permits American citizens to be denied access to places of public accommodation solely because of their race or color. Such a view does not do justice to a Constitution which

[2] *E. g., Anderson* v. *Martin,* 375 U. S. 399; *Goss* v. *Board of Education,* 373 U. S. 683; *Watson* v. *City of Memphis,* 373 U. S. 526; *Lombard* v. *Louisiana,* 373 U. S. 267; *Peterson* v. *City of Greenville,* 373 U. S. 244; *Johnson* v. *Virginia,* 373 U. S. 61; *Turner* v. *City of Memphis,* 369 U. S. 350; *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715; *Boynton* v. *Virginia,* 364 U. S. 454; *Gomillion* v. *Lightfoot,* 364 U. S. 339; *Cooper* v. *Aaron,* 358 U. S. 1. As Professor Freund has observed, *Brown* and the decisions that followed it "were not an abrupt departure in constitutional law or a novel interpretation of the guarantee of equal protection of the laws. The old doctrine of separate-but-equal, announced in 1896, had been steadily eroded for at least a generation before the school cases, in the way that precedents are whittled down until they finally collapse." Freund, The Supreme Court of the United States (1961), p. 173. See, *e. g., Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637.

is color blind and to the Court's decision in *Brown* v. *Board of Education,* which affirmed the right of all Americans to public equality. We cannot blind ourselves to the consequences of a constitutional interpretation which would permit citizens to be turned away by all the restaurants, or by the only restaurant, in town. The denial of the constitutional right of Negroes to access to places of public accommodation would perpetuate a caste system in the United States.

The Thirteenth, Fourteenth and Fifteenth Amendments do not permit Negroes to be considered as second-class citizens in any aspect of our public life. Under our Constitution distinctions sanctioned by law between citizens because of race, ancestry, color or religion "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U. S. 81, 100. We make no racial distinctions between citizens in exacting from them the discharge of public responsibilities: The heaviest duties of citizenship—military service, taxation, obedience to laws—are imposed evenhandedly upon black and white. States may and do impose the burdens of state citizenship upon Negroes and the States in many ways benefit from the equal imposition of the duties of federal citizenship. Our fundamental law which insures such an equality of public burdens, in my view, similarly insures an equality of public benefits. This Court has repeatedly recognized and applied this fundamental principle to many aspects of community life.[3]

III.

Of course our constitutional duty is "to construe, not to rewrite or amend, the Constitution." *Post,* at 342 (dissenting opinion of MR. JUSTICE BLACK). Our sworn duty to construe the Constitution requires, however, that

[3] See *supra,* note 2.

we read it to effectuate the intent and purposes of the Framers. We must, therefore, consider the history and circumstances indicating what the Civil War Amendments were in fact designed to achieve.

In 1873, in one of the earliest cases interpreting the Thirteenth and Fourteenth Amendments, this Court observed:

> "[N]o one can fail to be impressed with the one pervading purpose found in . . . all [these Amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . ." *Slaughter-House Cases,* 16 Wall. 36, 71.

A few years later, in 1880, the Court had occasion to observe that these Amendments were written and adopted "to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States." *Ex parte Virginia,* 100 U. S. 339, 344–345. In that same Term, the Court in *Strauder* v. *West Virginia,* 100 U. S. 303, 307, stated that the recently adopted Fourteenth Amendment must "be construed liberally, to carry out the purposes of its framers." Such opinions immediately following the adoption of the Amendments clearly reflect the contemporary understanding that they were "to secure to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons . . . ." *Neal* v. *Delaware,* 103 U. S. 370, 386.

The historical evidence amply supports the conclusion of the Government, stated by the Solicitor General in this Court, that:

> "it is an inescapable inference that Congress, in recommending the Fourteenth Amendment, expected to remove the disabilities barring Negroes from the public conveyances and places of public accommodation with which they were familiar, and thus to assure Negroes an equal right to enjoy these aspects of the public life of the community."

The subject of segregation in public conveyances and accommodations was quite familiar to the Framers of the Fourteenth Amendment.[4] Moreover, it appears that the contemporary understanding of the general public was that freedom from discrimination in places of public accommodation was part of the Fourteenth Amendment's promise of equal protection.[5] This view was readily

[4] See, *e. g.*, Cong. Globe, 38th Cong., 1st Sess., 839; Cong. Globe, 38th Cong., 1st Sess., 1156–1157; Cong. Globe, 42d Cong., 2d Sess., 381–383; 2 Cong. Rec. 4081–4082. For the general attitude of post-Civil War Congresses toward discrimination in places of public accommodation, see Frank and Munro, The Original Understanding of "Equal Protection of the Laws," 50 Col. L. Rev. 131, 150–153 (1950).

[5] The Civil Rights Act of 1866, 14 Stat. 27, which was the precursor of the Fourteenth Amendment, did not specifically enumerate such rights but, like the Fourteenth Amendment, was nevertheless understood to open to Negroes places of public accommodation. See Flack, *op. cit., supra,* note 1, at 45 (opinion of the press); Frank and Munro, *supra,* note 4, at 150–153; Lewis, The Sit-In Cases: Great Expectations, 1963 Sup. Ct. Rev. 101, 145–146. See also *Coger* v. *The North West. Union Packet Co.,* 37 Iowa 145; *Ferguson* v. *Gies,* 82 Mich. 358, 46 N. W. 718. The Government, in its brief in this Court, has agreed with these authorities: "[W]e may feel sure that any member of Congress would have answered affirmatively if he had been asked in 1868 whether the Civil Rights Act of 1866 and the Fourteenth Amendment would have the effect of securing Negroes the same right as other members of the public to use hotels, trains and public conveyances."

accepted by the Supreme Court of Mississippi in 1873 in *Donnell* v. *State,* 48 Miss. 661. The Mississippi Supreme Court there considered and upheld the equal accommodations provisions of Mississippi's "civil rights" bill as applied to a Negro theater patron. Justice Simrall, speaking for the court, noted that the "13th, 14th and 15th amendments of the constitution of the United States, are the logical results of the late civil war," *id.,* at 675, and concluded that the "fundamental idea and principle pervading these amendments, is an impartial equality of rights and privileges, civil and political, to all 'citizens of the United States' . . . ," *id.,* at 677.[6]

In *Strauder* v. *West Virginia, supra,* this Court had occasion to consider the concept of civil rights embodied in the Fourteenth Amendment:

> "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to

[6] Justice Simrall, a Kentuckian by birth, was a plantation owner and a prominent Mississippi lawyer and Mississippi State Legislator before the Civil War. Shortly before the war, he accepted a chair of law at the University of Louisville; he continued in that position until the beginning of the war when he returned to his plantation in Mississippi. He subsequently served for nine years on the Mississippi Supreme Court, the last three years serving as Chief Justice. He later lectured at the University of Mississippi and in 1890 was elected a member of the Constitutional Convention of Mississippi and served as chairman of the judiciary committee. 5 National Cyclopædia of American Biography (1907), 456; 1 Rowland, Courts, Judges, and Lawyers of Mississippi 1798–1935 (1935), 98–99.

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the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." *Id.*, at 307–308.

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"*The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect.* It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property." *Id.*, at 310. (Emphasis added.)

The Fourteenth Amendment was in part designed to provide a firm constitutional basis for the Civil Rights Act of 1866, 14 Stat. 27, and to place that legislation beyond the power of congressional repeal.[7] The origins of subsequently proposed amendments and legislation lay in the 1866 bill and in a companion measure, the Freed-

[7] Cong. Globe, 39th Cong., 1st Sess., at 2459, 2462, 2465, 2467, 2538; Flack, *op. cit., supra,* note 1, at 94; Harris, *op. cit., supra,* note 1, at 30–40; McKitrick, Andrew Johnson and Reconstruction (1960), 326–363; Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323, 1328–1332 (1952). A majority of the courts that considered the Act of 1866 had accepted its constitutionality. *United States* v. *Rhodes,* 27 Fed. Cas. 785 (No. 16,151); *In re Turner,* 24 Fed. Cas. 337 (No. 14,247); *Smith* v. *Moody,* 26 Ind. 299; *Hart* v. *Hoss & Elder,* 26 La. Ann. 90. Contra, *People* v. *Brady,* 40 Cal. 198 (compare *People* v. *Washington,* 36 Cal. 658); *Bowlin* v. *Commonwealth,* 65 Ky. 5.

men's Bureau bill.[8] The latter was addressed to States "wherein, in consequence of any State or local law, . . . custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes . . . ." Cong. Globe., 39th Cong., 1st Sess., 318. A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart both of the contemporary legislative proposals and of the Fourteenth Amendment encompassed the right to equal treatment in public places—a right explicitly recognized to be a "civil" rather than a "social" right. It was repeatedly emphasized "that colored persons shall enjoy the same civil rights as white persons," [9] that the colored man should have the right "to go where he pleases," [10] that he should have "practical" free-

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[8] As MR. JUSTICE BLACK pointed out in the Appendix to his dissent in *Adamson* v. *California*, 332 U. S. 46, 68, 107–108:

"Both proponents and opponents of § 1 of the [Fourteenth] amendment spoke of its relation to the Civil Rights Bill which had been previously passed over the President's veto. Some considered that the amendment settled any doubts there might be as to the constitutionality of the Civil Rights Bill. Cong. Globe, [39th Cong., 1st Sess.,] 2511, 2896. Others maintained that the Civil Rights Bill would be unconstitutional unless and until the amendment was adopted. Cong. Globe, 2461, 2502, 2506, 2513, 2961. Some thought that amendment was nothing but the Civil Rights [Bill] 'in another shape.' Cong. Globe, 2459, 2462, 2465, 2467, 2498, 2502."

[9] Cong. Globe, 39th Cong., 1st Sess., at 684 (Senator Sumner).

[10] *Id.*, at 322 (Senator Trumbull). The recurrent references to the right "to go and come at pleasure" as being "among the natural rights of free men" reflect the common understanding that the concepts of liberty and citizenship embraced the right to freedom of movement, the effective right to travel freely. See *id.*, at 41–43, 111, 475. Blackstone had stated that the "personal liberty of individuals" embraced "the power of locomotion, of changing situation, or moving one's per-

dom,[11] and that he should share "the rights and guarantees of the good old common law." [12]

In the debates that culminated in the acceptance of the Fourteenth Amendment, the theme of granting "civil," as distinguished from "social," rights constantly recurred.[13] Although it was commonly recognized that in some areas the civil-social distinction was misty, the critical fact is that it was generally understood that "civil rights" certainly included the right of access to places of public accommodation for these were most clearly places and areas of life where the relations of men were traditionally regulated by governments.[14] Indeed, the opponents both

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son to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Blackstone, Commentaries (Lewis ed. 1902), 134. This heritage was correctly described in *Kent* v. *Dulles*, 357 U. S. 116, 125–127:

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth [and Fourteenth Amendments]. . . . In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall* v. *Nevada*, 6 Wall. 35, 44; *Williams* v. *Fears*, 179 U. S. 270, 274; *Edwards* v. *California*, 314 U. S. 160." See also *Aptheker* v. *Secretary of State*, *post*, p. 500.

This right to move freely has always been thought to be and is now more than ever inextricably linked with the right of the citizen to be accepted and to be treated equally in places of public accommodation. See the opinion of MR. JUSTICE DOUGLAS, *ante*, at 250–251.

[11] Cong. Globe, 39th Cong., 1st Sess., at 474 (Senator Trumbull).

[12] *Id.*, at 111 (Senator Wilson). See *infra*, at note 17.

[13] *E. g.*, *id.*, at 476, 599, 606, 1117–1118, 1151, 1157, 1159, 1264.

[14] Frank and Munro, *supra*, note 4, at 148–149: "One central theme emerges from the talk of 'social equality': there are two kinds of relations of men, those that are controlled by the law and those that are

of the Freedmen's Bureau bill and of the Civil Rights Act of 1866 frequently complained, without refutation or contradiction, that these measures would grant Negroes the right to equal treatment in places of public accommodation. Thus, for example, Senator Davis of Kentucky, in opposing the Freedmen's Bureau bill, protested that "commingling with [white persons] in hotels, theaters, steamboats, and *other* civil rights and privileges, were always forbid to free negroes, until . . ." recently granted by Massachusetts.[15]

An 1873 decision of the Supreme Court of Iowa clearly reflects the contemporary understanding of the meaning of the Civil Rights Act of 1866. In *Coger* v. *North West. Union Packet Co.,* 37 Iowa 145, a colored woman sought damages for assault and battery occurring when the officers of a Mississippi River steamboat ordered that she be removed from a dining table in accordance with a practice of segregation in the main dining room on the boat. In giving judgment for the plaintiff, the Iowa Supreme Court quoted the Civil Rights Act of 1866 and concluded that:

> "Under this statute, equality in rights is secured to the negro. The language is comprehensive and includes the right to property and all rights growing out of contracts. It includes within its broad terms every right arising in the affairs of life. The right of the passenger under the contract of transportation with the carrier is included therein. The colored man is guarantied equality and equal protec-

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controlled by purely personal choice. The former involves civil rights, the latter social rights. There are statements by proponents of the Amendment from which a different definition could be taken, but this seems to be the usual one." See *infra,* at notes 16, 32.

[15] Cong. Globe, 39th Cong., 1st Sess., 936. (Emphasis added.) See also *id.*, at 541, 916, App. 70.

> tion of the laws with his white neighbor. These are the rights secured to him as a citizen of the United States, without regard to his color, and constitute his privileges, which are secured by [the Fourteenth Amendment]." *Id.*, at 156.

The Court then went on to reject the contention that the rights asserted were "social, and . . . not, therefore, secured by the constitution and statutes, either of the State or of the United States." *Id.*, at 157.[16]

Underlying the congressional discussions, and at the heart of the Fourteenth Amendment's guarantee of equal protection, was the assumption that the State by statute or by "the good old common law" was obligated to guarantee all citizens access to places of public accommodation. This obligation was firmly rooted in ancient

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[16] The court continued: "Without doubting that social rights and privileges are not within the protection of the laws and constitutional provisions in question, we are satisfied that the rights and privileges which were denied plaintiff are not within that class. She was refused accommodations equal to those enjoyed by white passengers. . . . She was unobjectionable in deportment and character. . . . She complains not because she was deprived of the society of white persons. Certainly no one will claim that the passengers in the cabin of a steamboat are there in the character of members of what is called society. Their companionship as travelers is not esteemed by any class of our people to create social relations. . . . The plaintiff . . . claimed no social privilege, but substantial privileges pertaining to her property and the protection of her person. It cannot be doubted that she was excluded from the table and cabin . . . because of prejudice entertained against her race . . . . The object of the amendments of the federal constitution and of the statutes above referred to, is to relieve citizens of the black race from the effects of this prejudice, to protect them in person and property from its spirit. *The Slaughter House Cases* [16 Wall. 36]. We are disposed to construe these laws according to their very spirit and intent, so that equal rights and equal protection shall be secured to all regardless of color or nationality." *Id.*, at 157–158. See also *Ferguson* v. *Gies*, 82 Mich. 358, 46 N. W. 718.

Anglo-American tradition. In his work on bailments, Judge Story spoke of this tradition:

> "An innkeeper is bound . . . to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence. . . . If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor. . . ." Story, Commentaries on the Law of Bailments (Schouler, 9th ed., 1878) § 476.[17]

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[17] The treatise defined an innkeeper as "the keeper of a common inn for the lodging and entertainment of travellers and passengers . . . ." Story, Commentaries on the Law of Bailments (Schouler, 9th ed., 1878), § 475. 3 Blackstone, *op. cit., supra,* note 10, at 166, stated a more general rule:

"[I]f an inn-keeper, *or other victualler,* hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages if he, without good reason, refuses to admit a traveler." (Emphasis added.) In Tidswell, The Innkeeper's Legal Guide (1864), p. 22, a "victualling house" is defined as a place "where people are provided with food and liquors, but not with lodgings," and in 3 Stroud, Judicial Dictionary (1903), as "a house where persons are provided with victuals, but without lodging."

Regardless, however, of the precise content of state common-law rules and the legal status of restaurants at the time of the adoption of the Fourteenth Amendment, the spirit of the common law was both familiar and apparent. In 1701 in *Lane* v. *Cotton,* 12 Mod. 472, 484–485, Holt, C. J., had declared:

"[W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him . . . . If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which

> "The first and most general obligation on [carriers of passengers] is to carry passengers whenever they offer themselves, and are ready to pay for their transportation. This results from their setting themselves up, like innkeepers, and common carriers of goods, for a common public employment on hire. They are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest. . . ." *Id.*, at §§ 590, 591.

It was in this vein that the Supreme Court of Mississippi spoke when in 1873 it applied the equal accommodations

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is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier . . . . If the inn be full, or the carrier's horses laden, the action would not lie for such refusal; but one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public." See *Munn* v. *Illinois*, 94 U. S. 113, 126–130 (referring to the duties traditionally imposed on one who pursues a public employment and exercises "a sort of public office").

Furthermore, it should be pointed out that the Framers of the Fourteenth Amendment, and the men who debated the Civil Rights Acts of 1866 and 1875, were not thinking only in terms of existing common-law duties but were thinking more generally of the customary expectations of white citizens with respect to places which were considered public and which were in various ways regulated by laws. See *infra*, at 298–305. Finally, as the Court acknowledged in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, the "Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect," for those who adopted it were conscious that a constitutional "principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States*, 217 U. S. 349, 373. See *infra*, at 315.

provisions of the State's civil rights bill to a Negro refused admission to a theater:

> "Among those customs which we call the common law, that have come down to us from the remote past, are rules which have a special application to those who sustain a *quasi* public relation to the community. The wayfarer and the traveler had a right to demand food and lodging from the inn-keeper; the common carrier was bound to accept all passengers and goods offered for transportation, according to his means. So, too, all who applied for admission to the public shows and amusements, were entitled to admission, and in each instance, for a refusal, an action on the case lay, unless sufficient reason were shown. The statute deals with subjects which have always been under legal control." *Donnell* v. *State,* 48 Miss. 661, 680–681.

In a similar manner, Senator Sumner, discussing the Civil Rights Act of 1875, referred to and quoted from Holingshed, Story, Kent and Parsons on the common-law duties of innkeepers and common carriers to treat all alike. Cong. Globe, 42d Cong., 2d Sess., 382–383. With regard to "theaters and places of public amusement," the Senator observed that:

> "Theaters and other places of public amusement, licensed by law, are kindred to inns or public conveyances, though less noticed by jurisprudence. But, like their prototypes, they undertake to provide for the public under sanction of law. They are public institutions, regulated if not created by law, enjoying privileges, and in consideration thereof, assuming duties not unlike those of the inn and the public conveyance. From essential reason, the rule should be the same with all. As the inn cannot close its

> doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so must it be with the theater and other places of public amusement. Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." *Id.*, at 383.[18]

The first sentence of § 1 of the Fourteenth Amendment, the spirit of which pervades all the Civil War Amend-

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[18] Similarly, in 1874, Senator Pratt said:

"No one reading the Constitution can deny that every colored man is a citizen, and as such, so far as legislation may go, entitled to equal rights and privileges with white people. Can it be doubted that for a denial of any of the privileges or accommodations enumerated in the bill [proposed supplement to the Civil Rights Act of 1866] he could maintain a suit at common law against the inn-keeper, the public carrier, or proprietor or lessee of the theater who withheld them? Suppose a colored man presents himself at a public inn, kept for the accommodation of the public, is decently clad and behaves himself well and is ready to pay the customary charges for rest and refreshment, and is either refused admittance or treated as an inferior guest—placed at the second table and consigned to the garret, or compelled to make his couch upon the floor—does any one doubt that upon an appeal to the courts, the law if justly administered would pronounce the inn-keeper responsible to him in damages for the unjust discrimination? I suppose not. Prejudice in the jury-box might deny him substantial damages; but about the law in the matter there can be no two opinions. The same is true of public carriers on land or water. Their engagement with the public is to carry all persons who seek conveyance on their cars or boats to the extent of their facilities for certain established fares, and all persons who behave themselves and are not afflicted with any contagious disease are entitled to equal accommodations where they pay equal fares.

"But it is asked, if the law be as you lay it down, where the necessity for this legislation, since the courts are open to all? My answer is, that the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it. When a man is traveling, and far from home, it does not pay to sue every inn-keeper who, or railroad company which, insults him by unjust discrimination. Practically the remedy is worthless." 2 Cong. Rec. 4081–4082.

ments, was obviously designed to overrule *Dred Scott* v. *Sandford,* 19 How. 393, and to ensure that the constitutional concept of citizenship with all attendant rights and privileges would henceforth embrace Negroes. It follows that Negroes as citizens necessarily became entitled to share the right, customarily possessed by other citizens, of access to public accommodations. The history of the affirmative obligations existing at common law serves partly to explain the negative—"deny to any person"—language of the Fourteenth Amendment. For it was assumed that under state law, when the Negro's disability as a citizen was removed, he would be assured the same public civil rights that the law had guaranteed white persons. This view pervades the opinion of the Supreme Court of Michigan in *Ferguson* v. *Gies,* 82 Mich. 358, 46 N. W. 718, decided in 1890. That State had recently enacted a statute prohibiting the denial to any person, regardless of race, of "the full and equal accommodations . . . and privileges of . . . restaurants . . . and all other places of public accommodation and amusement . . . ." [19] A Negro plaintiff brought an action for damages arising from the refusal of a restaurant owner to serve him at a row of tables reserved for whites. In upholding the plaintiff's claim, the Michigan court observed:

> "The negro is now, by the Constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man

[19] The statute specifically referred to "the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, eating-houses, barber-shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens." 82 Mich. 358, 364, 46 N. W. 718, 720.

> has in a public place, the black man has also, because of such citizenship." *Id.*, at 364, 46 N. W., at 720.

The court then emphasized that in light of this constitutional principle the same result would follow whether the claim rested on a statute or on the common law:

> "The common law as it existed in this State before the passage of this statute, and before the colored man became a citizen under our Constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places. It must be considered that, when this suit was planted, the colored man, under the common law of this State, was entitled to the same rights and privileges in public places as the white man, and he must be treated the same there; and that his right of action for any injury arising from an unjust discrimination against him is just as perfect and sacred in the courts as that of any other citizen. This statute is only declaratory of the common law, as I understand it now to exist in this State." *Id.*, at 365, 46 N. W., at 720.[20]

Evidence such as this demonstrates that Mr. Justice Harlan, dissenting in the *Civil Rights Cases,* 109 U. S. 3, 26, was surely correct when he observed:

> "But what was secured to colored citizens of the United States—as between them and their respective States—by the national grant to them of State citizenship? With what rights, privileges, or immunities did this grant invest them? There is one, if there be no other—exemption from race discrimination in respect of any civil right belonging to citizens of the

[20] The court also emphasized that the right under consideration was clearly a "civil" as distinguished from a "social" right. See 82 Mich., at 363, 367–368, 46 N. W., at 720–721; see also *supra,* at notes 13–14, 16 and *infra,* at note 32.

white race in the same State. That, surely, is their constitutional privilege when within the jurisdiction of other States. And such must be their constitutional right, in their own State, unless the recent amendments be splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the nation. Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude." *Id.*, at 48.

The Framers of the Fourteenth Amendment, reacting against the Black Codes,[21] made certain that the States could not frustrate the guaranteed equality by enacting discriminatory legislation or by sanctioning discriminatory treatment. At no time in the consideration of the Amendment was it suggested that the States could achieve the same prohibited result by withdrawing the traditional right of access to public places. In granting Negroes citizenship and the equal protection of the laws, it was never thought that the States could permit the proprietors of inns and public places to restrict their general invitation to the public and to citizens in order to exclude

[21] After the Civil War, Southern States enacted the so-called "Black Codes" imposing disabilities reducing the emancipated Negroes to the status of "slaves of society," even though they were no longer the chattels of individual masters. See Cong. Globe, 39th Cong., 1st Sess., 39, 516–517; opinion of MR. JUSTICE DOUGLAS, *ante*, at 247, n. 3. For the substance of these codes, see 1 Fleming, Documentary History of Reconstruction (1906), 273–312; McPherson, The Political History of the United States During the Period of Reconstruction (1871), 29–44.

the Negro public and Negro citizens. The Fourteenth Amendment was therefore cast in terms under which judicial power would come into play where the State withdrew or otherwise denied the guaranteed protection "from legal discriminations, implying inferiority in civil society, lessening the security of [the Negroes'] enjoyment of the rights which others enjoy . . . ." *Strauder* v. *West Virginia,* 100 U. S., at 308.

Thus a fundamental assumption of the Fourteenth Amendment was that the States would continue, as they had for ages, to enforce the right of citizens freely to enter public places. This assumption concerning the affirmative duty attaching to places of public accommodation was so rooted in the experience of the white citizenry that law and custom blended together indistinguishably.[22] Thus it seemed natural for the Supreme Court of Mississippi, considering a public accommodations provision in a civil rights statute, to refer to "those customs which we call the common law, that have come down to us from the remote past," *Donnell* v. *State,* 48 Miss., at 680,

[22] See Lewis, *supra,* note 5, at 146: "It was assumed by more than a few members of Congress that theaters and places of amusement would be or could be opened to all as a result either of the Equal Protection Clause or the Privileges and Immunities Clause. Why would the framers believe this? Some mentioned the law's regulation of such enterprises, but this is not enough. Some other standard must delineate between the regulated who must offer equal treatment and those who need not. Whites did not have a legal right to demand admittance to [such] enterprises, but they were admitted. Perhaps this observed conduct was confused with required conduct, just as the observed status of the citizens of all free governments—the governments that Washington, J., could observe—was mistaken for inherent rights to the status. The important point is that the framers, or some of them, believed the Amendment would open places of public accommodation, and study of the debates reveals this belief to be the observed expectations of the majority, tantamount in practice to legal rights. . . ."

and thus it seems significant that the various proposals for federal legislation often interchangeably referred to discriminatory acts done under "law" or under "custom." [23] In sum, then, it was understood that under the Fourteenth Amendment the duties of the proprietors of places of public accommodation would remain as they had long been and that the States would now be affirmatively obligated to insure that these rights ran to Negro as well as white citizens.

The Civil Rights Act of 1875, enacted seven years after the Fourteenth Amendment, specifically provided that all citizens must have "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement . . . ." 18 Stat. 335. The constitutionality of this federal legislation was reviewed by this Court in 1883 in the *Civil Rights Cases,* 109 U. S. 3. The dissent in the present case purports to follow the "state action" concept articulated in that early decision. There the Court had declared that under the Fourteenth Amendment:

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, *and State action of every kind,* which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due

[23] *E. g.,* The Supplementary Freedmen's Bureau Act, Cong. Globe, 39th Cong., 1st Sess., 318; The Civil Rights Act of 1866, 14 Stat. 27; The Enforcement Act of 1870, 16 Stat. 140; The Civil Rights Act of April 20, 1871, 17 Stat. 13; 42 U. S. C. § 1983. See also the language of the *Civil Rights Cases,* 109 U. S. 3, 17 (quoted *infra,* at note 25).

> process of law, or which denies to any of them the equal protection of the laws." 109 U. S., at 11. (Emphasis added.)

Mr. Justice Bradley, writing for the Court over the strong dissent of Mr. Justice Harlan, held that a proprietor's racially motivated denial of equal access to a public accommodation did not, without more, involve state action. It is of central importance to the case at bar that the Court's decision was expressly predicated:

> "on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with." *Id.*, at 19.

The Court added that:

> "Innkeepers and public carriers, by the laws of all the States, so far as we are aware,[24] are bound, to the

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[24] Of the five cases involved in the *Civil Rights Cases,* two concerned theatres, two concerned inns or hotels and one concerned a common carrier. In *United States* v. *Nichols* (involving a Missouri inn or hotel) the Solicitor General said: "I premise that upon the subject of inns the common law is in force in Missouri . . . ." Brief for the United States, Nos. 1, 2, 4, 460, October Term, 1882, p. 8. In *United States* v. *Ryan* (a California theatre) and in *United States* v. *Stanley* (a Kansas inn or hotel), it seems that common-law duties applied as well as state antidiscrimination laws. Calif. Laws 1897, p. 137; Kan. Laws 1874, p. 82. In *United States* v. *Singleton* (New York opera house) a state statute barred racial discrimination by "theaters, or other places of amusement." N. Y. Laws 1873, p. 303; Laws 1881, p. 541. In *Robinson* v. *Memphis* (a Tennessee railroad parlor car), the legal duties were less clear. The events occurred in 1879 and the trial was held in 1880. The common-law duty of carriers had existed in Tennessee and, from what appears in the record, was assumed by the trial judge, in charging the jury, to exist at the time of trial. However, in 1875 Tennessee had repealed the common-law rule, Laws 1875, p. 216, and in 1881 the State amended the law

extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." *Id.*, at 25.[25]

This assumption, whatever its validity at the time of the 1883 decision, has proved to be unfounded. Although reconstruction ended in 1877, six years before the *Civil Rights Cases,* there was little immediate action in the South to establish segregation, in law or in fact, in places

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to require a carrier to furnish separate but equal first-class accommodations, Laws 1881, p. 211.

[25] Reasoning from this same basic assumption, the Court said that Congress lacked the power to enact such legislation: "[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority." 109 U. S., at 13. And again: "[I]t is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, *unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong,* or a crime of that individual; an invasion of the rights of the injured party, it is true . . . ; but if not sanctioned in some way by the State . . . his rights remain in full force, *and may presumably be vindicated by resort to the laws of the State for redress.*" *Id.*, at 17. (Emphasis added.)

The argument of the Attorney General of Mississippi in *Donnell* v. *State*, 48 Miss. 661, explicitly related the State's new public accommodations law to the Thirteenth and Fourteenth Amendments. He stated that the Amendments conferred a national "power to enforce, 'by appropriate legislation,' these rights, privileges and immunities of citizenship upon the newly enfranchised class . . ."; he then concluded that "the legislature of this state has sought, by this [anti-discrimination] act, to render any interference by congress unnecessary." *Id.*, at 668. This view seems to accord with the assumption underlying the *Civil Rights Cases.*

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of public accommodation.[26] This benevolent, or perhaps passive, attitude endured about a decade and then in the late 1880's States began to enact laws mandating unequal treatment in public places.[27] Finally, three-quarters of a century later, after this Court declared such legislative action invalid, some States began to utilize and make available their common law to sanction similar discriminatory treatment.

A State applying its statutory or common law [28] to deny rather than protect the right of access to public accommodations has clearly made the assumption of the opin-

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[26] Woodward, The Strange Career of Jim Crow (1955), 15–26, points out that segregation in its modern and pervasive form is a relatively recent phenomenon. Although the speed of the movement varied, it was not until 1904, for example, that Maryland, the respondent in this case, extended Jim Crow legislation to railroad coaches and other common carriers. Md. Laws 1904, c. 110, p. 188; Md. Laws 1908, c. 248, p. 88. In the 1870's Negroes in Baltimore, Maryland, successfully challenged attempts to segregate transit facilities. See *Fields* v. *Baltimore City Passenger R. Co.*, reported in Baltimore American, Nov. 14, 1871, p. 4, col. 3; Baltimore Sun, Nov. 13, 1871, p. 4, col. 2.

[27] Not until 1887 did Florida, the appellee in *Robinson* v. *Florida, ante,* at 153, enact a statute requiring separate railroad passenger facilities for the two races. Fla. Laws 1887, c. 3743, p. 116. The State, in following a pattern that was not unique, had not immediately repealed its reconstruction antidiscrimination statute. Fla. Digest 1881, c. 19, pp. 171–172; see Fla. Laws 1891, c. 4055, p. 92; Fla. Rev. Stat. 1892, p. viii.

[28] This Court has frequently held that rights and liberties protected by the Fourteenth Amendment prevail over state common-law, as well as statutory, rules. "The fact that [a State's] policy is expressed by the judicial organ . . . rather than by the legislature we have repeatedly ruled to be immaterial. . . . '[R]ights under [the Fourteenth] amendment turn on the power of the State, no matter by what organ it acts.' *Missouri* v. *Dockery,* 191 U. S. 165, 170–71." *Hughes* v. *Superior Court,* 339 U. S. 460, 466–467. See also *Ex parte Virginia,* 100 U. S. 339, 346–347; *American Federation of Labor* v. *Swing,* 312 U. S. 321; *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 265.

ion in the *Civil Rights Cases* inapplicable and has, as the author of that opinion would himself have recognized, denied the constitutionally intended equal protection. Indeed, in light of the assumption so explicitly stated in the *Civil Rights Cases,* it is significant that Mr. Justice Bradley, who spoke for the Court, had earlier in correspondence with Circuit Judge Woods expressed the view that the Fourteenth Amendment "not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen; but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws." [29] In taking this position, which is consistent with his opinion and the assumption in the *Civil Rights Cases,*[30] he concluded that: "Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission

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[29] Letter from Justice Bradley to Circuit Judge (later Justice) William B. Woods (unpublished draft), Mar. 12, 1871, in the Bradley Papers on file, The New Jersey Historical Society, Newark, New Jersey; Supplemental Brief for the United States as Amicus Curiae, Nos. 6, 9, 10, 12 and 60, October Term, 1963, pp. 75–76. For a convenient source of excerpts, see Roche, Civil Liberty in the Age of Enterprise, 31 U. of Chi. L. Rev. 103, 108–110 (1963). See notes 30–31, *infra.*

[30] A comparison of the 1871 Bradley-Woods correspondence (and the opinion that Judge Woods later wrote, see note 31, *infra*) with Justice Bradley's 1883 opinion in the *Civil Rights Cases* indicates that in some respects the Justice modified his views. Attached to a draft of a letter to Judge Woods was a note, apparently written subsequently, by Justice Bradley stating that: "The views expressed in the foregoing letters were much modified by subsequent reflection, so far as relates to the power of Congress to pass laws for enforcing social equality between the races." The careful wording of this note, limiting itself to "the power of Congress to pass laws," supports the conclusion that Justice Bradley had only modified, not abandoned, his fundamental views and that the *Civil Rights Cases* should be read, as they were written, to rest on an explicit assumption as to the legal rights which the States were affirmatively protecting.

to pass laws for protection." [31] These views are fully consonant with this Court's recognition that state conduct which might be described as "inaction" can nevertheless

[31] The background of this correspondence and the subsequent opinion of Judge Woods in *United States* v. *Hall*, 26 Fed. Cas. 79 (Cas. No. 15,282), are significant. The correspondence on the subject apparently began in December 1870 when Judge Woods wrote Justice Bradley concerning the constitutional questions raised by an indictment filed by the United States under the Enforcement Act of 1870, 16 Stat. 140. The indictment charged that the defendants "did unlawfully and feloniously band and conspire together, with intent to injure, oppress, threaten and intimidate" certain citizens in their exercise of their "right of freedom of speech" and in "their free exercise and enjoyment of the right and privilege to peaceably assemble." The prosecution was instituted in a federal court in Alabama against private individuals whose conduct had in no way involved or been sanctioned by state action.

In May of 1871, after corresponding with Justice Bradley, Judge Woods delivered an opinion upholding the federal statute and the indictment. The judge declared that the rights allegedly infringed were protected under the Privileges and Immunities Clause of the Fourteenth Amendment: "We think . . . that the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, that they are secured by the constitution . . . ." 26 Fed. Cas., at 82. This position is similar to that of Justice Bradley two years later dissenting in the *Slaughter-House Cases*, 16 Wall. 36, 111, 118–119. More important for present purposes, however, is the fact that in analyzing the problem of "private" (nonstate) action, Judge Woods' reasoning and language follow that of Justice Bradley's letters. The judge concluded that under the Fourteenth Amendment Congress could adopt legislation: "to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." 26 Fed. Cas., at 81.

constitute responsible "state action" within the meaning of the Fourteenth Amendment. See, *e. g., Marsh* v. *Alabama,* 326 U. S. 501; *Shelley* v. *Kraemer,* 334 U. S. 1; *Terry* v. *Adams,* 345 U. S. 461; *Barrows* v. *Jackson,* 346 U. S. 249.

In the present case the responsibility of the judiciary in applying the principles of the Fourteenth Amendment is clear. The State of Maryland has failed to protect petitioners' constitutional right to public accommodations and is now prosecuting them for attempting to exercise that right. The decision of Maryland's highest court in sustaining these trespass convictions cannot be described as "neutral," for the decision is as affirmative in effect as if the State had enacted an unconstitutional law explicitly authorizing racial discrimination in places of public accommodation. A State, obligated under the Fourteenth Amendment to maintain a system of law in which Negroes are not denied protection in their claim to be treated as equal members of the community, may not use its criminal trespass laws to frustrate the constitutionally granted right. Nor, it should be added, may a State frustrate this right by legitimating a proprietor's attempt at self-help. To permit self-help would be to disregard the principle that "[t]oday, no less than 50 years ago, the solution to the problems growing out of race relations 'cannot be promoted by depriving citizens of their constitutional rights and privileges,' *Buchanan* v. *Warley* . . . 245 U. S., at 80–81." *Watson* v. *City of Memphis,* 373 U. S. 526, 539. As declared in *Cooper* v. *Aaron,* 358 U. S. 1, 16, "law and order are not . . . to be preserved by depriving the Negro . . . of [his] constitutional rights."

In spite of this, the dissent intimates that its view best comports with the needs of law and order. Thus it is said: "It would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his per-

sonal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace." *Post,* at 327–328. This statement, to which all will readily agree, slides over the critical question: Whose conduct is entitled to the "law's protection"? Of course every member of this Court agrees that law and order must prevail; the question is whether the weight and protective strength of law and order will be cast in favor of the claims of the proprietors or in favor of the claims of petitioners. In my view the Fourteenth Amendment resolved this issue in favor of the right of petitioners to public accommodations and it follows that in the exercise of that constitutionally granted right they are entitled to the "law's protection." Today, as long ago, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . ." *Marbury* v. *Madison,* 1 Cranch 137, 163.

IV.

My Brother DOUGLAS convincingly demonstrates that the dissent has constructed a straw man by suggesting that this case involves "a property owner's right to choose his social or business associates." *Post,* at 343. The restaurant involved in this case is concededly open to a large segment of the public. Restaurants such as this daily open their doors to millions of Americans. These establishments provide a public service as necessary today as the inns and carriers of Blackstone's time. It should be recognized that the claim asserted by the Negro petitioners concerns such public establishments and does not infringe upon the rights of property owners or personal associational interests.

Petitioners frankly state that the "extension of constitutional guarantees to the authentically private choices of man is wholly unacceptable, and any constitutional

theory leading to that result would have reduced itself to absurdity." Indeed, the constitutional protection extended to privacy and private association assures against the imposition of social equality. As noted before, the Congress that enacted the Fourteenth Amendment was particularly conscious that the "civil" rights of man should be distinguished from his "social" rights.[32] Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests; nor is it a claim infringing upon the control of private property not dedicated to public use. A judicial ruling on this claim inevitably involves the liberties and free-

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[32] The approach is reflected in the reasoning stated by the Supreme Court of Michigan in 1890:

"Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction.

. . . . . .

"The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he connot [*sic*] in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears." *Ferguson* v. *Gies*, 82 Mich., at 363, 367–368, 46 N. W., at 720, 721. See *supra*, at notes 13–14.

doms both of the restaurant proprietor and of the Negro citizen. The dissent would hold in effect that the restaurant proprietor's interest in choosing customers on the basis of race is to be preferred to the Negro's right to equal treatment by a business serving the public. The history and purposes of the Fourteenth Amendment indicate, however, that the Amendment resolves this apparent conflict of liberties in favor of the Negro's right to equal public accommodations. As the Court said in *Marsh* v. *Alabama,* 326 U. S. 501, 506: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." [33] The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight.[34] The relationship between the modern innkeeper or restaurateur and the customer is relatively impersonal and evanescent. This is highlighted by cases such as *Barr* v. *City of Columbia, ante,* at 146, *Bouie* v. *City of Columbia, post,* at 347, and *Robinson* v. *Florida, ante,* at 153, in which Negroes are invited into all departments of the store but nonetheless ordered, in the name of private association or property rights, not to purchase and eat food, as other customers do, on the premises. As the history of the common law

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[33] Cf. *Munn* v. *Illinois,* 94 U. S. 113, 125–126: "Looking, then, to the common law, from whence came the [property] right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris,* 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."

[34] See Lewis, *supra,* note 5, at 148.

and, indeed, of our own times graphically illustrates, the interests of proprietors of places of public accommodation have always been adapted to the citizen's felt need for public accommodations, a need which is basic and deep-rooted. 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.

Of course, although the present case involves the right to service in a restaurant, the fundamental principles of the Fourteenth Amendment apply with equal force to other places of public accommodation and amusement. Claims so important as those presented here cannot be dismissed by asserting that the Fourteenth Amendment, while clearly addressed to inns and public conveyances, did not contemplate lunch counters and soda fountains. Institutions such as these serve essentially the same needs in modern life as did the innkeeper and the carrier at common law.[35] It was to guard against narrow conceptions that Chief Justice Marshall admonished the Court never to 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." *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, 415. Today, as throughout the history of the Court, we should remember that "in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." *United States* v. *Classic,* 313 U. S. 299, 316.

[35] See *supra,* at note 17.

V.

In my view the historical evidence demonstrates that the traditional rights of access to places of public accommodation were quite familiar to Congressmen and to the general public who naturally assumed that the Fourteenth Amendment extended these traditional rights to Negroes. But even if the historical evidence were not as convincing as I believe it to be, the logic of *Brown* v. *Board of Education,* 347 U. S. 483, based as it was on the fundamental principle of constitutional interpretation proclaimed by Chief Justice Marshall,[36] requires that petitioners' claim be sustained.

In *Brown,* after stating that the available history was "inconclusive" on the specific issue of segregated public schools, the Court went on to say:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U. S., at 492–493.

The dissent makes no effort to assess the status of places of public accommodation "in the light of" their "full development and . . . present place" in the life of American citizens. In failing to adhere to that approach the dissent ignores a pervasive principle of constitutional adjudication and departs from the ultimate logic of *Brown.* As Mr. Justice Holmes so aptly said:

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United

[36] See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955).

States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri* v. *Holland,* 252 U. S. 416, 433.

CONCLUSION.

The constitutional right of all Americans to be treated as equal members of the community with respect to public accommodations is a civil right granted by the people in the Constitution—a right which "is too important in our free society to be stripped of judicial protection." Cf. *Wesberry* v. *Sanders,* 376 U. S. 1, 7; *Baker* v. *Carr,* 369 U. S. 186. This is not to suggest that Congress lacks authority under § 5 of the Fourteenth Amendment, or under the Commerce Clause, Art. I, § 8, to implement the rights protected by § 1 of the Fourteenth Amendment. In the give-and-take of the legislative process, Congress can fashion a law drawing the guidelines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations. In contrast, we can pass only on justiciable issues coming here on a case-to-case basis.

It is, and should be, more true today than it was over a century ago that "[t]he great advantage of the Americans is that . . . they are born equal" [37] and that in the eyes of the law they "are all of the same estate." The

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[37] 2 De Tocqueville, Democracy in America (Bradley ed. 1948), 101.

first Chief Justice of the United States, John Jay, spoke of the "free air" of American life. The great purpose of the Fourteenth Amendment is to keep it free and equal. Under the Constitution no American can, or should, be denied rights fundamental to freedom and citizenship. I therefore join in reversing these trespass convictions.

MR. JUSTICE BLACK, with whom MR. JUSTICE HARLAN and MR. JUSTICE WHITE join, dissenting.

This case does not involve the constitutionality of any existing or proposed state or federal legislation requiring restaurant owners to serve people without regard to color. The crucial issue which the case does present but which the Court does not decide is whether the Fourteenth Amendment, of itself, forbids a State to enforce its trespass laws to convict a person who comes into a privately owned restaurant, is told that because of his color he will not be served, and over the owner's protest refuses to leave. We dissent from the Court's refusal to decide that question. For reasons stated, we think that the question should be decided and that the Fourteenth Amendment does not forbid this application of a State's trespass laws.

The petitioners were convicted in a Maryland state court on a charge that they "unlawfully did enter upon and cross over the land, premises and private property" of the Hooper Food Co., Inc., "after having been duly notified by Albert Warfel, who was then and there the servant and agent for Hooper Food Co.," not to do so, in violation of Maryland's criminal trespass statute.[1] The

[1] "Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor . . . ." Md. Code, Art. 27, § 577.

conviction was based on a record showing in summary that:

> A group of fifteen to twenty Negro students, including petitioners, went to Hooper's Restaurant to engage in what their counsel describes as a "sit-in protest" because the restaurant would not serve Negroes. The hostess, on orders of Mr. Hooper, the president of the corporation owning the restaurant,[2] told them, "solely on the basis of their color," that she would not serve them. Petitioners refused to leave when requested by the hostess and the manager; instead they went to tables, took seats, and refused to leave, insisting that they be served. On orders of the owner the police were called, but they advised the manager that a warrant would be necessary before they could arrest petitioners. The manager then went to the police station and swore out the warrants. Petitioners had remained in the restaurant in all an hour and a half, testifying at their trial that they had stayed knowing they would be arrested—that being arrested was part of their "technique" in these demonstrations.

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[2] Mr. Hooper testified this as to his reasons for adopting his policy:

"I set at the table with him and two other people and reasoned and talked to him why my policy was not yet one of integration and told him that I had two hundred employees and half of them were colored. I thought as much of them as I did the white employees. I invited them back in my kitchen if they'd like to go back and talk to them. I wanted to prove to them it wasn't my policy, my personal prejudice, we were not, that I had valuable colored employees and I thought just as much of them. I tried to reason with these leaders, told them that as long as my customers were deciding who they wanted to eat with, I'm at the mercy of my customers. I'm trying to do what they want. If they fail to come in, these people are not paying my expenses, and my bills. They didn't want to go back and talk to my colored employees because every one of them are in sympathy with me and that is we're in sympathy with what their objectives are, with what they are trying to abolish . . . ."

The Maryland Court of Appeals affirmed the convictions, rejecting petitioners' contentions urged in both courts that Maryland had (1) denied them equal protection and due process under the Fourteenth Amendment by applying its trespass statute to enforce the restaurant owner's policy and practice of racial discrimination, and (2) denied them freedom of expression guaranteed by the Constitution by punishing them for remaining at the restaurant, which they were doing as a protest against the owner's practice of refusing service to Negroes.[3] This case, *Barr* v. *City of Columbia, ante,* p. 146, and *Bouie* v. *City of Columbia, post,* p. 347, all raised these same two constitutional questions, which we granted certiorari to decide.[4] The Solicitor General has filed *amicus* briefs and participated in oral argument in these cases; while he joins in asking reversal of all the convictions, his arguments vary in significant respects from those of the petitioners. We would reject the contentions of the petitioners and of the Solicitor General in this case and affirm the judgment of the Maryland court.

I.

On the same day that petitioners filed the petition for certiorari in this case, Baltimore enacted an ordinance forbidding privately owned restaurants to refuse to serve Negroes because of their color.[5] Nearly a year later Maryland, without repealing the state trespass law petitioners violated, passed a law applicable to Baltimore and some other localities making such discrimination by res-

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[3] 227 Md. 302, 176 A. 2d 771 (1962).

[4] 374 U. S. 804, 805 (1963). Probable jurisdiction was noted in *Robinson* v. *Florida,* 374 U. S. 803 (1963), rev'd, *ante,* p. 153. Certiorari had already been granted in *Griffin* v. *Maryland,* 370 U. S. 935 (1962), rev'd, *ante,* p. 130.

[5] Ordinance No. 1249, June 8, 1962, adding § 10A to Art. 14A, Baltimore City Code (1950 ed.).

taurant owners unlawful.[6] We agree that the general judicial rule or practice in Maryland and elsewhere, as pointed out in the Court's opinion, is that a new statute repealing an old criminal law will, in the absence of a general or special saving clause, be interpreted as barring pending prosecutions under the old law. Although Maryland long has had a general saving clause clearly declaring that prosecutions brought under a subsequently repealed statute shall not be barred, the Court advances many arguments why the Maryland Court of Appeals could and perhaps would, so the Court says, hold that the new ordinance and statute nevertheless bar these prosecutions. On the premise that the Maryland court might hold this way and because we could thereby avoid passing upon the constitutionality of the State's trespass laws, the Court, without deciding the crucial constitutional questions which brought this case here, instead sends the case back to the state court to consider the effect of the new ordinance and statute.

We agree that this Court has power, with or without deciding the constitutional questions, to remand the case for the Maryland Court of Appeals to decide the state question as to whether the convictions should be set aside and the prosecutions abated because of the new laws. But as the cases cited by the Court recognize, our question is not one of power to take this action but of whether we should. And the Maryland court would be equally free to give petitioners the benefit of any rights they have growing out of the new law whether we upheld the trespass statute and affirmed, or refused to pass upon its validity at this time. For of course our affirmance of the state court's holding that the Maryland trespass

[6] Md. Acts 1963, c. 227, Art. 49B Md. Code § 11 (enacted March 29, 1963, effective June 1, 1963). A later accommodations law, of statewide coverage, was enacted, Md. Acts 1964, Sp. Sess., c. 29, § 1, but will not take effect unless approved by referendum.

statute is constitutional as applied would in no way hamper or bar decision of further state questions which the Maryland court might deem relevant to protect the rights of the petitioners in accord with Maryland law. Recognition of this power of state courts after we affirm their holdings on federal questions is a commonplace occurrence. See, *e. g., Piza Hermanos* v. *Caldentey,* 231 U. S. 690, 692 (1914); *Fidelity Ins. Trust & Safe Deposit Co.* v. *McClain,* 178 U. S. 113, 114 (1900).

Nor do we agree that because of the new state question we should vacate the judgment in order to avoid deciding the constitutionality of the trespass statute as applied. We fully recognize the salutary general judicial practice of not unnecessarily reaching out to decide constitutional questions. But this is neither a constitutional nor a statutory requirement. Nor does the principle properly understood and applied impose a rigid, arbitrary, and inexorable command that courts should never decide a constitutional question in any single case if subtle ingenuity can think up any conceivable technique that might, if utilized, offer a distant possibility of avoiding decision. Here we believe the constitutionality of this trespass statute should be decided.

This case is but one of five involving the same kind of sit-in trespass problems we selected out of a large and growing group of pending cases to decide this very question. We have today granted certiorari in two more of this group of cases.[7] We know that many similar cases are now on the way and that many others are bound to follow. We

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[7] *Hamm* v. *City of Rock Hill,* 377 U. S. 988; *Lupper* v. *Arkansas,* 377 U. S. 989. The same question was presented but is not decided in seven other cases which the Court today disposes of in various ways. See *Drews* v. *Maryland, post,* p. 547; *Williams* v. *North Carolina, post,* p. 548; *Fox* v. *North Carolina, post,* p. 587; *Mitchell* v. *City of Charleston, post,* p. 551; *Ford* v. *Tennessee,* 377 U. S. 994; *Green* v. *Virginia, post,* p. 550; *Harris* v. *Virginia, post,* p. 552.

know, as do all others, that the conditions and feelings that brought on these demonstrations still exist and that rights of private property owners on the one hand and demonstrators on the other largely depend at this time on whether state trespass laws can constitutionally be applied under these circumstances. Since this question is, as we have pointed out, squarely presented in this very case and is involved in other cases pending here and others bound to come, we think it is wholly unfair to demonstrators and property owners alike as well as against the public interest not to decide it now. Since *Marbury* v. *Madison,* 1 Cranch 137 (1803), it has been this Court's recognized responsibility and duty to decide constitutional questions properly and necessarily before it. That case and others have stressed the duty of judges to act with the greatest caution before frustrating legislation by striking it down as unconstitutional. We should feel constrained to decide this question even if we thought the state law invalid. In this case, however, we believe that the state law is a valid exercise of state legislative power, that the question is properly before us, and that the national interest imperatively calls for an authoritative decision of the question by this Court. Under these circumstances we think that it would be an unjustified abdication of our duty to leave the question undiscussed. This we are not willing to do. So we proceed to state our views on the merits of the constitutional challenges to the Maryland law.

II.

Although the question was neither raised nor decided in the courts below, petitioners contend that the Maryland statute is void for vagueness under the Due Process Clause of the Fourteenth Amendment because its language gave no fair warning that "sit-ins" staged over a restaurant owner's protest were prohibited by the statute.

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The challenged statutory language makes it an offense for any person to "enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so . . . ." Petitioners say that this language plainly means that an entry upon another's property is an offense only if the owner's notice has been given before the intruder is physically on the property; that the notice to petitioners that they were not wanted was given only after they had stepped from the street into the restaurant; and that the statute as applied to them was void either because (1) there was no evidence to support the charge of entry *after* notice not to do so, or because (2) the statute failed to warn that it could be violated by remaining on property after having been told to leave. As to (1), in view of the evidence and petitioners' statements at the trial it is hard to take seriously a contention that petitioners were not fully aware, before they ever entered the restaurant, that it was the restaurant owner's firmly established policy and practice not to serve Negroes. The whole purpose of the "sit-in" was to protest that policy. (2) Be that as it may, the Court of Appeals of Maryland held that "the statutory references to 'entry upon or crossing over,' cover the case of remaining upon land after notice to leave," and the trial court found, with very strong evidentiary support, that after unequivocal notice to petitioners that they would not be seated or served they "persisted in their demands and, brushing by the hostess, took seats at various tables on the main floor and at the counter in the basement." We are unable to say that holding this conduct barred by the Maryland statute was an unreasonable interpretation of the statute or one which could have deceived or even surprised petitioners or others who

wanted to understand and obey it. It would certainly be stretching the rule against ambiguous statutes very far indeed to hold that the statutory language misled these petitioners as to the Act's meaning, in the face of evidence showing a prior series of demonstrations by Negroes, including some of petitioners, and in view of the fact that the group which included petitioners came prepared to picket Hooper and actually courted arrest, the better to protest his refusal to serve colored people.

We reject the contention that the statute as construed is void for vagueness. In doing so, we do not overlook or disregard the view expressed in other cases that statutes which, in regulating conduct, may indirectly touch the areas of freedom of expression should be construed narrowly where necessary to protect that freedom.[8] And we do not doubt that one purpose of these "sit-ins" was to express a vigorous protest against Hooper's policy of not serving Negroes.[9] But it is wholly clear that the Maryland statute here is directed not against what petitioners said but against what they did—remaining on the premises of another after having been warned to leave, conduct which States have traditionally prohibited in this country.[10] And none of our prior cases has held that a person's right to freedom of expression carries with it a right to force a private property owner to furnish his property as a platform to criticize the property owner's use of that property. Cf. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949). We believe that the statute as construed and applied is not void for vagueness.

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[8] *Winters* v. *New York*, 333 U. S. 507, 512 (1948); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308 (1940).

[9] See *Garner* v. *Louisiana*, 368 U. S. 157, 185 (1961) (HARLAN, J., concurring).

[10] See *Martin* v. *City of Struthers*, 319 U. S. 141, 147 and n. 10 (1943).

III.

Section 1 of the Fourteenth Amendment provides in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This section of the Amendment, unlike other sections,[11] is a prohibition against certain conduct only when done by a State—"state action" as it has come to be known—and "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer,* 334 U. S. 1, 13 (1948).[12] This well-established interpretation of section 1 of the Amendment—which all the parties here, including the petitioners and the Solicitor General, accept—means that this section of the Amendment does not of itself, standing alone, in the absence of some cooperative state action or compulsion,[13] forbid property holders, including restaurant owners, to ban people from entering or remaining upon their premises, even if the owners act out of racial prejudice. But "the prohibitions of the amendment extend to all action of the State denying equal protection of the laws" whether "by its legislative, its executive, or its judicial authorities." *Virginia* v. *Rives,* 100 U. S. 313, 318 (1880). The Amendment thus forbids all kinds of state action, by all state agencies and officers, that dis-

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[11] *E. g.,* § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[12] Citing *Civil Rights Cases,* 109 U. S. 3 (1883); *United States* v. *Harris,* 106 U. S. 629 (1883); *United States* v. *Cruikshank,* 92 U. S. 542 (1876).

[13] See *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961).

criminate against persons on account of their race.[14] It was this kind of state action that was held invalid in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), *Peterson* v. *City of Greenville,* 373 U. S. 244 (1963), *Lombard* v. *Louisiana,* 373 U. S. 267 (1963), and *Griffin* v. *County School Board,* 377 U. S. 218 (1964), and that this Court today holds invalid in *Robinson* v. *Florida, ante,* p. 153.

Petitioners, but not the Solicitor General, contend that their conviction for trespass under the state statute was by itself the kind of discriminatory state action forbidden by the Fourteenth Amendment. This contention, on its face, has plausibility when considered along with general statements to the effect that under the Amendment forbidden "state action" may be that of the Judicial as well as of the Legislative or Executive Branch of Government. But a mechanical application of the Fourteenth Amendment to this case cannot survive analysis. The Amendment does not forbid a State to prosecute for crimes committed against a person or his property, however prejudiced or narrow the victim's views may be. Nor can whatever prejudice and bigotry the victim of a crime may have be automatically attributed to the State that prosecutes. Such a doctrine would not only be based on a fiction; it would also severely handicap a State's efforts to maintain a peaceful and orderly society. Our society has put its trust in a system of criminal laws to punish lawless conduct. To avert personal feuds and violent brawls it has led its people to believe and expect that wrongs against them will be vindicated in the courts. Instead of attempting to take the law into their own hands, people have been taught to call for police protection to protect their rights wherever possible.[15] It would

[14] See *Shelley* v. *Kraemer, supra,* 334 U. S., at 14–15 (1948), particularly notes 13 and 14.

[15] The use in this country of trespass laws, both civil and criminal, to allow people to substitute the processes of the law for force and

betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace. The worst citizen no less than the best is entitled to equal protection of the laws of his State and of his Nation. None of our past cases justifies reading the Fourteenth Amendment in a way that might well penalize citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights.

In contending that the State's prosecution of petitioners for trespass is state action forbidden by the Fourteenth Amendment, petitioners rely chiefly on *Shelley* v. *Kraemer, supra.* That reliance is misplaced. *Shelley* held that the Fourteenth Amendment was violated by a State's enforcement of restrictive covenants providing that certain pieces of real estate should not be used or occupied by Negroes, Orientals, or any other non-Caucasians, either as owners or tenants, and that in case of use or occupancy by such proscribed classes, the title of any person so using or occupying it should be divested. Many briefs were filed in that case by the parties and by *amici curiae.* To support the holding that state

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violence has an ancient origin in England. Land law was once bound up with the notion of "seisin," a term connoting "peace and quiet." 2 Pollock and Maitland, The History of English Law Before the Time of Edward I (2d ed. 1909), 29, 30. As Coke put it, "he who is in possession may sit down in rest and quiet . . . ." 6 Co. Rep. 57b. To vindicate this right to undisturbed use and enjoyment of one's property, the law of trespass came into being. The leading historians of the early English law have observed the constant interplay between "our law of possession and trespass" and have concluded that since "to allow men to make forcible entries on land . . . is to invite violence," the trespass laws' protection of possession "is a prohibition of self-help in the interest of public order." 2 Pollock and Maitland, *supra,* at 31, 41.

enforcement of the agreements constituted prohibited state action even though the agreements were made by private persons to whom, if they act alone, the Amendment does not apply, two chief grounds were urged: (1) This type of agreement constituted a restraint on alienation of property, sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws, accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts, enforced by the State. See *Marsh* v. *Alabama,* 326 U. S. 501 (1946); *Terry* v. *Adams,* 345 U. S. 461 (1953); cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362 (1940).[16] (2) Nearly all the briefs in *Shelley* which asked invalidation of the restrictive covenants iterated and reiterated that judicial enforcement of this system of covenants was forbidden state action because the right of a citizen to own, use, enjoy, occupy, and dispose of property is a federal right protected by the Civil Rights Acts of 1866 and 1870, validly passed pursuant to congressional power authorized by section 5 of the Fourteenth Amendment.[17] This

[16] On this subject the Solicitor General in his brief says: "The series of covenants becomes in effect a local zoning ordinance binding those in the area subject to the restriction without their consent. Cf. *Buchanan* v. *Warley,* 245 U. S. 60. Where the State has delegated to private persons a power so similar to law-making authority, its exercise may fairly be held subject to constitutional restrictions."

[17] 42 U. S. C. § 1982, deriving from 14 Stat. 27, § 1 (1866), provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U. S. C. § 1981, deriving from 16 Stat. 144, § 16 (1870), provides: "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." The constitutionality of these statutes was recognized in *Virginia* v. *Rives,* 100 U. S. 313, 317–318 (1880), and in *Buchanan* v. *Warley,* 245 U. S. 60, 79–80 (1917).

argument was buttressed by citation of many cases, some of which are referred to in this Court's opinion in *Buchanan* v. *Warley,* 245 U. S. 60 (1917). In that case this Court, acting under the Fourteenth Amendment and the Civil Rights Acts of 1866 and 1870, struck down a city ordinance which zoned property on the basis of race, stating, 245 U. S., at 81, "The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person." *Buchanan* v. *Warley* was heavily relied on by this Court in *Shelley* v. *Kraemer, supra,* where this statement from *Buchanan* was quoted: "The Fourteenth Amendment and these statutes [of 1866 and 1870] enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." 334 U. S., at 11–12. And the Court in *Shelley* went on to cite with approval two later decisions of this Court which, relying on *Buchanan* v. *Warley,* had invalidated other city ordinances.[18]

It seems pretty clear that the reason judicial enforcement of the restrictive covenants in *Shelley* was deemed state action was not merely the fact that a state court had acted, but rather that it had acted "to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." 334 U. S., at 19. In other words, this Court held that state enforcement of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy, and use their property without regard to race or color. Thus, the line of cases from *Buchanan* through *Shelley* establishes these

[18] *Harmon* v. *Tyler,* 273 U. S. 668 (1927); *Richmond* v. *Deans,* 281 U. S. 704 (1930).

propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to "inherit, purchase, lease, sell, hold, and convey" property, prohibits a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. *Shelley* v. *Kraemer, supra,* 334 U. S., at 19. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: "the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." *Buchanan* v. *Warley, supra,* 245 U. S., at 74. This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as *both* parties are willing parties, then the principles stated in *Buchanan* and *Shelley* protect this right. But equally, when one party is unwilling, as when the property owner chooses *not* to sell to a particular person or *not* to admit that person, then, as this Court emphasized in *Buchanan,* he is entitled to rely on the guarantee of due process of law, that is, "law of the land," to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use. But petitioners here would have us hold that, despite the absence of any valid statute restricting the use of his property, the owner of Hooper's restaurant in Baltimore must not be accorded the same federally guaranteed right to occupy, enjoy, and use property given to the parties in *Buchanan* and *Shelley;* instead, petitioners would have us say that Hooper's federal right must be cut down and he must be compelled—though no statute said he must—to allow people to force their way into his restaurant and remain there over his protest. We cannot subscribe to

such a mutilating, one-sided interpretation of federal guarantees the very heart of which is equal treatment under law to all. We must never forget that the Fourteenth Amendment protects "life, liberty, or property" of all people generally, not just some people's "life," some people's "liberty," and some kinds of "property."

In concluding that mere judicial enforcement of the trespass law is not sufficient to impute to Maryland Hooper's refusal to serve Negroes, we are in accord with the Solicitor General's views as we understand them. He takes it for granted

> "that the mere fact of State intervention through the courts or other public authority in order to provide sanctions for a private decision is not enough to implicate the State for the purposes of the Fourteenth Amendment. . . . Where the only State involvement is color-blind support for every property-owner's exercise of the normal right to choose his business visitors or social guests, proof that the particular property-owner was motivated by racial or religious prejudice is not enough to convict the State of denying equal protection of the laws."

The Solicitor General also says:

> "The preservation of a free and pluralistic society would seem to require substantial freedom for private choice in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view were questioned, the philosophy of federalism leaves an area for choice to the States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts."

We, like the Solicitor General, reject the argument that the State's protection of Hooper's desire to choose customers on the basis of race by prosecuting trespassers is enough, standing alone, to deprive Hooper of his right to operate the property in his own way. But we disagree with the contention that there are other circumstances which, added to the State's prosecution for trespass, justify a finding of state action. There is no Maryland law, no municipal ordinance, and no official proclamation or action of any kind that shows the slightest state coercion of, or encouragement to, Hooper to bar Negroes from his restaurant.[19] Neither the State, the city, nor any of their agencies has leased publicly owned property to Hooper.[20] It is true that the State and city regulate the restaurants—but not by compelling restaurants to deny service to customers because of their race. License fees are collected, but this licensing has no relationship to race. Under such circumstances, to hold that a State must be held to have participated in prejudicial conduct of its licensees is too big a jump for us to take. Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices.

Neither the parties nor the Solicitor General, at least with respect to Maryland, has been able to find the present existence of any state law or local ordinance, any state court or administrative ruling, or any other official state conduct which could possibly have had any coercive influence on Hooper's racial practices. Yet despite a complete absence of any sort of proof or even respectable

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[19] Compare *Robinson* v. *Florida, ante,* p. 153; *Peterson* v. *City of Greenville,* 373 U. S. 244 (1963); *Lombard* v. *Louisiana,* 373 U. S. 267 (1963).

[20] Compare *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961).

speculation that Maryland in any way instigated or encouraged Hooper's refusal to serve Negroes, it is argued at length that Hooper's practice should be classified as "state action." This contention rests on a long narrative of historical events, both before and since the Civil War, to show that in Maryland, and indeed in the whole South, state laws and state actions have been a part of a pattern of racial segregation in the conduct of business, social, religious, and other activities. This pattern of segregation hardly needs historical references to prove it. The argument is made that the trespass conviction should be labeled "state action" because the "momentum" of Maryland's "past legislation" is still substantial in the realm of public accommodations. To that extent, the Solicitor General argues, "a State which has drawn a color line may not suddenly assert that it is color blind." We cannot accept such an *ex post facto* argument to hold the application here of Maryland's trespass law unconstitutional. Nor can we appreciate the fairness or justice of holding the present generation of Marylanders responsible for what their ancestors did in other days [21]—even if we had the right to substitute our own ideas of what the Fourteenth Amendment ought to be for what it was written and adopted to achieve.

There is another objection to accepting this argument. If it were accepted, we would have one Fourteenth Amendment for the South and quite a different and more lenient one for the other parts of the country. Present "state action" in this area of constitutional rights would

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[21] In fact, as pointed out in Part I of this opinion, Maryland has recently passed a law prohibiting racial discrimination in restaurants in Baltimore and some other parts of the State, and Baltimore has enacted a similar ordinance. Still another Maryland antidiscrimination law, of statewide application, has been enacted but is subject to referendum. See note 6, *supra*.

be governed by past history in the South—by present conduct in the North and West. Our Constitution was not written to be read that way, and we will not do it.

IV.

Our Brother GOLDBERG in his opinion argues that the Fourteenth Amendment, of its own force and without the need of congressional legislation, prohibits privately owned restaurants from discriminating on account of color or race. His argument runs something like this: (1) Congress understood the "Anglo-American" common law, as it then existed in the several States, to prohibit owners of inns and other establishments open to the public from discriminating on account of race; (2) in passing the Civil Rights Act of 1866 and other civil rights legislation, Congress meant access to such establishments to be among the "civil rights" protected; (3) finally, those who framed and passed the Fourteenth Amendment intended it, of its own force, to assure persons of all races equal access to privately owned inns and other accommodations. In making this argument, the opinion refers us to three state supreme court cases and to congressional debates on various post-Civil War civil rights bills. However, not only does the very material cited furnish scant, and often contradictory, support for the first two propositions (about the common law and the Reconstruction era statutes), but, even more important, the material furnishes absolutely none for the third proposition, which is the issue in this case.

In the first place, there was considerable doubt and argument concerning what the common law in the 1860's required even of carriers and innkeepers and still more concerning what it required of owners of other establishments. For example, in Senate debates in 1864 on a proposal to amend the charter of the street railway company in the District of Columbia to prohibit it from excluding

any person from its cars on account of color—a debate cited in MR. JUSTICE GOLDBERG'S opinion—one Senator thought that the common law would give a remedy to any Negro excluded from a street car,[22] while another argued that "it was universally conceded that railroad companies, steamboat proprietors, coach lines, had the right to make this regulation" requiring Negroes to ride in separate cars.[23] Senator Sumner of Massachusetts, one of the chief proponents of legislation of this type, admitted that there was "doubt" both as to what the street railway's existing charter required and as to what the common law required; therefore he proposed that, since the common law had "fallen into disuse" or "become disputable," Congress should act: "[L]et the rights of colored persons be placed under the protection of positive statute . . . ." [24]

Second, it is not at all clear that in the statutes relied on—the Civil Rights Act of 1866 and the Supplementary Freedmen's Bureau Act—Congress meant for those statutes to guarantee Negroes access to estab-

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[22] Cong. Globe, 38th Cong., 1st Sess., 1159 (1864) (Senator Morrill).

[23] *Id.*, at 1157–1158 (Senator Saulsbury).

[24] *Id.*, at 1158. In response to a question put by Senator Carlile of Virginia, Sumner stated that it had taken a statute to assure Negroes equal treatment in Massachusetts:

"That whole question, after much discussion in Massachusetts, has been settled by *legislation*, and the rights of every colored person are placed on an equality with those of white persons. They have the same right with white persons to ride in every public conveyance in the Commonwealth. *It was done by positive legislation* twenty-one years ago." *Ibid.* (Emphasis supplied.)

A few minutes later, Senator Davis of Kentucky asked Sumner directly if it was not true that what treatment was extended to colored people by "public hotels" incorporated by the Commonwealth of Massachusetts was left to "the judgment and discretion of the proprietors and managers of the hotels." Sumner, who had answered immediately preceding statements by Davis, left this one unchallenged. *Id.*, at 1161.

lishments otherwise open to the general public.[25] For example, in the House debates on the Civil Rights bill of 1866 cited, not one of the speakers mentioned privately owned accommodations.[26] Neither the text of the bill,[27]

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[25] A number of the remarks quoted as having been made in relation to Negroes' access to privately owned accommodations in fact dealt with other questions altogether. For example, Senator Trumbull of Illinois is quoted, *ante*, p. 293, as having said that the Negro should have the right "to go where he pleases." It is implied that such remarks cast light on the question of access to privately owned accommodations. In fact, the statement, made in the course of a debate on a bill (S. 60) to enlarge the powers of the Freedmen's Bureau, related solely to Black Laws that had been enacted in some of the Southern States. Trumbull attacked the "slave codes" which "prevented the colored man going from home," and he urged that Congress nullify all laws which would not permit the colored man "to go where he pleases." Cong. Globe, 39th Cong., 1st Sess., 322 (1866). Similarly, in another debate, on a bill (S. 9) for the protection of freedmen, Senator Wilson of Massachusetts had just told the Senate about such laws as that of Mississippi which provided that any freedman who quit his job "without good cause" during the term of his employment should, upon affidavit of the employer, be arrested and carried back to the employer. Speaking of such relics of slavery, Wilson said that freedmen were "as free as I am, to work when they please, to play when they please, to go where they please . . . ." *Id.*, at 41. Senator Trumbull then joined the debate, wondering if S. 9 went far enough and saying that to prevent States "from enslaving, under any pretense," the freedmen, he might introduce his own bill to ensure the right of freedmen to "go and come when they please." *Id.*, at 43. It was to the Black Laws—and not anything remotely to do with accommodations—that Wilson, Trumbull, and others addressed their statements. Moreover, in the debate on S. 9, Senator Trumbull expressly referred to the Thirteenth Amendment as the constitutional basis both for the pending bill and for his own bill, *ibid.*, showing that the Senate's concern was with state laws restricting the movement of, and in effect re-enslaving, colored people.

[26] Cong. Globe, 39th Cong., 1st Sess., 474–476 (1866) (Trumbull of Illinois), 599 (Trumbull), 606 (Trumbull), 1117 (Wilson of Iowa), 1151 (Thayer of Pennsylvania), 1154 (Thayer), 1157 (Thornton of Minnesota), 1159 (Windom of Minnesota).

[27] See *id.*, at 211–212.

nor, for example, the enumeration by a leading supporter of the bill of what "civil rights" the bill would protect,[28] even mentioned inns or other such facilities. Hence we are pointed to nothing in the legislative history which gives rise to an inference that the proponents of the Civil Rights Act of 1866 meant to include as a "civil right" a right to demand service at a privately owned restaurant or other privately owned establishment. And, if the 1866 Act did impose a statutory duty on innkeepers and others, then it is strange indeed that Senator Sumner in 1872 thought that an Act of Congress was necessary to require hotels, carriers, theatres, and other places to receive all races,[29] and even more strange that Congress felt obliged in 1875 to pass the Civil Rights Act of that year explicitly prohibiting discrimination by inns, conveyances, theatres, and other places of public amusement.[30]

Finally, and controlling here, there is nothing whatever in the material cited to support the proposition that the Fourteenth Amendment, without congressional legislation, prohibits owners of restaurants and other places to refuse service to Negroes. We are cited, only in passing, to general statements made in the House of Representatives to the effect that the Fourteenth Amendment was meant to incorporate the "principles" of the Civil Rights Act of 1866.[31] Whether "principles" are the same thing as "provisions," we are not told. But we have noted the serious doubt that the Civil Rights Act of 1866 even dealt with access to privately owned facilities. And it is revealing that in not one of the passages cited from the debates on the Fourteenth Amendment did any speaker suggest that the Amendment was designed,

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[28] *Id.*, at 1151 (Thayer).

[29] Cong. Globe, 42d Cong., 2d Sess., 381–383 (1872).

[30] 18 Stat. 335.

[31] Cong. Globe, 39th Cong., 1st Sess., 2459, 2462, 2465, 2467, 2538 (1866).

of itself, to assure all races equal treatment at inns and other privately owned establishments.

Apart from the one passing reference just mentioned above to the debates on the Fourteenth Amendment, a reference which we have shown had no relevance whatever to whom restaurants should serve, every one of the passages cited deals entirely with proposed *legislation*—not with the Amendment.[32] It should be obvious that what may have been proposed in connection with passage of one statute or another is altogether irrelevant to the question of what the Fourteenth Amendment does in the absence of legislation. It is interesting to note that in 1872, some years after the passage of the Fourteenth Amendment, Senator Sumner, always an indefatigable proponent of statutes of this kind, proposed in a debate to which we are cited a bill to give all citizens, regardless of color, equal enjoyment of carriers, hotels, theatres, and certain other places. He submitted that, as to hotels and carriers (but not as to theatres and places of amusement), the bill "simply reenforce[d]" the common law;[33] it is

[32] Cong. Globe, 38th Cong., 1st Sess., 839 (1864) (debate on bill to repeal law prohibiting colored persons from carrying the mail); Cong. Globe, 38th Cong., 1st Sess., 1156–1157 (1864) (debate on amending the charter of the Metropolitan Railroad Co.); Cong. Globe, 39th Cong., 1st Sess., 322, 541, 916, 936 (1866) (debate on bill to amend the Freedmen's Bureau Act, S. 60); Cong. Globe, 39th Cong., 1st Sess., 474–476, 599, 606, 1117–1118, 1151, 1154, 1157, 1159, 1263 (1866) (debate on the Civil Rights Act of 1866, S. 61); Cong. Globe, 39th Cong., 1st Sess., 41, 111 (1866) (debate on bill for the protection of freedmen from Black Codes, S. 9); Cong. Globe, 42d Cong., 2d Sess., 381–383 (1872) (debate on Sumner's amendment to bill removing political and civil disabilities on ex-Confederates, H. R. 380); 2 Cong. Rec. 4081–4082 (1874) (debate on bill to give all citizens equal enjoyment of inns, etc., S. 1). One cited passage, Cong. Globe, 39th Cong., 1st Sess., 684 (1866), consists of remarks made in debate on a proposed constitutional amendment having to do with apportionment of representation, H. R. 51.

[33] Cong. Globe, 42d Cong., 2d Sess., 383 (1872).

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significant that he did not argue that the bill would enforce a right already protected by the Fourteenth Amendment itself—the stronger argument, had it been available to him. Similarly, in an 1874 debate on a bill to give all citizens, regardless of color, equal enjoyment of inns, public conveyances, theatres, places of public amusement, common schools, and cemeteries (a debate also cited), Senator Pratt argued that the bill gave the same rights as the common law but would be a more effective remedy.[34] Again, it is significant that, like Sumner in the 1872 debates, Pratt suggested as precedent for the bill only his belief that the common law required equal treatment; he never intimated that the Fourteenth Amendment laid down such a requirement.

We have confined ourselves entirely to those debates cited in Brother GOLDBERG'S opinion the better to show how, even on its own evidence, the opinion's argument that the Fourteenth Amendment without more prohibits discrimination by restaurants and other such places rests on a wholly inadequate historical foundation. When read and analyzed, the argument is shown to rest entirely on what speakers are said to have believed bills and statutes of the time were meant to do. Such proof fails entirely when the question is, not what statutes did, but rather what the Constitution does. Nor are the three state cases[35] relied on any better evidence, for all three

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[34] 2 Cong. Rec. 4081 (1874).

[35] *Donnell* v. *State*, 48 Miss. 661 (1873); *Coger* v. *North West. Packet Co.*, 37 Iowa 145 (1873); *Ferguson* v. *Gies*, 82 Mich. 358, 46 N. W. 718 (1890). The Mississippi case does contain this observation pertinent to a court's duty to confine itself to deciding cases and interpreting constitutions and statutes and to leave the legislating to legislatures:

"Events of such vast magnitude and influence now and hereafter, have gone into history within the last ten years, that the public mind is not yet quite prepared to consider them calmly and dispas[s]ionately. To the judiciary, which ought at all times to be calm, delib-

dealt with state antidiscrimination statutes; not one purported to interpret the Fourteenth Amendment.[36] And, if we are to speak of cases decided at that time, we should recall that this Court, composed of Justices appointed by Presidents Lincoln, Grant, Hayes, Garfield, and Arthur, held in a series of constitutional interpretations beginning with the *Slaughter-House Cases*, 16 Wall. 36 (1873), that the Amendment of itself was directed at state action only and that it did not displace the power of the state and federal legislative bodies to regulate the affairs of privately owned businesses.[37]

We are admonished that in deciding this case we should remember that "it is *a constitution* we are ex-

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erate and firm, especially so when the public thought and sentiment are at all excited beyond the normal tone, is committed the high trust of declaring what are the rules of conduct and propriety prescribed by the supreme authority, and what are the rights of individuals under them. As to the policy of legislation, the judiciary have nothing to do. That is wisely left with the law-making department of the government." 48 Miss., at 675.

[36] The Attorney General of Mississippi is quoted as having argued in *Donnell* v. *State*, 48 Miss. 661 (1873), that the Mississippi Legislature had "sought, by this [antidiscrimination] act, to render any interference by congress unnecessary." *Ante*, p. 307, n. 25. This very statement shows that the Mississippi Attorney General thought in 1873, as we believe today, that the Fourteenth Amendment did not of itself guarantee access to privately owned facilities and that it took legislation, such as that of Mississippi, to guarantee such access.

[37] Brother GOLDBERG'S opinion in this case relies on *Munn* v. *Illinois*, 94 U. S. 113 (1877), which discussed the common-law rule that "when private property is devoted to a public use, it is subject to public regulation." *Id.*, at 130. This statement in *Munn* related, of course, to the extent to which a legislature constitutionally can regulate private property. *Munn* therefore is not remotely relevant here, for in this case the problem is, not what legislatures can do, but rather what the Constitution itself does. And in fact this Court some years ago rejected the notion that a State must depend upon some rationalization such as "affected with a public interest" in order for legislatures to regulate private businesses. See *Nebbia* v. *New York*, 291 U. S. 502 (1934).

pounding." [38] We conclude as we do because we remember that it *is* a Constitution and that it is our duty "to bow with respectful submission to its provisions." [39] And in recalling that it is a Constitution "intended to endure for ages to come," [40] we also remember that the Founders wisely provided the means for that endurance: changes in the Constitution, when thought necessary, are to be proposed by Congress or conventions and ratified by the States. The Founders gave no such amending power to this Court. Cf. *Ex parte Virginia,* 100 U. S. 339, 345–346 (1880). Our duty is simply to interpret the Constitution, and in doing so the test of constitutionality is not whether a law is offensive to our conscience or to the "good old common law," [41] but whether it is offensive to the Constitution. Confining ourselves to our constitutional duty to construe, not to rewrite or amend, the Constitution, we believe that Section 1 of the Fourteenth Amendment does not bar Maryland from enforcing its trespass laws so long as it does so with impartiality.

This Court has done much in carrying out its solemn duty to protect people from unlawful discrimination. And it will, of course, continue to carry out this duty in the future as it has in the past.[42] But the Fourteenth

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[38] *McCulloch* v. *Maryland,* 4 Wheat. 316, 407 (1819). (Emphasis in original.)

[39] *Cohens* v. *Virginia,* 6 Wheat. 264, 377 (1821).

[40] *McCulloch* v. *Maryland,* 4 Wheat. 316, 415 (1819).

[41] That the English common law was not thought altogether "good" in this country is suggested by the complaints of the Declaration of Independence, by the Virginia and Kentucky Resolutions, and by observations of Thomas Jefferson. The Jeffersonian Cyclopedia 163 (Foley ed. 1900).

[42] It is said that our holding "does not do justice" to a Constitution which is color blind and to this Court's decision in *Brown* v. *Board of Education,* 347 U. S. 483 (1954). *Ante,* pp. 287–288. We agree, of course, that the Fourteenth Amendment is "color blind," in the sense that it outlaws all state laws which discriminate merely on

Amendment of itself does not compel either a black man or a white man running his own private business to trade with anyone else against his will. 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 [43] or federal regulation. The case before us does not involve the power of the Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race and to trade with all if they trade with any. We express no views as to the power of Congress, acting under one or another provision of the Constitution, to prevent racial discrimination in the operation of privately owned businesses, nor upon any particular form of legislation to that end. Our sole conclusion is that Section 1 of the Fourteenth Amendment, standing alone, does not prohibit privately owned restaurants from choosing their own customers. It does not destroy what has until very recently been universally recognized in this country as the unchallenged right of a man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him to do otherwise.[44]

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account of color. This was the basis upon which the Court struck down state laws requiring school segregation in *Brown* v. *Board of Education, supra*. But there was no possible intimation in *Brown* or in any other of our past decisions that this Court would construe the Fourteenth Amendment as requiring restaurant owners to serve all races. Nor has there been any intimation that the Court should or would expand the Fourteenth Amendment because of a belief that it does not in our judgment go far enough.

[43] Cf. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963).

[44] The opinion of our Brother GOLDBERG characterizes our argument as being that the Constitution "permits" Negroes to be denied access to restaurants on account of their color. We fear that this statement

V.

Petitioners, but not the Solicitor General, contend that their convictions for trespass deny them the right of freedom of expression guaranteed by the Constitution. They argue that their

> "expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase food in a place and at a time set aside for such transactions. Their protest demonstration was a part of the 'free trade in ideas' (*Abrams* v. *United States,* 250 U. S. 616, 630, Holmes, J., dissenting) . . . ."

Their argument comes down to this: that since petitioners did not shout, obstruct Hooper's business (which the record refutes), make speeches, or display picket signs, handbills, or other means of communication, they had a perfect constitutional right to assemble and remain in the restaurant, over the owner's continuing objections, for the purpose of expressing themselves by language and "demonstrations" bespeaking their hostility to Hooper's refusal to serve Negroes. This Court's prior cases do not support such a privilege growing out of the constitutional rights of speech and assembly. Unquestionably peti-

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might mislead some readers. Precisely put, our position is that the Constitution of itself does not prohibit discrimination by those who sell goods and services. There is of course a crucial difference between the argument—which we do make—that the Constitution itself does not prohibit private sellers of goods or services from choosing their own customers, and the argument—which we do not make—that the Constitution affirmatively creates a right to discriminate which neither state nor federal legislation could impair.

tioners had a constitutional right to express these views wherever they had an unquestioned legal right to be. Cf. *Marsh* v. *Alabama, supra.* But there is the rub in this case. The contention that petitioners had a constitutional right to enter or to stay on Hooper's premises against his will because, if there, they would have had a constitutional right to express their desire to have restaurant service over Hooper's protest, is a bootstrap argument. The right to freedom of expression is a right to express views—not a right to force other people to supply a platform or a pulpit. It is argued that this supposed constitutional right to invade other people's property would not mean that a man's home, his private club, or his church could be forcibly entered or used against his will—only his store or place of business which he has himself "opened to the public" by selling goods or services for money. In the first place, that argument assumes that Hooper's restaurant *had* been opened to the public. But the whole quarrel of petitioners with Hooper was that instead of being open to all, the restaurant refused service to Negroes. Furthermore, legislative bodies with power to act could of course draw lines like this, but if the Constitution itself fixes its own lines, as is argued, legislative bodies are powerless to change them, and homeowners, churches, private clubs, and other property owners would have to await case-by-case determination by this Court before they knew who had a constitutional right to trespass on their property. And even if the supposed constitutional right is confined to places where goods and services are offered for sale, it must be realized that such a constitutional rule would apply to all businesses and professions alike. A statute can be drafted to create such exceptions as legislators think wise, but a constitutional rule could as well be applied to the smallest business as to the largest, to the most personal professional relationship as to the most impersonal business,

to a family business conducted on a man's farm or in his home as to businesses carried on elsewhere.

A great purpose of freedom of speech and press is to provide a forum for settlement of acrimonious disputes peaceably, without resort to intimidation, force, or violence. The experience of ages points to the inexorable fact that people are frequently stirred to violence when property which the law recognizes as theirs is forcibly invaded or occupied by others. Trespass laws are born of this experience. They have been, and doubtless still are, important features of any government dedicated, as this country is, to a rule of law. Whatever power it may allow the States or grant to the Congress to regulate the use of private property, the Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons. Our Constitution, noble work of wise men, was designed—all of it—to chart a quite different course: to "establish Justice, insure domestic Tranquility . . . and secure the Blessings of Liberty to ourselves and our Posterity." At times the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve both "Liberty" and equality for all. On that plan we have put our trust and staked our future. This constitutional rule of law has served us well. Maryland's trespass law does not depart from it. Nor shall we.

We would affirm.

BOUIE ET AL. *v.* CITY OF COLUMBIA.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 10. Argued October 14–15, 1963.—Decided June 22, 1964.

Petitioners, Negro "sit-in" demonstrators, entered a drugstore which extended service to Negroes at all departments except the restaurant department, and took seats in a restaurant booth without having received any notice that that department was barred to Negroes. They refused to leave upon being asked to do so, and were convicted of violating a South Carolina criminal trespass statute proscribing entry upon the lands of another after notice prohibiting such entry. Their convictions were affirmed by the State Supreme Court on the basis of a judicial construction of the statute, announced after the incident giving rise to these convictions, which construed the statute as applicable to the act of remaining on the premises of another after receiving notice to leave. *Held:* The State Supreme Court, in giving retroactive application to its new construction of the statute, has deprived petitioners of their right to fair warning of a criminal prohibition, and thus has violated the Due Process Clause of the Fourteenth Amendment. Pp. 348–363.

239 S. C. 570, 124 S. E. 2d 332, reversed.

Matthew J. Perry, Constance Baker Motley and *Jack Greenberg* argued the cause for petitioners. With them on the brief were *James M. Nabrit III, Charles L. Black, Jr., Juanita Jackson Mitchell, Tucker R. Dearing, Lincoln C. Jenkins, Derrick A. Bell, Jr., William T. Coleman, Jr., Louis H. Pollak, Richard R. Powell, Joseph L. Rauh, Jr.* and *John Silard.*

David W. Robinson II and *John W. Sholenberger* argued the cause for respondent. With them on the briefs was *David W. Robinson. Daniel R. McLeod,* Attorney General of South Carolina, entered his appearance for respondent.

Ralph S. Spritzer, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging

reversal. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Marshall, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *David Rubin.*

Mr. Justice Brennan delivered the opinion of the Court.

This case arose out of a "sit-in" demonstration at Eckerd's Drug Store in Columbia, South Carolina. In addition to a lunch counter, Eckerd's maintained several other departments, including those for retail drugs, cosmetics, and prescriptions. Negroes and whites were invited to purchase and were served alike in all departments of the store with the exception of the restaurant department, which was reserved for whites. There was no evidence that any signs or notices were posted indicating that Negroes would not be served in that department.

On March 14, 1960, the petitioners, two Negro college students, took seats in a booth in the restaurant department at Eckerd's and waited to be served. No one spoke to them or approached them to take their orders for food. After they were seated, an employee of the store put up a chain with a "no trespassing" sign attached. Petitioners continued to sit quietly in the booth. The store manager then called the city police department and asked the police to come and remove petitioners. After the police arrived at the store the manager twice asked petitioners to leave. They did not do so. The Assistant Chief of Police then asked them to leave. When petitioner Bouie asked "For what?" the Assistant Chief replied: "Because it's a breach of the peace . . . ." Petitioners still refused to leave, and were then arrested. They were charged with breach of the peace in violation of § 15–909, Code of Laws of South Carolina, 1952, but were not convicted. Petitioner Bouie was also charged

with resisting arrest, and was convicted, but the conviction was reversed by the State Supreme Court for insufficiency of evidence. Both petitioners were also charged with criminal trespass in violation of § 16–386 of the South Carolina Code of 1952 (1960 Cum. Supp.);[1] on this charge they were convicted, and their convictions were affirmed by the State Supreme Court over objections based upon the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 239 S. C. 570, 124 S. E. 2d 332. We granted certiorari to review the judgments affirming these trespass convictions. 374 U. S. 805.

We do not reach the question presented under the Equal Protection Clause, for we find merit in petitioners' contention under the Due Process Clause and reverse the judgments on that ground.

Petitioners claim that they were denied due process of law either because their convictions under the trespass statute were based on no evidence to support the charge, see *Thompson* v. *Louisville,* 362 U. S. 199, or because the statute failed to afford fair warning that the conduct for which they have now been convicted had been made a crime. The terms of the statute define the prohibited conduct as "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such en-

[1] That section provides: *"Entry on lands of another after notice prohibiting same.*—Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid for the purpose of trespassing."

try . . . ." See note 1, *supra*. Petitioners emphasize the conceded fact that they did not commit such conduct; they received no "notice . . . prohibiting such entry" either before they entered Eckerd's Drug Store (where in fact they were invited to enter) or before they entered the restaurant department of the store and seated themselves in the booth. Petitioners thus argue that, under the statute as written, their convictions would have to be reversed for want of evidence under the *Thompson* case. The argument is persuasive but beside the point, for the case in its present posture does not involve the statute "as written." The South Carolina Supreme Court, in affirming petitioners' convictions, construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave.[2] Under the statute as so construed, it is clear that there was evidence to support petitioners' convictions, for they concededly remained in the lunch counter booth after being asked to leave. Petitioners contend, however, that by applying such a construction of the statute to affirm their convictions in this case, the State has punished them for conduct that was not criminal at the time they committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits. We agree with this contention.

The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has

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[2] This construction of the statute was first announced by the South Carolina Supreme Court in *City of Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 512, decided on December 13, 1961, certiorari granted and judgment reversed, *post*, p. 551. In the instant case and in *City of Columbia* v. *Barr*, 239 S. C. 395, 123 S. E. 2d 521, reversed, *ante*, p. 146, the South Carolina Supreme Court simply relied on its ruling in *Mitchell*.

often been recognized by this Court. As was said in *United States* v. *Harriss,* 347 U. S. 612, 617,

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Thus we have struck down a state criminal statute under the Due Process Clause where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally* v. *General Const. Co.,* 269 U. S. 385, 391. We have recognized in such cases that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law," *ibid.,* and that "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453.[3]

It is true that in the *Connally* and *Lanzetta* cases, and in other typical applications of the principle, the uncertainty as to the statute's prohibition resulted from vague or overbroad language in the statute itself, and the Court concluded that the statute was "void for vagueness." The instant case seems distinguishable, since on its face the language of § 16–386 of the South Carolina Code was admirably narrow and precise; the statute applied only to "entry upon the lands of another . . . after

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[3] See also *McBoyle* v. *United States,* 283 U. S. 25, 27; *United States* v. *Cardiff,* 344 U. S. 174, 176–177; *Pierce* v. *United States,* 314 U. S. 306, 311.

notice . . . prohibiting such entry . . . ." The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical "void for vagueness" situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," as in *Lanzetta,* or to "guess at [the statute's] meaning and differ as to its application," as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce* v. *United States,* 314 U. S. 306, 311, "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot "be cured in a given

case by a construction in that very case placing valid limits on the statute," for

> "the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss. . . ." Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 541 (1951).

See Amsterdam, Note, 109 U. Pa. L. Rev. 67, 73–74, n. 34. If this view is valid in the case of a judicial construction which adds a "clarifying gloss" to a vague statute, *id.*, at 73, making it narrower or more definite than its language indicates, it must be *a fortiori* so where the construction unexpectedly broadens a statute which on its face had been definite and precise. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action," or "that *aggravates* a *crime,* or makes it *greater* than it was, when committed." *Calder* v. *Bull,* 3 Dall. 386, 390.[4] If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the

[4] Thus, it has been said that "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time." *Kring* v. *Missouri,* 107 U. S. 221, 235. See *Fletcher* v. *Peck,* 6 Cranch 87, 138; *Cummings* v. *Missouri,* 4 Wall. 277, 325–326.

same result by judicial construction. Cf. *Smith* v. *Cahoon,* 283 U. S. 553, 565. The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," Hall, General Principles of Criminal Law (2d ed. 1960), at 58–59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. *Id.,* at 61.

The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. See, *e. g., Wright* v. *Georgia,* 373 U. S. 284, 291; *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 456–458; *Barr* v. *City of Columbia, ante,* p. 146. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him. In both situations, "a federal right turns upon the status of state law as of a given moment in the past—or, more exactly, the appearance to the individual of the status of state law as of that moment . . . ." 109 U. Pa. L. Rev., *supra,* at 74, n. 34. When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 678. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a per-

son to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. Applicable to either situation is this Court's statement in *Brinkerhoff-Faris, supra,* that "if the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute." *Id.,* at 679–680.

Applying those principles to this case, we agree with petitioners that § 16–386 of the South Carolina Code did not give them fair warning, at the time of their conduct in Eckerd's Drug Store in 1960, that the act for which they now stand convicted was rendered criminal by the statute. By its terms, the statute prohibited only "entry upon the lands of another . . . after notice from the owner . . . prohibiting such entry . . . ." There was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave. Petitioners did not violate the statute as it was written; they received no notice before entering either the drugstore or the restaurant department. Indeed, they knew they would not receive any such notice before entering the store, for they were invited to purchase everything except food there. So far as the words of the statute were concerned, petitioners were given not only no "fair warning," but no warning whatever, that their conduct in Eckerd's Drug Store would violate the statute.[5]

[5] We think it irrelevant that petitioners at one point testified that they had intended to be arrested. The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective

The interpretation given the statute by the South Carolina Supreme Court in the *Mitchell* case, note 2, *supra,* so clearly at variance with the statutory language, has not the slightest support in prior South Carolina decisions. Far from equating entry after notice not to enter with remaining on the premises after notice to leave, those decisions emphasized that proof of notice before entry was necessary to sustain a conviction under § 16–386. Thus in *State* v. *Green,* 35 S. C. 266, 14 S. E. 619 (1892), the defendant was apparently in possession of the land when he was told to leave. Yet the prosecution was not for remaining on the land after such notice but for returning later, and the court said, "under the view we take of this provision of our laws, when the owner or tenant in possession of land forbids entry thereon, any person with notice who afterwards enters such premises is liable to punishment." 35 S. C., at 268, 14 S. E., at 620. In *State* v. *Cockfield,* 15 Rich. Law (S. C.) 53, 55 (1867), the court, after quoting the statute's provision (as it then read) that "Every entry on the inclosed or uninclosed lands of another, after notice from the owner or tenant, prohibiting the same, shall be deemed a misdemeanor," stated that this language "will not permit the Court to suppose that it was intended to have any other than the ordinary acceptation." See also *State* v. *Mays,* 24 S. C. 190 (1885); *State* v. *Tenny,* 58 S. C. 215, 36 S. E. 555 (1900); *State* v. *Olasov,* 133 S. C. 139, 130 S. E. 514 (1925). In sum, in the 95 years between the enactment of the statute in 1866 and the 1961 decision in the *Mitchell* case, the South Carolina cases construing the statute uniformly empha-

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expectations of particular defendants. But apart from that, the record is silent as to what petitioners intended to be arrested for, and in fact what they *were* arrested for was not trespass but breach of the peace—on which charge they were not convicted. Hence there is no basis for an inference that petitioners intended to be arrested *for violating this statute,* either by remaining on the premises after being asked to leave or by any other conduct.

sized the notice-before-entry requirement, and gave not the slightest indication that that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave.

In holding in *Mitchell* that "entry . . . after notice" includes remaining after being asked to leave, the South Carolina Supreme Court did not cite any of the cases in which it had previously construed the same statute. The only two South Carolina cases it did cite were simply irrelevant; they had nothing whatever to do with the statute, and nothing to do even with the general field of criminal trespass, involving instead the law of *civil* trespass—which has always been recognized, by the common law in general and by South Carolina law in particular, as a field quite distinct and separate from criminal trespass. *Shramek* v. *Walker,* 152 S. C. 88, 149 S. E. 331 (1929), was an action for damages for an assault and battery committed by a storekeeper upon a customer who refused to leave the store after being told to do so; the defense was that the storekeeper was entitled to use reasonable force to eject an undesirable customer. The validity of such a defense was recognized, the court stating that "while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser and justify the owner in using reasonable force to eject him." 152 S. C., at 99–100, 149 S. E., at 336. *State* v. *Williams,* 76 S. C. 135, 56 S. E. 783 (1907), was a murder prosecution in which the defense was similarly raised that the victim was a trespasser against whom the defendant was entitled to use force, and the court approved the trial judge's instruction that a person remaining on another's premises after being told to leave is a trespasser and may be ejected by reasonable force. 76 S. C., at 142, 56 S. E., at 785.

Both cases thus turned wholly upon tort principles. For that reason they had no relevance whatever, under

South Carolina law prior to the *Mitchell* case, to § 16–386 in particular or to criminal trespass in general. It is one thing to say that a person remaining on another's land after being told to leave may be ejected with reasonable force or sued in a civil action, and quite another to say he may be convicted and punished as a criminal. The clear distinction between civil and criminal trespass is well recognized in the common law. Thus it is stated, in 1 Bishop, Criminal Law, § 208 (9th ed. 1923) that

> "In civil jurisprudence, when a man does a thing by permission and not by license, and, after proceeding lawfully part way, abuses the liberty the law had given him, he shall be deemed a trespasser from the beginning by reason of this subsequent abuse. But this doctrine does not prevail in our criminal jurisprudence; for no man is punishable criminally for what was not criminal when done, even though he afterward adds either the act or the intent, yet not the two together."

Unless a trespass is "committed under such circumstances as to constitute an *actual* breach of the peace, it is not indictable at common law, but is to be redressed by a civil action only." Clark and Marshall, Crimes (5th ed. 1952), at 607.[6] There is no reason to doubt that, until the *Mitchell* case, this basic distinction was recognized in South Carolina itself. In *State* v. *Cargill,* 2 Brev. 114 (1810), the South Carolina Supreme Court reversed a conviction for forcible entry, saying

> "If the prosecutor had a better right to the possession than the defendant, he might have availed himself of his civil remedy. *The law will not punish, criminally, a private injury of this nature.*

[6] Accord, *Krauss* v. *State,* 216 Md. 369, 140 A. 2d 653 (1958); 2 Wharton, Criminal Law and Procedure, § 868 (1957); Hochheimer, Law of Crimes and Criminal Procedure, §§ 327–329 (2d ed.).

> There must be, at least, some appearance of force, by acts, words, or gestures, to constitute the offence charged." *Id.*, at 115. (Italics added.)

Under pre-existing South Carolina law the two cases relied on by the State Supreme Court were thus completely unrelated, not only to this particular statute, but to the entire field of criminal trespass. The pre-existing law gave petitioners no warning whatever that this criminal statute would be construed, despite its clear language and consistent judicial interpretation to the contrary, as incorporating a doctrine found only in civil trespass cases.[7]

The South Carolina Supreme Court in *Mitchell* also cited North Carolina decisions in support of its construction of the statute. It would be a rare situation in which the meaning of a statute of another State sufficed to afford a person "fair warning" that his own State's stat-

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[7] Indeed, it appears that far from being understood to incorporate a doctrine of civil trespass, § 16–386 is considered in South Carolina not to incorporate *any* common law of trespass, either criminal or civil—in other words, not to be a "trespass" statute at all. South Carolina has long had on its books, side by side with § 16–386, a statute that does deal *eo nomine* with "trespass"; § 16–382 makes it unlawful to "wilfully, unlawfully and maliciously . . . commit any . . . trespass upon real property in the possession of another . . . ." When South Carolina in 1960 enacted legislation dealing specifically with a refusal to leave upon request (thus filling the gap which the South Carolina Supreme Court has filled by judicial construction in *Mitchell* and in this case), it apparently gave express recognition to the distinction between the two statutes, declaring that "The provisions of this section shall be construed as being in addition to, and not as superseding, any other statutes of the State relating to trespass or entry on lands of another." South Carolina Code of 1962, § 16–388. Thus it would seem that § 16–386 is regarded by state law as dealing not with "trespass," but rather with the distinct offense of "entry on lands of another" after notice not to enter. The contention that the statute was understood to incorporate a doctrine of civil trespass law is therefore all the more untenable.

ute meant something quite different from what its words said. No such situation is presented here. The meaning ascribed by the North Carolina Supreme Court to the North Carolina criminal trespass statute—also a ruling first announced in a "sit-in" case of recent vintage—was expressly based on what criminal trespass cases in North Carolina had "repeatedly held." *State* v. *Clyburn,* 247 N. C. 455, 462, 101 S. E. 2d 295, 300 (1958). As was demonstrated above, South Carolina's criminal trespass decisions prior to *Mitchell* had "repeatedly held" no such thing, nor had they even intimated the attribution of such a meaning to the words "entry . . . after notice" in § 16–386. Moreover, if the law of other States is indeed to be consulted, it is the prior law of South Carolina, not the law first announced in *Mitchell,* that is consonant with the traditional interpretation of similar "entry . . . after notice" statutes by other state courts. Thus in *Goldsmith* v. *State,* 86 Ala. 55, 5 So. 480 (1889), the Alabama court construed § 3874 of the Alabama Code of 1887, imposing criminal penalties on one who "enters . . . after having been warned . . . not to do so," and held that

> "There must be a warning first, and an entry afterwards. One already in possession, even though a trespasser, or there by that implied permission which obtains in society, can not, by a warning then given, be converted into a violator of the statute we are construing, although he may violate some other law, civil or criminal." 86 Ala., at 57, 5 So., at 480–481.[8]

In *Martin* v. *City of Struthers,* 319 U. S. 141, 147, this Court noted that "Traditionally the American law pun-

[8] See *Pennsylvania R. Co.* v. *Fucello,* 91 N. J. L. 476, 477, 103 A. 988 (1918); *Commonwealth* v. *Richardson,* 313 Mass. 632, 48 N. E. 2d 678 (1943); *Brunson* v. *State,* 140 Ala. 201, 203, 37 So. 197, 198 (1904).

ishes persons who enter onto the property of another after having been warned by the owner to keep off." Section 16–386 of the South Carolina Code is simply an example of this "traditional American law." In construing such statutes, other state courts have recognized that they apply only to "entry onto" the property of another after notice not to enter, and have not interpreted them to cover also the distinct act of remaining on the property after notice to leave. The South Carolina Supreme Court's retroactive application of such a construction here is no less inconsistent with the law of other States than it is with the prior case law of South Carolina and, of course, with the language of the statute itself.

Our conclusion that petitioners had no fair warning of the criminal prohibition under which they now stand convicted is confirmed by the opinion held in South Carolina itself as to the scope of the statute. The state legislature was evidently aware of no South Carolina authority to the effect that remaining on the premises after notice to leave was included within the "entry after notice" language of § 16–386. On May 16, 1960, shortly after the "sit-in" demonstration in this case and prior to the State Supreme Court's decision in *Mitchell,* the legislature enacted § 16–388 of the South Carolina Code, expressly making criminal the act of failing and refusing "to leave immediately upon being ordered or requested to do so." Similarly, it evidently did not occur to the Assistant Chief of Police who arrested petitioners in Eckerd's Drug Store that their conduct violated § 16–386, for when they asked him why they had to leave the store, he answered, "Because it's a breach of the peace . . . ." And when he was asked further whether he was assisting the drugstore manager in ousting petitioners, he answered that he was not, but rather that "My purpose was that they were creating a disturbance there in the store, a breach of the peace in my

presence, and that was my purpose." It thus appears that neither the South Carolina Legislature nor the South Carolina police anticipated the present construction of the statute.

We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of *ex post facto* laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal. Application of this rule is particularly compelling where, as here, the petitioners' conduct cannot be deemed improper or immoral. Compare *McBoyle* v. *United States,* 283 U. S. 25.[9]

In the last analysis the case is controlled, we think, by the principle which Chief Justice Marshall stated for the Court in *United States* v. *Wiltberger,* 5 Wheat. 76, 96:

> "The case must be a strong one indeed, which would justify a Court in departing from the plain

[9] See Freund, 4 Vand. L. Rev., *supra,* at 540: "In applying the rule against vagueness or overbroadness something . . . should depend on the moral quality of the conduct. In order not to chill conduct within the protection of the Constitution and having a genuine social utility, it may be necessary to throw the mantle of protection beyond the constitutional periphery, where the statute does not make the boundary clear."

> meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. . . ."

The crime for which these petitioners stand convicted was "not enumerated in the statute" at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment.

Reversed.

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE joins, would, while joining in the opinion and judgment of the Court, also reverse for the reasons stated in the concurring opinion of MR. JUSTICE GOLDBERG in *Bell* v. *Maryland, ante,* p. 286.

MR. JUSTICE DOUGLAS would reverse for the reasons stated in his opinion in *Bell* v. *Maryland, ante,* p. 242.

MR. JUSTICE BLACK, with whom MR. JUSTICE HARLAN and MR. JUSTICE WHITE join, dissenting.

This case arose out of a "sit-in" demonstration which took place at Eckerd's Drug Store in Columbia, South Carolina. The petitioners, two Negro college students, went to the store, took seats in a booth in the restaurant department, and waited to be served. The store's policy was to sell to Negroes as well as whites in all departments except the restaurant. After petitioners sat down, a store employee put up a chain with a "no trespassing"

sign attached. Petitioners nevertheless continued to sit quietly in the booth. The store manager then called the city police department and asked the police to come and remove petitioners. After the police arrived at the store the manager twice asked petitioners to leave. They did not do so. The Chief of Police then twice asked them to leave. When they again refused, he arrested them both. They were charged with criminal trespass in violation of § 16–386 of the South Carolina Code,[1] tried in Recorder's Court, and found guilty.[2] On appeal the County Court in an unreported opinion affirmed the convictions. Petitioners then appealed to the Supreme Court of South Carolina, which likewise affirmed over petitioners' objections that by convicting them the State was denying them due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment. 239 S. C. 570, 124 S. E. 2d 332. This

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[1] Section 16–386, Code of Laws of South Carolina, 1952 (1960 Supp.), provides:

"*Entry on lands of another after notice prohibiting same.*—Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing."

[2] Both petitioners were also charged with breach of the peace in violation of § 15–909, Code of Laws of South Carolina, 1952, but were not convicted. Petitioner Bouie in addition was charged with and convicted of resisting arrest; that conviction was affirmed by the County Court but reversed by the State Supreme Court for insufficiency of evidence.

Court granted certiorari to consider these questions. 374 U. S. 805.

It is not contradicted that the store manager denied petitioners service and asked them to leave only because of the store's acknowledged policy of not serving Negroes in its restaurant. Apart from the fact that they remained in the restaurant after having been ordered to leave, petitioners' conduct while there was peaceful and orderly. They simply claimed that they had a right to be served; the manager insisted, as the State now insists, that he had a legal right to choose his own customers and to have petitioners removed from the restaurant after they refused to leave at his request. We have stated today in *Bell* v. *Maryland, ante,* p. 318, our belief that the Fourteenth Amendment does not of its own force compel a restaurant owner to accept customers he does not want to serve, even though his reason for refusing to serve them may be his racial prejudice, adherence to local custom, or what he conceives to be his economic self-interest, and that the arrest and conviction of a person for trespassing in a restaurant under such circumstances is not the kind of "state action" forbidden by the Fourteenth Amendment. Here as in the *Bell* case there was, so far as has been pointed out to us, no city ordinance, official utterance, or state law of any kind tending to prevent Eckerd's from serving these petitioners had it chosen to do so. Compare *Robinson* v. *Florida, ante,* p. 153; *Lombard* v. *Louisiana,* 373 U. S. 267; *Peterson* v. *City of Greenville,* 373 U. S. 244. On the first question here raised, therefore, our opinion in *Bell* v. *Maryland* is for us controlling.

Petitioners also contend that they were denied due process of law either because their conviction under the trespass statute was based on no evidence to support the charge, cf. *Thompson* v. *City of Louisville,* 362 U. S.

199, or because that statute as applied was so vague and indefinite that it failed to furnish fair warning that it prohibited a person who entered the property of another without notice not to do so from remaining after being asked to leave, cf. *Edwards* v. *South Carolina,* 372 U. S. 229; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Lanzetta* v. *New Jersey,* 306 U. S. 451. Under the State Supreme Court's construction of the statute, it is clear that there was evidence to support the conviction. There remains to be considered, therefore, only the vagueness contention, which rests on the argument that since the statutory language forbids only "entry upon the lands of another . . . after notice . . . prohibiting such entry," the statute cannot fairly be construed as prohibiting a person from remaining on property after notice to leave. We voted to sustain a Maryland trespass statute [3] against an identical challenge in *Bell* v. *Maryland, supra.* While there is some difference in the language of the South Carolina and Maryland statutes—the Maryland statute prohibited entering or crossing over the lands of another after notice not to do so, while South Carolina's statute speaks only of entry and not of crossing over—this distinction has no relevance to the statute's prohibition against remaining after being asked to leave. In holding that the South Carolina statute forbids remaining after having been asked to leave as well as entry after notice not to do so, the South Carolina courts relied in part on the fact that it has long been accepted as the common law of that State that a person who enters upon the property of another by invitation becomes a trespasser if he refuses to leave when asked to do so. See, *e. g., Shramek* v. *Walker,* 152 S. C. 88, 149 S. E. 331 (1929); *State* v. *Williams,* 76 S. C. 135, 142, 56 S. E. 783, 785 (1907); *State* v. *Lazarus,* 1 Mill Const. 34 (1817). We cannot

[3] Md. Code, Art. 27, § 577.

believe that either the petitioners [4] or anyone else could have been misled by the language of this statute into believing that it would permit them to stay on the property of another over the owner's protest without being guilty of trespass.

We would affirm.

[4] The petitioners testified that they had agreed the day before to "sit in" at the drugstore restaurant. One petitioner said that he had intended to be arrested; the other said that he had the same purpose "if it took that."

JACKSON *v.* DENNO, WARDEN.

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

No. 62. Argued December 9–10, 1963.—Decided June 22, 1964.

Petitioner after robbing a hotel fatally wounded a policeman and himself received two bullet wounds. Questioned shortly after arrival at a hospital, he admitted the shooting and the robbery. Some time later, after considerable loss of blood and soon after he had been given drugs, he was interrogated and admitted firing the first shot at the policeman. Petitioner was indicted for murder and both statements were admitted at the trial, at which petitioner's testimony differed in some important respects from the confessions. In accord with New York practice where the voluntariness of a confession is attacked, the trial court submitted that issue, with the others, to the jury. The jury was told to disregard the confession entirely if it was found involuntary, and to determine the guilt or innocence solely from other evidence; or, if it found the confession voluntary, it was to determine its truth or reliability and weigh it accordingly. The jury found petitioner guilty of first-degree murder, the New York Court of Appeals affirmed and this Court denied certiorari. Petitioner filed a petition for a writ of habeas corpus asserting that the New York procedure for determining voluntariness of a confession was unconstitutional and that his confession was involuntary. The District Court denied the petition and the Court of Appeals affirmed. *Held:*

1. Under the New York procedure, the trial judge must make a preliminary determination of the voluntariness of a confession and exclude it if in no circumstances could the confession be deemed voluntary. If the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from the undisputed facts, the judge must admit the confession and leave to the jury, under proper instructions, the determination of its voluntary character and also of its truthfulness. This procedure does not provide an adequate and reliable determination of the voluntariness of the confession and does not adequately protect the petitioner's right not to be convicted through the use of a coerced confession and is therefore violative of the Due Process Clause of the Fourteenth Amendment. *Stein* v. *New York*, 346 U. S. 156, overruled. Pp. 376–391.

(a) It is a deprivation of due process of law to base a conviction, in whole or in part, on a coerced confession, regardless of its truth, and even though there may be sufficient other evidence to support the conviction. P. 376.

(b) A defendant has a constitutional right to a fair hearing and reliable determination of the voluntariness of a confession, not influenced by its truth or falsity. Pp. 376–377.

(c) It is impossible to tell whether the trial jury found the confession voluntary and relied on it, or involuntary and supposedly ignored it, but for the Court to accept these alternatives is to fail to protect the rights of the accused. Pp. 379–391.

(d) Under the New York procedure the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness. Alternatively there is the danger that a confession found to be coerced plays some part in the jury's deliberations on guilt or innocence. Pp. 386–389.

2. Petitioner is entitled to a state court hearing on the issue of the voluntariness of the confession by a body other than the one trying his guilt or innocence, but that does not necessarily entitle him to a new trial. Pp. 391–396.

(a) If at an evidentiary hearing on the coercion issue it is determined that the confession was voluntary and admissible in evidence, a new trial is unnecessary. P. 394.

(b) If it is determined at the hearing that the confession was involuntary, a new trial, at which the confession is excluded, is required. P. 394.

309 F. 2d 573, reversed and remanded.

Daniel G. Collins argued the cause and filed a brief for petitioner.

William I. Siegel argued the cause for respondent. With him on the brief was *Edward S. Silver.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Jackson, has filed a petition for habeas corpus in the Federal District Court asserting that his conviction for murder in the New York courts is invalid because it was founded upon a confession not properly

determined to be voluntary. The writ was denied, 206 F. Supp. 759 (D. C. S. D. N. Y.), the Court of Appeals affirmed, 309 F. 2d 573 (C. A. 2d Cir.), and we granted certiorari to consider fundamental questions about the constitutionality of the New York procedure governing the admissibility of a confession alleged to be involuntary.[1] 371 U. S. 967.

I.

On June 14, 1960, at about 1 a. m., petitioner, Jackson, and Nora Elliott entered a Brooklyn hotel where Miss Elliott registered for both of them. After telling Miss Elliott to leave, which she did, Jackson drew a gun and took money from the room clerk. He ordered the clerk and several other people into an upstairs room and left the hotel, only to encounter Miss Elliott and later a policeman on the street. A struggle with the latter followed, in the course of which both men drew guns. The

[1] There is no claim in this Court that the constitutionality of the New York procedural rule governing admission of confessions is not properly before us. Although it appears that this issue was not seasonably tendered to the New York courts, exhaustion requirements were satisfied and the Federal District Court ruled on the merits of the issue, as our decision last Term in *Fay* v. *Noia*, 372 U. S. 391, clearly requires:

"[W]e have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy." *Id.*, at 426–427.

No one suggests that the petitioner, Jackson, "after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures," the only ground for which relief may be denied in federal habeas corpus for failure to raise a federal constitutional claim in the state courts. *Fay* v. *Noia*, 372 U. S. 391, 439. See also *Johnson* v. *Zerbst*, 304 U. S. 458.

policeman was fatally wounded and petitioner was shot twice in the body. He managed to hail a cab, however, which took him to the hospital.

A detective questioned Jackson at about 2 a. m., soon after his arrival at the hospital. Jackson, when asked for his name, said, "Nathan Jackson, I shot the colored cop. I got the drop on him." He also admitted the robbery at the hotel. According to the detective, Jackson was in "strong" condition despite his wounds.

Jackson was given 50 milligrams of demerol and 1/50 of a grain of scopolamine at 3:55 a. m. Immediately thereafter an Assistant District Attorney, in the presence of police officers and hospital personnel, questioned Jackson, the interrogation being recorded by a stenographer. Jackson, who had been shot in the liver and lung, had by this time lost about 500 cc. of blood. Jackson again admitted the robbery in the hotel, and then said, "Look, I can't go on." But in response to further questions he admitted shooting the policeman and having fired the first shot.[2] The interview was completed at 4 a. m. An

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[2] The confession reads in pertinent part as follows:

"Q. Where did you meet the officer? A. On the street.

"Q. What happened when you met him? A. I said, 'There was a fight upstairs.'

"Q. Then what? A. He insisted I go with him so I got the best of him.

"Q. How did you get the best of him? A. I know Judo.

"Q. You threw him over? A. Yeah.

"Q. Where was your gun while you were giving him the Judo? A. In my holster.

"Q. After you threw him to the ground, did you pull your gun? Where was the holster? A. On my shoulder.

"Q. After you threw him to the ground, what did you do about your gun? A. He went for his gun.

"Q. What did you do? A. I got mine out first.

"Q. Did you point the gun at him? A. Yeah.

[*Footnote 2 is continued on p. 372*]

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operation upon petitioner was begun at 5 a. m. and completed at 8 a. m.

Jackson and Miss Elliott were indicted for murder in the first degree and were tried together. The statements made by Jackson, both at 2 and 3:55 a. m., were introduced in evidence without objection by Jackson's counsel. Jackson took the stand in his own defense. His account of the robbery and of the shooting of the policeman differed in some important respects from his confession. According to Jackson's testimony, there was a substantial interval of time between his leaving the hotel and the shooting, and the policeman attempted to draw his gun first and fired the first shot. As to the questioning at the hospital, Jackson recalled that he was in pain and gasping for breath at the time and was refused water and told he would not be let alone until the police had the answers they wanted. He knew that he had been interrogated but could remember neither the questions nor the answers.

To counter Jackson's suggestion that he had been pressured into answering questions, the State offered the testimony of the attending physician and of several other persons. They agreed that Jackson was refused water, but because of the impending operation rather than his refusal to answer questions. On cross-examination of the doctor, Jackson's counsel, with the help of the hospital

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"Q. What did you say to him? A. Told him not to be a hero.

. . . . . .

"Q. How many shots did you fire at the officer? A. I don't know.

"Q. Was it more than one? A. Yeah.

"Q. Who fired first, you or the police officer? A. I beat him to it.

"Q. How many times did you fire at him? A. I don't know; twice probably.

"Q. Did he go down? Did he fall down? A. Yeah.

"Q. What did you do? A. I shot. I didn't know. I knew I was shot. While I was on the ground he fired the gun."

records, elicited the fact that demerol and scopolamine were administered to Jackson immediately before his interrogation. But any effect of these drugs on Jackson during the interrogation was denied.[3]

[3] The properties of these medications were described in this way:

"*By Mr. Healy:*

"Q. Could you tell us what time demerol was prescribed for him? A. From our records it was stated here. It was given at 3:55 a.m.

"Q. 3:55. Well, will that put you to sleep, demerol, Doctor? A. Well, it will make you—

"Q. Dopey? A. It will make you dopey.

"Q. And what was the other one, atropine—

"The Court: Atropine, a-t-r-o-p-i-n-e-.

"*By Mr. Healy:*

"Q. Atropine, what is that? A. Oh, it is not atropine. It is scopolamine.

"Q. What is that, Doctor? A. It dries up the secretion.

"The Court: It dries up the secretion?

"The Witness: Of the throat and the pharynges and the upper respiratory tract.

. . . . .

"*Redirect Examination by Mr. Schor:*

"Q. Doctor, you just told us that demerol makes a person dopey; right? A. Yes, sir.

"Q. How long does it take from the time it is administered until the patient feels the effect? A. Well, it manifests its action about fifteen minutes after it is injected.

"Q. Fifteen minutes later? A. About fifteen minutes later.

. . . . .

"*By Mr. Healy:*

. . . . .

"Q. So if a person was in good health and took demerol, the effect wouldn't be any different? A. Not much different.

. . . . .

"Q. How about a person who, for instance, has been shot through the liver, as your report shows there? Would that be the same time as for a healthy person? Do you mean that, Doctor? A. Yes, sir.

. . . . .

"Q. The report—the record shows that he had lost 500 cc's of blood. Now, I am asking you, would that make any difference in the time that this—A. I don't think so."

Although Jackson's counsel did not specifically object to the admission of the confession initially, the trial court indicated its awareness that Jackson's counsel was questioning the circumstances under which Jackson was interrogated.[4]

In his closing argument, Jackson's counsel did not ask for an acquittal but for a verdict of second-degree murder or manslaughter. Counsel's main effort was to negative the premeditation and intent necessary to first-degree murder and to separate the robbery felony from the killing. He made much of the testimony tending to show a substantial interval between leaving the hotel and the beginning of the struggle with the policeman. The details of that struggle and the testimony indicating the policeman fired the first shot were also stressed.

Consistent with the New York practice where a question has been raised about the voluntariness of a confession, the trial court submitted that issue to the jury along with the other issues in the case. The jury was told that if it found the confession involuntary, it was to disregard it entirely, and determine guilt or innocence

[4] "The Court: Judge Healy raised the point in cross-examination that sedation of a kind was administered to the patient.

"Mr. Healy: Some kind.

"The Court: And therefore he is going to contend and he does now that the confession hasn't the weight the law requires. Is that your purpose?

"Mr. Healy: That's correct. There are two, one statement and another statement. One statement to the police and one statement to the District Attorney.

. . . . . .

"Mr. Healy: Mr. Lentini being the hearing reporter. That was taken at 3:55.

"The Court: That's the time that you say he was in no mental condition to make the statement?

"Mr. Healy: That's correct.

"The Court: Is that correct?

"Mr. Healy: That's correct."

solely from the other evidence in the case; alternatively, if it found the confession voluntary, it was to determine its truth or reliability and afford it weight accordingly.[5]

The jury found Jackson guilty of murder in the first degree, Miss Elliott of manslaughter in the first degree. Jackson was sentenced to death, Miss Elliott to a prison

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[5] "If you determine that it was a confession, the statement offered here, and if you determine that Jackson made it, and if you determine that it is true; if you determine that it is accurate, before you may use it, the law still says you must find that it is voluntary, and the prosecution has the burden of proving that it was a voluntary confession. The defendant merely comes forward with the suggestion that it was involuntary, but the burden is upon the prosecution to show that it was voluntary.

"Under our law, a confession, even if true and accurate, if involuntary, is not admissible, and if it is left for the jury to determine whether or not it was voluntary, its decision is final. If you say it was involuntarily obtained, it goes out of the case. If you say it was voluntarily made, the weight of it is for you. So I am submitting to you as a question of fact to determine whether or not (a) this statement was made by Jackson, or allegedly made by Jackson, whether it was a voluntary confession, and whether it was true and accurate. That decision is yours.

"Should you decide under the rules that I gave you that it is voluntary, true and accurate, you may use it, and give it the weight you feel that you should give it. If you should decide that it is involuntary, exclude it from the case. Do not consider it at all. In that event, you must go to the other evidence in the case to see whether or not the guilt of Jackson was established to your satisfaction outside of the confession, beyond a reasonable doubt.

"If you should determine that Jackson made this confession, and that it was a true confession, and you have so determined from the evidence, then if you should decide that it was gotten by influence, of fear produced by threats, and if that is your decision, then reject it.

"I repeat to you again, the burden of proving the accuracy, truth, and the voluntariness of the confession always rests upon the prosecution."

There is no issue raised as to whether these instructions stated an adequate and correct federal standard for determining the voluntariness of Jackson's confession.

term. Jackson's conviction was affirmed by the New York Court of Appeals, 10 N. Y. 2d 780, 177 N. E. 2d 59, its remittitur being amended to show that it had necessarily passed upon the voluntariness of the confession and had found that Jackson's constitutional rights had not been violated. 10 N. Y. 2d 816, 178 N. E. 2d 234. Certiorari was denied here. 368 U. S. 949. Jackson then filed a petition for habeas corpus, claiming that the New York procedure for determining the voluntariness of a confession was unconstitutional and that in any event his confession was involuntary. After hearing argument and examining the state court record the District Court denied the petition without holding an evidentiary hearing. Indicating that it is the trier of fact who must determine the truth of the testimony of prisoner and official alike and resolve conflicts in the testimony, the court found "no clear and conclusive proof that these statements were extorted from him, or that they were given involuntarily." Nor was any constitutional infirmity found in the New York procedure. 206 F. Supp. 759 (D. C. S. D. N. Y.). The Court of Appeals, after noting the conflicting testimony concerning the coercion issue and apparently accepting the State's version of the facts, affirmed the conviction. 309 F. 2d 573 (C. A. 2d Cir.).

II.

It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers* v. *Richmond,* 365 U. S. 534, and even though there is ample evidence aside from the confession to support the conviction. *Malinski* v. *New York,* 324 U. S. 401; *Stroble* v. *California,* 343 U. S. 181; *Payne* v. *Arkansas,* 356 U. S. 560. Equally clear is the defendant's constitutional right at some stage in the proceedings

to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. *Rogers* v. *Richmond, supra.* In our view, the New York procedure employed in this case did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment. We therefore reverse the judgment below denying the writ of habeas corpus.

III.

Under the New York rule, the trial judge must make a preliminary determination regarding a confession offered by the prosecution and exclude it if in no circumstances could the confession be deemed voluntary.[6] But if the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts, the judge "must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness."[7] *Stein* v. *New York,* 346 U. S. 156, 172. If an issue of coercion is presented, the judge may not resolve conflicting evidence or arrive at his independent appraisal of the voluntariness

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[6] See *People* v. *Weiner,* 248 N. Y. 118, 161 N. E. 441; *People* v. *Leyra,* 302 N. Y. 353, 98 N. E. 2d 553.

[7] *People* v. *Doran,* 246 N. Y. 409, 416–417, 159 N. E. 379, 381–382; *People* v. *Leyra, supra.* Under the New York rule the judge is not required to exclude the jury while he hears evidence as to voluntariness and perhaps is not allowed to do so. *People* v. *Brasch,* 193 N. Y. 46, 85 N. E. 809; *People* v. *Randazzio,* 194 N. Y. 147, 87 N. E. 112.

of the confession, one way or the other. These matters he must leave to the jury.

This procedure has a significant impact upon the defendant's Fourteenth Amendment rights. In jurisdictions following the orthodox rule, under which the judge himself solely and finally determines the voluntariness of the confession, or those following the Massachusetts procedure,[8] under which the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused,[9] the judge's con-

[8] We raise no question here concerning the Massachusetts procedure. In jurisdictions following this rule, the judge hears the confession evidence, himself resolves evidentiary conflicts and gives his own answer to the coercion issue, rejecting confessions he deems involuntary and admitting only those he believes voluntary. It is only the latter confessions that are heard by the jury, which may then, under this procedure, disagree with the judge, find the confession involuntary and ignore it. Given the integrity of the preliminary proceedings before the judge, the Massachusetts procedure does not, in our opinion, pose hazards to the rights of a defendant. While no more will be known about the views of the jury than under the New York rule, the jury does not hear all confessions where there is a fair question of voluntariness, but only those which a judge actually and independently determines to be voluntary, based upon all of the evidence. The judge's consideration of voluntariness is carried out separate and aside from issues of the reliability of the confession and the guilt or innocence of the accused and without regard to the fact the issue may again be raised before the jury if decided against the defendant. The record will show the judge's conclusions in this regard and his findings upon the underlying facts may be express or ascertainable from the record.

Once the confession is properly found to be voluntary by the judge, reconsideration of this issue by the jury does not, of course, improperly affect the jury's determination of the credibility or probativeness of the confession or its ultimate determination of guilt or innocence.

[9] Not all the States and federal judicial circuits can be neatly classified in accordance with the above three procedures. In many cases it is difficult to ascertain from published appellate court opinions whether the New York or Massachusetts procedure, or some variant of either, is being followed. Some jurisdictions apparently leave the

clusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his findings upon disputed issues of fact are expressly stated or may be ascertainable from the record. In contrast, the New York jury returns only a general verdict upon the ultimate question of guilt or innocence. It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing

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matter entirely to the discretion of the trial court; others state the rule differently on different occasions; and still others deal with voluntariness in terms of trustworthiness, which is said to be a matter for the jury, an approach which, in the light of this Court's recent decision in *Rogers* v. *Richmond,* 365 U. S. 534, may make these cases of doubtful authority.

Because of the above-described difficulties, annotators and commentators have not attempted definitive classifications of jurisdictions following the Massachusetts procedure separate from those following the New York practice. See 170 ALR 568; 85 ALR 870; Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317 (1954); 3 Wigmore, Evidence (3d ed. 1940), § 861, n. 3.

"The formal distinction between the New York and Massachusetts procedures is often blurred in appellate opinions. Under either procedure, the trial court faced with an objection to the admissibility of a confession, must rule on that objection, i. e., must determine whether the jury is to hear the challenged confession. But the controlling question is different under the two procedures. . . . Since courts which require the ultimate submission of the voluntariness issue to the jury refer to the necessity of a judicial determination without specifying its character, it is sometimes difficult to determine which of two procedures is being approved . . . ." Meltzer, *supra,* at 323–324.

Those jurisdictions where it appears unclear from appellate court opinions whether the Massachusetts or New York procedure is used in the trial court are listed in the Appendix.

to show that these matters were resolved at all, one way or the other.

These uncertainties inherent in the New York procedure were aptly described by the Court in *Stein* v. *New York*, 346 U. S. 156, 177–178:

> "Petitioners suffer a disadvantage inseparable from the issues they raise in that this procedure does not produce any definite, open and separate decision of the confession issue. Being cloaked by the general verdict, petitioners do not know what result they really are attacking here. . . .
>
> This method of trying the coercion issue to a jury is not informative as to its disposition. Sometimes the record permits a guess or inference, but where other evidence of guilt is strong a reviewing court cannot learn whether the final result was to receive or to reject the confessions as evidence of guilt. Perhaps a more serious, practical cause of dissatisfaction is the absence of any assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard."

A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined. But did the jury in Jackson's case make these critical determinations, and if it did, what were these determinations?

Notwithstanding these acknowledged difficulties inherent in the New York procedure, the Court in *Stein* found

no constitutional deprivation to the defendant. The Court proceeded to this conclusion on the basis of alternative assumptions regarding the manner in which the jury might have resolved the coercion issue. Either the jury determined the disputed issues of fact against the accused, found the confession voluntary and therefore properly relied upon it; or it found the contested facts in favor of the accused and deemed the confession involuntary, in which event it disregarded the confession in accordance with its instructions and adjudicated guilt based solely on the other evidence. On either assumption the Court found no error in the judgment of the state court.

We disagree with the Court in *Stein;* for in addition to sweeping aside its own express doubts that the jury acted at all in the confession matter the Court, we think, failed to take proper account of the dangers to an accused's rights under either of the alternative assumptions.

On the assumption that the jury found the confession voluntary, the Court concluded that it could properly do so. But this judgment was arrived at only on the further assumptions that the jury had actually found the disputed issues of fact against the accused and that these findings were reliably arrived at in accordance with considerations that are permissible and proper under federal law. These additional assumptions, in our view, were unsound.

The New York jury is at once given both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime. The jury may therefore believe the confession and believe that the defendant has committed the very act with which he is charged, a circumstance which may seriously distort judgment of the credibility of the accused and assessment of the testimony concerning the critical facts surrounding his confession.

In those cases where without the confession the evidence is insufficient, the defendant should not be convicted if the jury believes the confession but finds it to be involuntary. The jury, however, may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession, a policy which has divided this Court in the past, see *Stein* v. *New York, supra,* and an issue which may be reargued in the jury room. That a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free. Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the implicit findings become suspect.[10]

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[10] "It may be urged that the commitment of our system to jury trial presupposes the acceptance of the assumptions that the jury follows its instructions, that it will make a separate determination of the voluntariness issue, and that it will disregard what it is supposed to disregard. But that commitment generally presupposes that the judge will apply the exclusionary rules before permitting evidence to be submitted to the jury." Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 327 (1954). See also 9 Wigmore, Evidence (3d ed. 1940), § 2550.

"The case of a confession induced by physical or mental coercion deserves special mention. The protection which the orthodox rule or the Massachusetts doctrine affords the accused is of major value to him. A fair consideration of the evidence upon the preliminary question is essential; in this consideration the truth or untruth of the confession is immaterial. Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, and, regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. . . . The rule excluding a coerced confession is more than a rule excluding hearsay. Whatever may be said about the orthodox reasoning that its exclusion is on the ground of its probable falsity, the fact is that the considerations which call for the exclusion of a coerced confession

The danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness, as well as its conclusion upon that issue itself, is sufficiently serious to preclude their unqualified acceptance upon review in this Court, regardless of whether there is or is not sufficient other evidence to sustain a finding of guilt. In Jackson's case, he confessed to having fired the first shot, a matter very relevant to the charge of first degree murder. The jury also heard the evidence of eyewitnesses to the shooting. Jackson's testimony going to his physical and mental condition when he confessed and to the events which took place at that time, bearing upon the issue of voluntariness, was disputed by the prosecution. The obvious and serious danger is that the jury disregarded or disbelieved Jackson's testimony pertaining to the confession because it believed he had done precisely what he was charged with doing.

The failure to inquire into the reliability of the jury's resolution of disputed factual considerations underlying its conclusion as to voluntariness—findings which were afforded decisive weight by the Court in *Stein*—was not a mere oversight but stemmed from the premise underlying the *Stein* opinion that the exclusion of involuntary confessions is constitutionally required solely because of the inherent untrustworthiness of a coerced confession. It followed from this premise that a reliable or true confession need not be rejected as involuntary and that evidence corroborating the truth or falsity of the confession and the guilt or innocence of the accused is indeed pertinent to

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are those which call for the protection of every citizen, whether he be in fact guilty or not guilty. And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed." Morgan, Some Problems of Proof Under the Anglo-American System of Litigation (1956), 104–105.

the determination of the coercion issue.[11] This approach in *Stein* drew a sharp dissent from Mr. Justice Frankfurter, who admonished that considerations of truth or falsity of the admissions are to be put aside in determining the question of coercion:

> "This issue must be decided without regard to the confirmation of details in the confession by reliable other evidence. The determination must not be influenced by an irrelevant feeling of certitude that the accused is guilty of the crime to which he confessed." 346 U. S., at 200.

This underpinning of *Stein* proved to be a short-lived departure from prior views of the Court, see *Malinski* v. *New York,* 324 U. S. 401; *Lyons* v. *Oklahoma,* 322 U. S. 596, 597; *Gallegos* v. *Nebraska,* 342 U. S. 55, 63, and was unequivocally put to rest in *Rogers* v. *Richmond, supra,* where it was held that the reliability of a confession has

[11] "[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so." 346 U. S., at 192. The Court further noted in *Stein* that the detailed confessions were "corroborated throughout by other evidence," 346 U. S., at 168, and felt it necessary to recount the context in which the confessions were obtained only from "a summary of the whole testimony," 346 U. S., at 162. The premise that the veracity of the confession is highly pertinent to its voluntariness can also be gleaned from other statements in the opinion. In response to an objection that the New York procedure deterred testimony from a defendant on the facts surrounding the obtaining of the confession, the Court stated: "If in open court, free from violence or threat of it, defendants had been obliged to admit incriminating facts, it might bear on the credibility of their claim that the same facts were admitted to the police only in response to beating." *Id.,* at 175.

nothing to do with its voluntariness—proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne. Reflecting his dissent in *Stein,* Mr. Justice Frankfurter wrote for a unanimous Court on this issue in *Rogers, supra:*

> "[T]he weight attributed to the impermissible consideration of truth and falsity . . . entering into the Connecticut trial court's deliberations concerning the admissibility of the confessions, may well have distorted, by putting in improper perspective, even its findings of historical fact. Any consideration of this 'reliability' element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known." 365 U. S., at 545.[12]

It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only

[12] *Rogers* dealt with the situation where the state trial judge and the State Supreme Court applied a legal standard of voluntariness which incorporated reliability of the confession as a relevant determinant of voluntariness, whereas there is no issue here that the jury was explicitly instructed to consider reliability in deciding whether Jackson's confession was admissible, although it should be noted that the jury was not clearly told not to consider this element. The jury is indeed told to and necessarily does consider this element in determining the weight to be given the confession. The issues of probativeness and voluntariness are discrete and have different policy underpinnings, but are often confused. See note 13, *infra.* Regardless of explicit instructions, however, we think the likelihood that these forbidden considerations enter the jury's deliberations too great for us to ignore. Under the New York procedure the jury is not asked to resolve the issue of voluntariness until after the State has carried its burden of proof on the issue of a defendant's guilt and thus not until after matters pertaining to the defendant's guilt, including matters corroborative of the confession itself, are fully explored at trial. See Morgan, note 10, *supra.*

because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," *Blackburn* v. *Alabama,* 361 U. S. 199, 206–207, and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano* v. *New York,* 360 U. S. 315, 320–321. Because it did not recognize this "complex of values," *Blackburn, supra,* underlying the exclusion of involuntary confessions, *Stein* also ignored the pitfalls in giving decisive weight to the jury's assumed determination of the facts surrounding the disputed confession.

Under the New York procedure, the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness. Indeed the jury is told to determine the truthfulness of the confession in assessing its probative value.[13] As a consequence, it cannot be

[13] The question of the credibility of a confession, as distinguished from its admissibility, is submitted to the jury in jurisdictions following the orthodox, Massachusetts, or New York procedure. Since the evidence surrounding the making of a confession bears on its credibility, such evidence is presented to the jury under the orthodox rule not on the issue of voluntariness or competency of the confession, but on the issue of its weight. Just as questions of admissibility of evidence are traditionally for the court, questions of credibility, whether of a witness or a confession, are for the jury. This is so because trial courts do not direct a verdict against the defendant on issues involving credibility. Nothing in this opinion, of course, touches upon these ordinary rules of evidence relating to impeachment.

A finding that the confession is voluntary prior to admission no more affects the instructions on or the jury's view of the reliability

assumed, as the *Stein* Court assumed, that the jury reliably found the facts against the accused.[14] This unsound assumption undermines *Stein's* authority as a precedent and its view on the constitutionality of the New York procedure. The admixture of reliability and voluntariness in the considerations of the jury would itself entitle a defendant to further proceedings in any case in which the essential facts are disputed, for we cannot determine how the jury resolved these issues and will not assume that they were reliably and properly resolved against the accused. And it is only a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant and which would permit the jury to consider the confession in adjudicating guilt or innocence.

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of the confession than a finding in a preliminary hearing that evidence was not obtained by an illegal search affects the instructions on or the jury's view of the probativeness of this evidence.

The failure to distinguish between the discrete issues of voluntariness and credibility is frequently reflected in opinions which declare that it is the province of the court to resolve questions of admissibility of confessions, as with all other questions of admissibility of evidence, the province of the jury to determine issues of credibility, but which then approve the trial court's submission of the voluntariness question to the jury. Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 320–321 (1954).

[14] Another assumption of *Stein*—that a criminal conviction can stand despite the introduction of a coerced confession if there is sufficient other evidence to sustain a finding of guilt and if the confession is only tentatively submitted to the jury—an assumption also related to the view that the use of involuntary confessions is constitutionally proscribed solely because of their illusory trustworthiness, has also been rejected in the decisions of this Court. It is now clear that reversal follows if the confession admitted in evidence is found to be involuntary in this Court regardless of the possibility that the jury correctly followed instructions and determined the confession to be involuntary. *Haynes* v. *Washington,* 373 U. S. 503; *Spano* v. *New York,* 360 U. S. 315; *Payne* v. *Arkansas,* 356 U. S. 560; *Leyra* v. *Denno,* 347 U. S. 556.

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But we do not rest on this ground alone, for the other alternative hypothesized in *Stein*—that the jury found the confession involuntary and disregarded it—is equally unacceptable. Under the New York procedure, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false. If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession? [15]

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[15] See *Rideau* v. *Louisiana,* 373 U. S. 723, 727: "But we do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" See also *Delli Paoli* v. *United States,* 352 U. S. 232, 248: "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." (Dissenting opinion of Mr. Justice Frankfurter relating to use of a confession of a co-defendant under limiting instructions.) *Krulewitch* v. *United States,* 336 U. S. 440, 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal* v. *United States,* 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *Baltimore & Ohio R. Co.,* 167 F. 2d 54." (Concurring opinion of Mr. Justice Jackson relating to limiting instructions concerning use of declarations of co-conspirators.) *Shepard* v. *United States,* 290 U. S. 96, 104; *United States* v. *Leviton,* 193 F. 2d 848, 865 (C. A. 2d Cir.), certiorari denied, 343 U. S. 946; Morgan, Functions of Judge and Jury in the Determination of Preliminary

It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness, if this is the course it took, was affected by the other evidence showing the confession was true. But the New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore.[16]

As reflected in the cases in this Court, police conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will.

> "[T]his Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisti-

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Questions of Fact, 43 Harv. L. Rev. 165, 168–169 (1929); Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 326 (1954).

[16] Further obstacles to a reliable and fair determination of voluntariness under the New York procedure result from the ordinary rules relating to cross-examination and impeachment. Although not the case here, an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination, both of whose prejudicial effects are familiar. The fear of such impeachment and extensive cross-examination in the presence of the jury that is to pass on guilt or innocence as well as voluntariness may induce a defendant to remain silent, although he is perhaps the only source of testimony on the facts underlying the claim of coercion. Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence. Cf. *United States* v. *Carignan,* 342 U. S. 36.

cated modes of 'persuasion.'" *Blackburn* v. *Alabama,* 361 U. S. 199, 206.[17]

Expanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused's will has been overborne—facts are frequently disputed, questions of credibility are often crucial, and inferences to be drawn from established facts are often determinative. The overall determination of the voluntariness of a confession has thus become an exceedingly sensitive task, one that requires facing the issue squarely, in illuminating isolation and unbeclouded by other issues and the effect of extraneous but prejudicial evidence. See *Wilson* v. *United States,* 162 U. S. 613; *United States* v. *Carignan,* 342 U. S. 36; *Smith* v. *United States,* 348 U. S. 147.[18] Where pure

[17] Also see *Gallegos* v. *Colorado,* 370 U. S. 49; *Culombe* v. *Connecticut,* 367 U. S. 568; *Spano* v. *New York,* 360 U. S. 315; *Fikes* v. *Alabama,* 352 U. S. 191; *Watts* v. *Indiana,* 338 U. S. 49; *Turner* v. *Pennsylvania,* 338 U. S. 62; *Harris* v. *South Carolina,* 338 U. S. 68.

[18] In *Wilson* v. *United States,* 162 U. S. 613, an early confession case in this Court, where the trial judge first ruled on the voluntariness of the confession before submitting the issue to the jury, the procedure governing admissibility in the federal courts was stated as follows:

"When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. *Commonwealth* v. *Preece,* 140 Mass. 276." *Id.,* at 624.

The Court held in *United States* v. *Carignan,* 342 U. S. 36, 38, that it was reversible error for a federal court to refuse a defendant the opportunity to testify before the judge and out of the presence of the jury on the facts surrounding the obtaining of a confession claimed to be involuntary. The Court explicitly followed this holding in *Smith* v. *United States,* 348 U. S. 147, 151, when a defendant's asserted deprivation of a preliminary hearing on admissibility before the judge during the trial was rejected solely because "the trial judge had already held a hearing on this issue in passing on the pretrial motion to suppress evidence."

factual considerations are an important ingredient, which is true in the usual case, appellate review in this Court is, as a practical matter, an inadequate substitute for a full and reliable determination of the voluntariness issue in the trial court and the trial court's determination, *pro tanto*, takes on an increasing finality. The procedures used in the trial court to arrive at its conclusions on the coercion issue progressively take on added significance as the actual measure of the protection afforded a defendant under the Due Process Clause of the Fourteenth Amendment against the use of involuntary confessions. These procedures must, therefore, be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend.[19] In our view, the New York procedure falls short of satisfying these constitutional requirements. *Stein* v. *New York* is overruled.

IV.

We turn to consideration of the disposition of this case. Since Jackson has not been given an adequate hearing upon the voluntariness of his confession he must be given one, the remaining inquiry being the scope of that hearing and the court which should provide it.

This is not a case where the facts concerning the circumstances surrounding the confession are undisputed and the task is only to judge the voluntariness of the confession based upon the clearly established facts and in accordance with proper constitutional standards. Here there are substantial facts in dispute: Jackson said that he was in pain from his wounds, gasping for breath and unable to talk long. A state witness described Jackson

[19] Whether the trial judge, another judge, or another jury, but not the convicting jury, fully resolves the issue of voluntariness is not a matter of concern here. To this extent we agree with *Stein* that the States are free to allocate functions between judge and jury as they see fit.

as in strong condition despite his wounds. According to Jackson, the police told him he could have no water and would not be left alone until he gave the answers the authorities desired. These verbal threats were denied by the State. Whereas Jackson claimed his will was affected by the drugs administered to him, the State's evidence was that the drugs neither had nor could have had any effect upon him at all. Whether Jackson is entitled to relief depends upon how these facts are resolved, for if the State is to be believed we cannot say that Jackson's confession was involuntary, whereas if Jackson's version of the facts is accepted the confession was involuntary and inadmissible.[20]

As we have already said, Jackson is entitled to a reliable resolution of these evidentiary conflicts. If this case were here upon direct review of Jackson's conviction, we could not proceed with review on the assumption that these disputes had been resolved in favor of the State for as we have held we are not only unable to tell how the jury resolved these matters but, even if the jury did resolve them against Jackson, its findings were infected with impermissible considerations and accordingly cannot be controlling here. Cf. *Rogers* v. *Richmond, supra.* Likewise, a federal habeas corpus court, in the face of the unreliable state court procedure, would not be justified in disposing of the petition solely upon the basis of the undisputed portions of the record. At the very least, *Townsend* v. *Sain,* 372 U. S. 293, would require a full evidentiary hearing to determine the factual context in which Jackson's confession was given.

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[20] We reject Jackson's alternative claim that even the undisputed evidence in this record shows his confession to have been involuntary. If the State's version of the facts is accepted, we have only Jackson's ready and coherent responses to brief questioning by the police unaffected by drugs or threats or coercive behavior on the part of the police; and his apparently strong condition at the time despite his two bullet wounds.

However, we think that the further proceedings to which Jackson is entitled should occur initially in the state courts rather than in the federal habeas corpus court. Jackson's trial did not comport with constitutional standards and he is entitled to a determination of the voluntariness of his confession in the state courts in accordance with valid state procedures; the State is also entitled to make this determination before this Court considers the case on direct review or a petition for habeas corpus is filed in a Federal District Court. This was the disposition in *Rogers* v. *Richmond, supra,* where, in a case coming to this Court from a denial of a habeas corpus, the Court ascertained a trial error of constitutional dimension: [21]

> "A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment. . . . [T]he State, too, has a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts and juries. To require a federal judge exercising habeas corpus jurisdiction to attempt to combine within himself the proper functions of judge and jury in a state trial—to ask him to approximate the sympathies of the defendant's peers or to make the rulings which the state trial judge might make . . . —is potentially to prejudice state defendants claiming federal rights and to pre-empt functions that belong to state machinery in the administration of state criminal law." 365 U. S., at 547–548.

It is New York, therefore, not the federal habeas corpus court, which should first provide Jackson with that which

[21] Compare *Townsend* v. *Sain,* 372 U. S. 293, with *Rogers* v. *Richmond,* 365 U. S. 534.

he has not yet had and to which he is constitutionally entitled—an adequate evidentiary hearing productive of reliable results concerning the voluntariness of his confession. It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. Jackson's position before the District Court, and here, is that the issue of his confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence. So far we agree and hold that he is now entitled to such a hearing in the state court. But if at the conclusion of such an evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for Jackson has already been tried by a jury with the confession placed before it and has been found guilty. True, the jury in the first trial was permitted to deal with the issue of voluntariness and we do not know whether the conviction rested upon the confession; but if it did, there is no constitutional prejudice to Jackson from the New York procedure if the confession is now properly found to be voluntary and therefore admissible. If the jury relied upon it, it was entitled to do so. Of course, if the state court, at an evidentiary hearing, redetermines the facts and decides that Jackson's confession was involuntary, there must be a new trial on guilt or innocence without the confession's being admitted in evidence.[22]

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[22] In *Rogers* v. *Richmond, supra,* the Court, upon finding that the state trial judge applied a wholly erroneous standard of voluntariness, ordered a new trial. But the alternative disposition urged and rejected in that case was an evidentiary hearing in the Federal District Court. It does not appear that the Court considered the possi-

Obviously, the State is free to give Jackson a new trial if it so chooses, but for us to impose this requirement before the outcome of the new hearing on voluntariness is known would not comport with the interests of sound judicial administration and the proper relationship between federal and state courts. We cannot assume that New York will not now afford Jackson a hearing that is consistent with the requirements of due process. Indeed, New York thought it was affording Jackson such a hearing, and not without support in the decisions of this Court,[23] when it submitted the issue of voluntariness to the same jury that adjudicated guilt. It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence. But as to Jackson, who has already been convicted and now seeks collateral relief, we cannot say that the Constitution requires a new trial if in a soundly conducted collateral proceeding, the confession which was admitted at the trial is fairly deter-

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bility of a more limited initial hearing in the state court with a new trial dependent upon the outcome of the hearing.

[23] Except for *Stein* v. *New York, supra,* the procedure invalidated herein was not questioned in confession cases decided by this Court. In *Spano* v. *New York,* 360 U. S. 315, the Court read *Stein* as holding that "when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it." Also see *Thomas* v. *Arizona,* 356 U. S. 390; *Lyons* v. *Oklahoma,* 322 U. S. 596; *Wilson* v. *United States,* 162 U. S. 613. But cf. *United States* v. *Carignan,* 342 U. S. 36, 38:

"We think it clear that this defendant was entitled to such an opportunity to testify [in the absence of the jury as to the facts surrounding the confession]. An involuntary confession is inadmissible. *Wilson* v. *United States,* 162 U. S. 613, 623. Such evidence would be pertinent to the inquiry on admissibility and might be material and determinative. The refusal to admit the testimony was reversible error."

mined to be voluntary. Accordingly, the judgment denying petitioner's writ of habeas corpus is reversed and the case is remanded to the District Court to allow the State a reasonable time to afford Jackson a hearing or a new trial, failing which Jackson is entitled to his release.

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

ARIZONA: *State* v. *Preis,* 89 Ariz. 336, 338–339, 362 P. 2d 660, 661–662, cert. denied, 368 U. S. 934 (conflicts in the evidence for the jury but "it must appear to the reasonable satisfaction of the trial court that the confession was not obtained by threats, coercion or promises of immunity"). *State* v. *Hudson,* 89 Ariz. 103, 358 P. 2d 332, states the Arizona practice more clearly. If the judge finds that the confession is voluntary, he may admit it into evidence; if it appears the confession was not voluntary, he must not let the confession go before the jury. See also *State* v. *Pulliam,* 87 Ariz. 216, 349 P. 2d 781.

GEORGIA: *Downs* v. *State,* 208 Ga. 619, 68 S. E. 2d 568 (admissible where no evidence of involuntariness offered at preliminary examination). *Garrett* v. *State,* 203 Ga. 756, 48 S. E. 2d 377 (before admission prima facie showing of voluntariness is required; showing is satisfied where testimony as to voluntariness is not contradicted). *Coker* v. *State,* 199 Ga. 20, 33 S. E. 2d 171 (confession should have been excluded by trial judge even though there was testimony that the defendant was not coerced).

IDAHO: *State* v. *Van Vlack,* 57 Idaho 316, 65 P. 2d 736 (primarily for the trial court to determine the admissibility of a confession). *State* v. *Dowell,* 47 Idaho 457, 276 P. 39; *State* v. *Andreason,* 44 Idaho 396, 257 P. 370 (the question of voluntariness primarily for the determination of the trial court). *State* v. *Nolan,* 31 Idaho 71,

169 P. 295 (judge must determine if freely and vountarily made before admission).

MICHIGAN: *People* v. *Crow,* 304 Mich. 529, 8 N. W. 2d 164 (question of voluntariness for the jury). *People* v. *Preston,* 299 Mich. 484, 300 N. W. 853 (confession first ruled voluntary in preliminary examination; at trial the question is for the jury). *People* v. *Cleveland,* 251 Mich. 542, 232 N. W. 384 (involuntariness issue should be carefully scrutinized and confession excluded if involuntary; if conflict in evidence, matter for jury).

MINNESOTA: *State* v. *Schabert,* 218 Minn. 1, 15 N. W. 2d 585 (if evidence creates issue of fact as to trustworthiness, that issue should be submitted to the jury on proper instructions, citing *Wilson* v. *United States,* 162 U. S. 613, and New York, Pennsylvania and Massachusetts cases). *State* v. *Nelson,* 199 Minn. 86, 271 N. W. 114 (if judge finds confession admissible, the jury should also be allowed to pass on the question of voluntariness).

MISSOURI: *State* v. *Statler,* 331 S. W. 2d 526 (if the evidence is conflicting and issue close in preliminary hearing, the issue should be tried again at trial so that both trial judge and jury may pass upon it with additional evidence adduced at trial). *State* v. *Phillips,* 324 S. W. 2d 693. *State* v. *Bradford,* 262 S. W. 2d 584 (trial court not obliged to submit question to jury because there is substantial evidence showing the confession is voluntary; where the issue is close, the trial court may decide the question after additional evidence adduced at trial is in).

OHIO: *Burdge* v. *State,* 53 Ohio St. 512, 42 N. E. 594 (matters preliminary to the admission of evidence for the court but where court is in doubt about the matter, it may leave the question to the jury, relying on Massachusetts case). *State* v. *Powell,* 105 Ohio App. 529, 148 N. E. 2d 230, appeal dismissed, 167 Ohio St. 319, 148 N. E. 2d 232, cert. denied, 359 U. S. 964 (where the trial judge dis-

believes the defendant's testimony as to voluntariness, he may leave the issue to the jury; preliminary hearing in presence of jury is discretionary).

OREGON: *State* v. *Bodi,* 223 Ore. 486, 354 P. 2d 831 (judge in his discretion may determine voluntariness or allow jury to decide whether the confession is voluntary and *trustworthy*). *State* v. *Nunn,* 212 Ore. 546, 321 P. 2d 356 (trial judge is not finally to determine whether a confession is voluntary but is to determine whether the State's proof warrants a finding of voluntariness; if so, the jury can consider voluntariness in determining the weight to be afforded the confession).

PENNSYLVANIA: *Commonwealth* v. *Senk,* 412 Pa. 184, 194 A. 2d 221 (confession determined to be conditionally admissible after preliminary hearing). *Commonwealth* v. *Ross,* 403 Pa. 358, 365, 169 A. 2d 780, 784, cert. denied, 368 U. S. 904 (both trial court in preliminary hearing and jury applied the proper standard in determining the confession to be voluntary; trial court added that the question was one of fact for the jury). *Commonwealth* v. *Spardute,* 278 Pa. 37, 122 A. 161 (where State's evidence shows confession is voluntary, matter is for the jury; only coercive practices inducing a false confession render it inadmissible).

SOUTH CAROLINA: *State* v. *Bullock,* 235 S. C. 356, 111 S. E. 2d 657, appeal dismissed, 365 U. S. 292 (after trial judge decides the confession is admissible, jury may pass on the question of voluntariness). *State* v. *Livingston,* 223 S. C. 1, 73 S. E. 2d 850, cert. denied, 345 U. S. 959. *State* v. *Scott,* 209 S. C. 61, 38 S. E. 2d 902 (question is for the judge in first instance, but if the judge is doubtful or evidence is conflicting, the jury is necessarily the final arbiter).

SOUTH DAKOTA: *State* v. *Hinz,* 78 S. D. 442, 103 N. W. 2d 656 (court may resolve the question one way or the

other, or, if very doubtful, leave it to the jury). *State* v. *Nicholas,* 62 S. D. 511, 253 N. W. 737 (procedure is discretionary with the trial judge, but the more frequent practice is for the trial judge to decide the question of voluntariness). *State* v. *Montgomery,* 26 S. D. 539, 128 N. W. 718 (question of voluntariness may be submitted to the jury where the evidence is conflicting).

Texas: *Marrufo* v. *State,* 172 Tex. Cr. R. 398, 357 S. W. 2d 761 (confession not inadmissible as a matter of law). *Odis* v. *State,* 171 Tex. Cr. R. 107, 345 S. W. 2d 529 (proper for trial judge to find confession admissible as a matter of law and recognize an issue in regard to voluntariness for jury's consideration). *Bingham* v. *State,* 97 Tex. Cr. R. 594, 262 S. W. 747 (reversible error for the court to fail to pass on the admissibility of a confession since defendant entitled to the court's judgment on the matter; only if trial judge disbelieves evidence going to involuntariness should the confession be admitted).

Wisconsin: *State* v. *Bronston,* 7 Wis. 2d 627, 97 N. W. 2d 504 (issue of *trustworthiness* of a confession for the jury). *Pollack* v. *State,* 215 Wis. 200, 253 N. W. 560 (unless the confession is wholly *untrustworthy,* it is to be submitted to the jury).

Wyoming: The only expression of the Wyoming court is found in *Clay* v. *State,* 15 Wyo. 42, 86 P. 17, where, in dictum, it is said that the jury may pass on the question if the admissions appear to be voluntary or the evidence is conflicting.

The same difficulty of classification exists in the federal judicial circuits. The cases in which the New York practice is said to be followed are generally instances where the defendant declines to offer any evidence in a preliminary examination after the Government has shown the confession to be voluntary. See *Hayes* v. *United States,* 296 F. 2d 657 (C. A. 8th Cir.), cert. denied, 369 U. S. 867. *United States* v. *Echeles,* 222 F. 2d 144 (C. A. 7th Cir.),

cert. denied, 350 U. S. 828; *United States* v. *Leviton,* 193 F. 2d 848 (C. A. 2d Cir.); or where the trial judge finds the confession to be voluntary, *United States* v. *Anthony,* 145 F. Supp. 323 (D. C. M. D. Pa.).

Other opinions from the United States Courts of Appeals for the various circuits indicate that they follow the Massachusetts or orthodox procedure. See *United States* v. *Gottfried,* 165 F. 2d 360, 367 (C. A. 2d Cir.), cert. denied, 333 U. S. 860; *United States* v. *Lustig,* 163 F. 2d 85, 88–89 (C. A. 2d Cir.), cert. denied, 332 U. S. 775; *McHenry* v. *United States,* 308 F. 2d 700 (C. A. 10th Cir.); *Andrews* v. *United States,* 309 F. 2d 127 (C. A. 5th Cir.), cert. denied, 372 U. S. 946; *Leonard* v. *United States,* 278 F. 2d 418 (C. A. 9th Cir.); *Smith* v. *United States,* 268 F. 2d 416 (C. A. 9th Cir.); *Shores* v. *United States,* 174 F. 2d 838 (C. A. 8th Cir.); *Denny* v. *United States,* 151 F. 2d 828 (C. A. 4th Cir.), cert. denied, 327 U. S. 777; *Kemler* v. *United States,* 133 F. 2d 235 (C. A. 1st Cir.); *Murphy* v. *United States,* 285 F. 801 (C. A. 7th Cir.), cert. denied, 261 U. S. 617.

The Court of Appeals for the District of Columbia, however, does seem to sanction a variation of the New York practice, with the requirement that the judge hold a full preliminary hearing, at which the defendant may testify, outside the presence of the jury. It is not clear what the trial judge must find before admitting the confession and submitting the issue of voluntariness to the jury. *Sawyer* v. *United States,* 112 U. S. App. D. C. 381, 303 F. 2d 392; *Wright* v. *United States,* 102 U. S. App. D. C. 36, 250 F. 2d 4 (where the confession could be found voluntary, the issue is for the jury). Although there apparently are no recent cases, the Court of Appeals for the Sixth Circuit appears to follow the New York practice. *Anderson* v. *United States,* 124 F. 2d 58, rev'd 318 U. S. 350; *McBryde* v. *United States,* 7 F. 2d 466.

MR. JUSTICE BLACK, with whom MR. JUSTICE CLARK joins as to Part I of this opinion, dissenting in part and concurring in part.

I.

In *Stein* v. *New York,* 346 U. S. 156, 177–179, this Court sustained the constitutionality of New York's procedure under which the jury, rather than the trial judge, resolves disputed questions of fact as to the voluntariness of confessions offered against defendants charged with crime. I think this holding was correct and would adhere to it. While I dissented from affirmance of the convictions in *Stein,* my dissent went to other points; I most assuredly did not dissent because of any doubts about a State's constitutional power in a criminal case to let the jury, as it does in New York, decide the question of a confession's voluntariness. In fact, I would be far more troubled about constitutionality should either a State or the Federal Government declare that a jury in trying a defendant charged with crime is compelled to accept without question a trial court's factual finding that a confession was voluntarily given. Whatever might be a judge's view of the voluntariness of a confession, the jury in passing on a defendant's guilt or innocence is, in my judgment, entitled to hear and determine voluntariness of a confession along with other factual issues on which its verdict must rest.

The Court rests its challenge to the reliability of jury verdicts in this field on its belief that it is unfair to a defendant, and therefore unconstitutional,[1] to have the question of voluntariness of a confession submitted to a jury until the trial judge has first canvassed the matter completely and made a final decision that the confession

[1] I am by no means suggesting that I believe that it is within this Court's power to treat as unconstitutional every state law or procedure that the Court believes to be "unfair."

is voluntary. New York does not do this, although, as pointed out in *Stein, supra,* 346 U. S., at 174, the trial judge does have much power to consider this question both before and after a jury's final verdict is entered.[2] If a rule like that which the Court now holds to be constitutionally required would in actual practice reduce the number of confessions submitted to juries, this would obviously be an advantage for a defendant whose alleged confession was for this reason excluded. Even assuming this Court's power to fashion this rule, I am still unable to conclude that this possible advantage to some defendants is reason enough to create a new constitutional rule striking down the New York trial-by-jury practice.

Another reason given by the Court for invalidating the New York rule is that it is inherently unfair and therefore unconstitutional to permit the jury to pass on voluntariness, since the jury, even though finding a confession to have been coerced, may nevertheless be unwilling to follow the court's instruction to disregard it, because it may also believe the confession is true, the defendant is guilty, and a guilty person ought not be allowed to escape punishment. This is a possibility, of a nature that is inherent in any confession fact-finding by human fact-finders—a possibility present perhaps as much in judges as in jurors. There are, of course, no statistics available, and probably none could be gathered, accurately reporting whether and to what extent fact-finders (judges or juries) are affected as the Court says they may be.

Though able to cite as support for its holding no prior cases suggesting that the New York practice is so unfair to defendants that it must be held unconstitutional, the

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[2] The trial judge may set aside a verdict if he believes it to be "against the weight of the evidence." The state appellate courts exercise the same power and may set verdicts aside if for any reason they believe that "justice requires" them to do so. See N. Y. Code Crim. Proc. §§ 465, 528.

Court does refer to commentators who have made the suggestion.[3] None of these commentators appears to have gathered factual data to support his thesis, nor does it appear that their arguments are at all rooted in the actual trial of criminal cases. Theoretical contemplation is a highly valuable means of moving toward improved techniques in many fields, but it cannot wholly displace the knowledge that comes from the hard facts of everyday experience. With this in mind it is not amiss to recall that the New York method of submitting the question of voluntariness to the jury without first having a definitive ruling by the judge not only has more than a century of history behind it but appears from the cases to be the procedure used in 15 States, the District of Columbia, and Puerto Rico, has been approved by this Court as a federal practice, see *Smith* v. *United States,* 348 U. S. 147, 150–151; compare *Wilson* v. *United States,* 162 U. S. 613, 624, and has been approved in six of the 11 United States Court of Appeals Circuits.[4] Fourteen other States appear to require full-scale determinations as to voluntariness both by the trial court and the jury.[5] Another 20 States require the trial judge first to decide the question of voluntariness for purposes of "admissibility" but have him then submit that question for the jury to consider in determining "credibility" or "weight."[6] Yet no matter what label a particular State gives its rule and no matter what the purpose for which the rule says the jury may consider the confession's voluntariness, it is clear that all the States, in the end, do let the jury pass on

[3] Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165, 168–169 (1929); Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 325–326 (1954).

[4] For a survey of the rule in the various States and in the Federal Judicial Circuits, see Appendices A and B.

[5] See Appendix A.

[6] See Appendix A.

the question of voluntariness for itself, whether in deciding "admissibility" or "credibility."

The Court in note 8 of its opinion indicates that a State may still, under the new constitutional rule announced today, permit a trial jury to determine voluntariness if first the trial judge has "fully and independently resolved the issue against the accused." *Ante*, p. 378. In other words, the Constitution now requires the judge to make this finding, and the jury's power to pass on voluntariness is a mere matter of grace, not something constitutionally required. If, as the Court assumes, allowing the jury to pass on the voluntariness of a confession before the judge has done so will "seriously distort" the jury's judgment, I fail to understand why its judgment would not be similarly distorted by its being allowed to pass on voluntariness after the judge has decided that question. Yet, of course, the jury passing on guilt or innocence must, under any fair system of criminal procedure, be allowed to consider and decide whether an offered confession is voluntary in order to pass on its credibility. But it should be obvious that, under the Court's new rule, when a confession does come before a jury it will have the judge's explicit or implicit stamp of approval on it. This Court will find it hard to say that the jury will not be greatly influenced, if not actually coerced, when what the trial judge does is the same as saying "*I* am convinced that this confession is voluntary, but, *of course,* you may decide otherwise if you like." [7]

Another disadvantage to the defendant under the Court's new rule is the failure to say anything about the

[7] The Court's opinion indicates that the judge will not make any such statement to the jury. If the Court here is holding that it is constitutionally impermissible for the judge to tell the jury that he himself has decided that the confession is voluntary, that is one thing. As I read the decisions in this field, however, I am far from persuaded that there are not many States in which the judge does admit the confession along with his statement that it is voluntary.

burden of proving voluntariness. The New York rule does now and apparently always has put on the State the burden of convincing the jury beyond a reasonable doubt that a confession is voluntary. See *Stein* v. *New York, supra,* 346 U. S., at 173 and n. 17; *People* v. *Valletutti,* 297 N. Y. 226, 229, 78 N. E. 2d 485, 486. The Court has not said that its new constitutional rule, which requires the judge to decide voluntariness, also imposes on the State the burden of proving this fact beyond a reasonable doubt. Does the Court's new rule allow the judge to decide voluntariness merely on a preponderance of the evidence? If so, this is a distinct disadvantage to the defendant. In fashioning its new constitutional rule, the Court should not leave this important question in doubt.

Finally, and even more important, the Court's new constitutional doctrine is, it seems to me, a strange one when we consider that both the United States Constitution and the New York Constitution (Art. I, § 2) establish trial by jury of criminal charges as a bedrock safeguard of the people's liberties.[8] The reasons given by the Court for this downgrading of trial by jury appear to me to challenge the soundness of the Founders' great faith in jury trials. Implicit in these constitutional requirements of jury trial is a belief that juries can be trusted to decide factual issues. Stating the obvious fact that "it is only a *reliable* determination on the voluntariness issue which satisfies the constitutional rights of the defendant . . . ," *ante,* p. 387 (emphasis supplied), the Court concludes, however, that a jury's finding on this question is tainted by inherent unreliability. In making this judgment about the unreliability of juries, the Court, I believe, overlooks the fact that the Constitution itself long ago made the decision that juries *are* to be trusted.

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[8] New York Const., Art. I, § 2, also provides that a defendant may not waive trial by jury if the crime with which he is charged may be punishable by death.

Today's holding means that hundreds of prisoners in the State of New York have been convicted after the kind of trial which the Court now says is unconstitutional. The same can fairly be said about state prisoners convicted in at least 14 other States listed in Appendix A–II to this opinion and federal prisoners convicted in 6 federal judicial circuits listed in Appendix B–II. Certainly if having the voluntariness of their confessions passed on only by a jury is a violation of the Fourteenth Amendment, as the Court says it is, then not only Jackson but all other state and federal prisoners already convicted under this procedure are, under our holding in *Fay* v. *Noia*, 372 U. S. 391, entitled to release unless the States and Federal Government are still willing and able to prosecute and convict them. Cf. *Doughty* v. *Maxwell*, 376 U. S. 202; *Pickelsimer* v. *Wainwright*, 375 U. S. 2. The disruptive effect which today's decision will have on the administration of criminal justice throughout the country will undoubtedly be great. Before today's holding is even a day old the Court has relied on it to vacate convictions in 11 cases from Arizona, Pennsylvania, Texas, New York, and the District of Columbia.[9] Nevertheless, if I thought that submitting the issue of voluntariness to the jury really denied the kind of trial commanded by the Constitution, I would not hesitate to reverse on that ground even if it meant overturning convictions in all the States, instead of in just about one-third of them. But for the reasons already stated it is

[9] *McNerlin* v. *Denno*, *post*, p. 575 (trial in New York court); *Muschette* v. *United States*, *post*, p. 569 (C. A. D. C. Cir.); *Pea* v. *United States*, *post*, p. 571 (C. A. D. C. Cir.); *Owen* v. *Arizona*, *post*, p. 574; *Catanzaro* v. *New York*, *post*, p. 573; *Del Hoyo* v. *New York*, *post*, p. 570; *Lathan* v. *New York*, *post*, p. 566; *Oister* v. *Pennsylvania*, *post*, p. 568; *Senk* v. *Pennsylvania*, *post*, p. 562; *Harris* v. *Texas*, *post*, p. 572; *Lopez* v. *Texas*, *post*, p. 567. See also *Berman* v. *United States*, *post*, p. 530, at 532, n. (dissenting opinion).

impossible for me to believe that permitting the jury alone to pass on factual issues of voluntariness violates the United States Constitution, which attempts in two different places to guarantee trial by jury. My wide difference with the Court is in its apparent holding that it has constitutional power to change state trial procedures because of its belief that they are not fair. There is no constitutional provision which gives this Court any such lawmaking power. I assume, although the Court's opinion is not clear on this point, that the basis for its holding is the "due process of law" clause of the Fourteenth Amendment. The Court appears to follow a judicial philosophy which has relied on that clause to strike down laws and procedures in many fields because of a judicial belief that they are "unfair," are contrary to "the concept of ordered liberty," "shock the conscience," or come within various other vague but appealing catch phrases. See, *e. g., Betts* v. *Brady,* 316 U. S. 455; *Rochin* v. *California,* 342 U. S. 165; *Palko* v. *Connecticut,* 302 U. S. 319; see also cases collected in *Adamson* v. *California,* 332 U. S. 46, 83, n. 12 (dissenting opinion). I have repeatedly objected to the use of the Due Process Clause to give judges such a wide and unbounded power, whether in cases involving criminal procedure, see, *e. g., Betts* v. *Brady, supra,* 316 U. S., at 474 (dissenting opinion); cf. *Gideon* v. *Wainwright,* 372 U. S. 335, or economic legislation, see *Ferguson* v. *Skrupa,* 372 U. S. 726. I believe that "due process of law" as it applies to trials means, as this Court held in *Chambers* v. *Florida,* 309 U. S. 227, 235–238, a trial according to the "law of the land," including all constitutional guarantees, both explicit and necessarily implied from explicit language, and all valid laws enacted pursuant to constitutionally granted powers. See also *Adamson* v. *California, supra,* 332 U. S., at 68 (dissenting opinion). I think that the New York law here held invalid is

in full accord with all the guarantees of the Federal Constitution and that it should not be held invalid by this Court because of a belief that the Court can improve on the Constitution.

II.

The Fifth Amendment provides that no person shall in any criminal case be compelled to be a witness against himself. We have held in *Malloy* v. *Hogan, ante,* p. 1, that the Fourteenth Amendment makes this provision applicable to the States. And we have held that this provision means that coerced confessions cannot be used as evidence to convict a defendant charged with crime. See, *e. g., Haynes* v. *Washington,* 373 U. S. 503; *Chambers* v. *Florida,* 309 U. S. 227; *Brown* v. *Mississippi,* 297 U. S. 278. It is our duty when a conviction for crime comes to us based in part on a confession to review the record to decide for ourselves whether that confession was freely and voluntarily given. In so doing we must reexamine the facts to be certain that there has been no constitutional violation, and our inquiry to determine the facts on which constitutional rights depend cannot be cut off by factfindings at the trial, whether by judge or by jury. *Blackburn* v. *Alabama,* 361 U. S. 199, 205, n. 5; *Payne* v. *Arkansas,* 356 U. S. 560, 561–562; cf. *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 18–19. In the present case the undisputed evidence showed:

> Petitioner committed a robbery in a hotel in New York. He ran from the place to get away, was accosted by a policeman, and after some words each shot the other. The policeman died. Petitioner caught a cab and went directly to a hospital, arriving there about 2 a. m. In response to a question he admitted that he had shot the policeman. By 3:35 a. m. he had lost a considerable amount of blood from serious gunshot wounds in his liver and one lung and was awaiting an operation which began

about an hour later and lasted about two hours. At 3:55 he was given doses of demerol and scopolamine, which are sedative and relaxing in their effects. During all the time he was in the hospital policemen were there. He had no counsel present and no friends. Immediately after the demerol and scopolamine were given him the assistant district attorney and a stenographer arrived. At the time he was questioned by the assistant district attorney he was thirsty and asked for water which was denied him either because, as he testified, he could get no water until he confessed, or because, as the State's witnesses testified, it was the hospital's rule not to give water to preoperative patients. While in this situation and condition he gave in answer to questions the confession that was used against him.

This last confession (but not the first statement, given at 2 a. m.) was, I think, shown by the above evidence without more to have been given under circumstances that were "inherently coercive," see *Ashcraft* v. *Tennessee,* 322 U. S. 143, 154, and therefore was not constitutionally admissible under the Fifth and Fourteenth Amendments. For this reason I would reverse the judgment below and remand the case to the District Court with directions to grant the petitioner's application for habeas corpus and to release him from custody unless the State within a reasonable time sets aside his former conviction and grants him a new trial.

III.

The Court, instead of reversing for an entire new trial, gives New York a reasonable time for a judge to hold a new hearing, including the taking of new testimony, to determine whether the confession was voluntary. Even were I to accept the Court's holding that the New York rule is unconstitutional, I should agree with my Brother

Clark that what Jackson is entitled to is a complete new trial. The Court's action makes use of the technique recently invented in *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, under which a defendant is subjected to "piecemeal prosecution." 355 U. S., at 250 (dissenting opinion). I think, as I said in *Shotwell,* that such a fragmentizing process violates the spirit of the constitutional protection against double jeopardy, even if it does not infringe it technically. In *Shotwell* the use of the piecemeal procedure was justified by what were called the "peculiar circumstances" of that case. 355 U. S., at 243. But, as this case demonstrates, the availability and usefulness of the *Shotwell* device in sustaining convictions and denying defendants a new trial where all the facts are heard together are too apparent for its use to be confined to exceptional cases. I think *Shotwell* was wrong and should be overruled, not extended as the Court is doing.

APPENDIX A TO OPINION OF MR. JUSTICE BLACK.

Rules Followed in the States to Determine Voluntariness of Confessions.

The decisions cited below are leading cases or cases illustrating the rules followed in the respective States; the listings are not exhaustive. This classification does not take account of such variables as burden of proof, whether a preliminary hearing is held, whether the jury is present at such a hearing, etc. A few States have two or more lines of cases suggesting approval of two or more conflicting rules; in such situations the State is listed under the view which in light of most recent cases appears the dominant one, and decisions seemingly inconsistent are pointed out. Where a court clearly has changed from one rule to another, even though without specifically overruling its earlier decisions, those earlier deci-

sions are not cited. *E. g., Commonwealth* v. *Knapp,* 10 Pick. (27 Mass.) 477, 495–496 (1830), approved the "orthodox" rule, which, since *Commonwealth* v. *Preece,* 140 Mass. 276, 277, 5 N. E. 494, 495 (1885), is no longer followed in Massachusetts.[1]

As the Court, my Brother HARLAN, and commentators in this field have aptly pointed out, the rules stated in the decisions are not always clear, so that in some cases there may be room for doubt as to precisely what procedure a State follows. I believe, however, that a full and fair reading of the cases listed below as following the New York rule will show that there is every reason to believe that many people have been convicted of crimes in those States with cases so classified after trials in which judges did not resolve factual issues and determine the question of voluntariness.

I. *Wigmore*[2] *or "Orthodox" Rule.*

Judge hears all the evidence and then rules on voluntariness for purpose of admissibility of confession; jury considers voluntariness as affecting weight or credibility of confession.

ALABAMA: *Phillips* v. *State,* 248 Ala. 510, 520, 28 So. 2d 542, 550 (1946); *Blackburn* v. *State,* 38 Ala. App. 143, 149, 88 So. 2d 199, 204 (1954), cert. denied, 264 Ala. 694, 88 So. 2d 205 (1956), vacated and remanded on another point *sub nom. Blackburn* v. *Alabama,* 354

[1] The law in Nevada on this point apparently has not been settled. Although *State* v. *Williams,* 31 Nev. 360, 375–376, 102 P. 974, 980–981 (1909), appeared to establish the "orthodox" rule, the Supreme Court of Nevada in *State* v. *Fouquette,* 67 Nev. 505, 533–534, 221 P. 2d 404, 419 (1950), cert. denied, 341 U. S. 932 (1951), stated that the question was still open and that the *Williams* case had not decided it. The trial judge in the *Fouquette* case applied the Massachusetts rule.

[2] See 3 Wigmore, Evidence (3d ed. 1940), § 861.

U. S. 393 (1957), aff'd, 40 Ala. App. 116, 109 So. 2d 736 (1958), cert. denied, 268 Ala. 699, 109 So. 2d 738 (1959), rev'd on another point *sub nom. Blackburn* v. *Alabama,* 361 U. S. 199 (1960).

COLORADO: *Read* v. *People,* 122 Colo. 308, 318–319, 221 P. 2d 1070, 1076 (1950); *Downey* v. *People,* 121 Colo. 307, 317, 215 P. 2d 892, 897 (1950); *Osborn* v. *People,* 83 Colo. 4, 29–30, 262 P. 892, 901 (1927); *Fincher* v. *People,* 26 Colo. 169, 173, 56 P. 902, 904 (1899). But see *Bruner* v. *People,* 113 Colo. 194, 217–218, 156 P. 2d 111, 122 (1945) (seems to state Massachusetts rule). And see *Roper* v. *People,* 116 Colo. 493, 497–499, 179 P. 2d 232, 234–235 (1947) (approves *Bruner* but also quotes from *Osborn* v. *People, supra,* a case clearly stating the "orthodox" rule).

CONNECTICUT: *State* v. *Buteau,* 136 Conn. 113, 124, 68 A. 2d 681, 686 (1949), cert. denied, 339 U. S. 903 (1950); *State* v. *McCarthy,* 133 Conn. 171, 177, 49 A. 2d 594, 597 (1946).

FLORIDA: *Leach* v. *State,* 132 So. 2d 329, 333 (1961), cert. denied, 368 U. S. 1005 (1962); *Graham* v. *State,* 91 So. 2d 662, 663–664 (1956); *Bates* v. *State,* 78 Fla. 672, 676, 84 So. 373, 374–375 (1919).

ILLINOIS: *People* v. *Miller,* 13 Ill. 2d 84, 97, 148 N. E. 2d 455, 462, cert. denied, 357 U. S. 943 (1958); *People* v. *Fox,* 319 Ill. 606, 616–619; 150 N. E. 347, 351–352 (1926).

INDIANA: *Caudill* v. *State,* 224 Ind. 531, 538, 69 N. E. 2d 549, 552 (1946).

KANSAS: *State* v. *Seward,* 163 Kan. 136, 144–146, 181 P. 2d 478, 484–485 (1947); *State* v. *Curtis,* 93 Kan. 743, 750–751, 145 P. 858, 861 (1915).

KENTUCKY: Ky. Rev. Stat. § 422.110; *Cooper* v. *Commonwealth,* 374 S. W. 2d 481, 482–483 (1964); *Bass* v. *Commonwealth,* 296 Ky. 426, 431, 177 S. W. 2d 386, 388,

cert. denied, 323 U. S. 745 (1944); *Herd* v. *Commonwealth,* 294 Ky. 154, 156–157, 171 S. W. 2d 32, 33 (1943).

LOUISIANA: *State* v. *Freeman,* 245 La. 665, 670–671, 160 So. 2d 571, 573 (1964); *State* v. *Kennedy,* 232 La. 755, 762–763, 95 So. 2d 301, 303 (1957); *State* v. *Wilson,* 217 La. 470, 486, 46 So. 2d 738, 743–744 (1950), aff'd, 341 U. S. 901 (1951).

MISSISSIPPI: *Jones* v. *State,* 228 Miss. 458, 474–475, 88 So. 2d 91, 98 (1956); *Brooks* v. *State,* 178 Miss. 575, 581–582, 173 So. 409, 411 (1937); *Ellis* v. *State,* 65 Miss. 44, 47–48, 3 So. 188, 189–190 (1887).

MONTANA: *State* v. *Rossell,* 113 Mont. 457, 466, 127 P. 2d 379, 383 (1942); *State* v. *Dixson,* 80 Mont. 181, 196, 260 P. 138, 144 (1927); *State* v. *Sherman,* 35 Mont. 512, 518–519, 90 P. 981, 982 (1907).

NEW MEXICO: *State* v. *Armijo,* 64 N. M. 431, 434–435, 329 P. 2d 785, 787–788 (1958); *State* v. *Ascarate,* 21 N. M. 191, 201–202, 153 P. 1036, 1039 (1915), appeal dismissed, 245 U. S. 625 (1917). But cf. *State* v. *Armijo,* 18 N. M. 262, 268, 135 P. 555, 556–557 (1913) (dictum that trial judge may in his discretion follow Massachusetts rule).

NORTH CAROLINA: *State* v. *Outing,* 255 N. C. 468, 472, 121 S. E. 2d 847, 849 (1961); *State* v. *Davis,* 253 N. C. 86, 94–95, 116 S. E. 2d 365, 370 (1960), cert. denied, 365 U. S. 855 (1961).

NORTH DAKOTA: *State* v. *English,* 85 N. W. 2d 427, 430 (1957); *State* v. *Nagel,* 75 N. D. 495, 515–516, 28 N. W. 2d 665, 677 (1947); *State* v. *Kerns,* 50 N. D. 927, 935–936, 198 N. W. 698, 700 (1924).

TENNESSEE: *Tines* v. *State,* 203 Tenn. 612, 619, 315 S. W. 2d 111, 114 (1958), cert. denied, 358 U. S. 889 (1958); *Wynn* v. *State,* 181 Tenn. 325, 328–329, 181 S. W. 2d 332, 333 (1944); cf. *Boyd* v. *State,* 2 Humph. (21 Tenn.) 39, 40–41 (1840).

Utah: *State* v. *Braasch,* 119 Utah 450, 455, 229 P. 2d 289, 291 (1951), cert. denied, 342 U. S. 910 (1952); *State* v. *Mares,* 113 Utah 225, 243–244, 192 P. 2d 861, 870 (1948); *State* v. *Crank,* 105 Utah 332, 346–355, 142 P. 2d 178, 184–188 (1943).

Vermont: *State* v. *Blair,* 118 Vt. 81, 85, 99 A. 2d 677, 680 (1953); *State* v. *Watson,* 114 Vt. 543, 548, 49 A. 2d 174, 177 (1946); *State* v. *Long,* 95 Vt. 485, 490, 115 A. 734, 737 (1922).

Virginia: *Durrette* v. *Commonwealth,* 201 Va. 735, 744, 113 S. E. 2d 842, 849 (1960); *Campbell* v. *Commonwealth,* 194 Va. 825, 830, 75 S. E. 2d 468, 471 (1953); *Jackson* v. *Commonwealth,* 193 Va. 664, 673, 70 S. E. 2d 322, 327 (1952).

Washington: *State* v. *Moore,* 60 Wash. 2d 144, 146–147, 372 P. 2d 536, 538 (1962); *State* v. *Holman,* 58 Wash. 2d 754, 756–757, 364 P. 2d 921, 922–923 (1961).

West Virginia: *State* v. *Vance,* 146 W. Va. 925, 934, 124 S. E. 2d 252, 257 (1962); *State* v. *Brady,* 104 W. Va. 523, 529–530, 140 S. E. 546, 549 (1927).

II. *"New York" Rule.*

If there is a factual conflict in the evidence as to voluntariness over which reasonable men could differ, the judge leaves the question of voluntariness to the jury.

Arkansas: *Monts* v. *State,* 233 Ark. 816, 823, 349 S. W. 2d 350, 355 (1961); *Burton* v. *State,* 204 Ark. 548, 550–551, 163 S. W. 2d 160, 162 (1942); *McClellan* v. *State,* 203 Ark. 386, 393–394, 156 S. W. 2d 800, 803 (1941).

District of Columbia: *Wright* v. *United States,* 102 U. S. App. D. C. 36, 45, 250 F. 2d 4, 13 (1957); *Catoe* v. *United States,* 76 U. S. App. D. C. 292, 295, 131 F. 2d 16, 19 (1942); *McAffee* v. *United States,* 70 App. D. C.

142, 145, 105 F. 2d 21, 24 (1939), 72 App. D. C. 60, 65, 111 F. 2d 199, 204, cert. denied, 310 U. S. 643 (1940); cf. *Sawyer* v. *United States,* 112 U. S. App. D. C. 381, 303 F. 2d 392, 393 (1962).

GEORGIA: *Downs* v. *State,* 208 Ga. 619, 621, 68 S. E. 2d 568, 569–570 (1952); *Garrett* v. *State,* 203 Ga. 756, 762–763, 48 S. E. 2d 377, 382 (1948); *Coker* v. *State,* 199 Ga. 20, 23–25, 33 S. E. 2d 171, 173–174 (1945); *Bryant* v. *State,* 191 Ga. 686, 710–711, 13 S. E. 2d 820, 836–837 (1941).

IOWA: *State* v. *Jones,* 253 Iowa 829, 834–835, 113 N. W. 2d 303, 307 (1962); *State* v. *Hofer,* 238 Iowa 820, 828, 829, 28 N. W. 2d 475, 480 (1947); *State* v. *Johnson,* 210 Iowa 167, 171, 230 N. W. 513, 515 (1930).

MICHIGAN: *People* v. *Crow,* 304 Mich. 529, 531, 8 N. W. 2d 164, 165 (1943); *People* v. *Preston,* 299 Mich. 484, 493–494, 300 N. W. 853, 857 (1941).

MINNESOTA: *State* v. *Schabert,* 218 Minn. 1, 7–9, 15 N. W. 2d 585, 588 (1944) (states New York rule although also cites both New York rule and Massachusetts rule cases).

MISSOURI: *State* v. *Goacher,* 376 S. W. 2d 97, 103 (1964); *State* v. *Bridges,* 349 S. W. 2d 214, 219 (1961); *State* v. *Laster,* 365 Mo. 1076, 1081–1082, 293 S. W. 2d 300, 303–304, cert. denied, 352 U. S. 936 (1956). Cf. *State* v. *Statler,* 331 S. W. 2d 526, 530 (1960) (question of voluntariness of confession should be submitted to jury "if there is substantial conflicting evidence on the issue and if the issue is close"); accord, *State* v. *Phillips,* 324 S. W. 2d 693, 696–697 (1959); *State* v. *Gibilterra,* 342 Mo. 577, 584–585, 116 S. W. 2d 88, 93–94 (1938).

NEW YORK: *People* v. *Pignataro,* 263 N. Y. 229, 240–241, 188 N. E. 720, 724 (1934); *People* v. *Weiner,* 248 N. Y. 118, 122, 161 N. E. 441, 443 (1928); *People* v. *Doran,* 246 N. Y. 409, 416–418, 159 N. E. 379, 381–382 (1927).

Ohio: If the evidence as to voluntariness is conflicting, the trial judge may in his discretion follow the New York rule; otherwise he may follow the "orthodox" rule. *Burdge* v. *State,* 53 Ohio St. 512, 516–518, 42 N. E. 594, 595–596 (1895); *State* v. *Powell,* 105 Ohio App. 529, 530–531, 148 N. E. 2d 230, 231 (1957), appeal dismissed, 167 Ohio St. 319, 148 N. E. 2d 232 (1958), cert. denied, 359 U. S. 964 (1959); *State* v. *Hensley,* 31 Ohio L. Abs. 348, 349–350 (1939).

Oregon: *State* v. *Bodi,* 223 Ore. 486, 491, 354 P. 2d 831, 833–834 (1960); *State* v. *Nunn,* 212 Ore. 546, 554, 321 P. 2d 356, 360 (1958).

Pennsylvania: *Commonwealth* v. *Senk,* 412 Pa. 184, 194, 194 A. 2d 221, 226 (1963), vacated and remanded on authority of the present case *sub nom. Senk* v. *Pennsylvania, post,* p. 562; *Commonwealth* v. *Oister,* 201 Pa. Super. 251, 257–258, 191 A. 2d 851, 854 (1963), vacated and remanded on authority of the present case *sub nom. Oister* v. *Pennsylvania, post,* p. 568; *Commonwealth* v. *Ross,* 403 Pa. 358, 365, 169 A. 2d 780, 784, cert. denied, 368 U. S. 904 (1961); *Commonwealth* v. *Spardute,* 278 Pa. 37, 48, 122 A. 161, 165 (1923).

Puerto Rico: *People* v. *Fournier,* 77 P. R. 208, 243–244 (1954); *People* v. *Declet,* 65 P. R. 22, 25 (1945).

South Carolina: *State* v. *Bullock,* 235 S. C. 356, 366–367, 111 S. E. 2d 657, 662 (1959), appeal dismissed, 365 U. S. 292 (1961); *State* v. *Livingston,* 223 S. C. 1, 6, 73 S. E. 2d 850, 852 (1952), cert. denied, 345 U. S. 959 (1953); *State* v. *Scott,* 209 S. C. 61, 64, 38 S. E. 2d 902, 903 (1946).

South Dakota: *State* v. *Nicholas,* 62 S. D. 511, 515, 253 N. W. 737, 738–739 (1934); *State* v. *Montgomery,* 26 S. D. 539, 542, 128 N. W. 718, 719 (1910) (question of voluntariness of confession should be submitted to jury "if the evidence submitted to the court should

be conflicting, leaving in the mind of the court any question as to the competency of such confession"); cf. *State* v. *Hinz,* 78 S. D. 442, 449–450, 103 N. W. 2d 656, 660 (1960).

TEXAS: *Harris* v. *State,* 370 S. W. 2d 886, 887 (1963), vacated and remanded on authority of the present case *sub nom. Harris* v. *Texas, post,* p. 572; *Lopez* v. *State,* 366 S. W. 2d 587 (1963), vacated and remanded on authority of the present case *sub nom. Lopez* v. *Texas, post,* p. 567; *Marrufo* v. *State,* 172 Tex. Cr. R. 398, 402, 357 S. W. 2d 761, 764 (1962); *Odis* v. *State,* 171 Tex Cr. R. 107, 109, 345 S. W. 2d 529, 530–531 (1961); *Newman* v. *State,* 148 Tex. Cr. R. 645, 649–650, 187 S. W. 2d 559, 561–562 (1945), cert. denied, 326 U. S. 772 (1945); *Gipson* v. *State,* 147 Tex. Cr. R. 428, 429, 181 S. W. 2d 76, 77 (1944); *Ward* v. *State,* 144 Tex. Cr. R. 444, 449, 158 S. W. 2d 516, 518 (1941), rev'd on another point *sub nom. Ward* v. *Texas,* 316 U. S. 547 (1942). But cf. *Bingham* v. *State,* 97 Tex. Cr. R. 594, 596–601, 262 S. W. 747, 749–750 (1924) (perhaps states Massachusetts rule).

WISCONSIN: *State* v. *Bronston,* 7 Wis. 2d 627, 638, 97 N. W. 2d 504, 511 (1959); *Pollack* v. *State,* 215 Wis. 200, 217, 253 N. W. 560, 567 (1934).

WYOMING: *Clay* v. *State,* 15 Wyo. 42, 59, 86 P. 17, 19 (1906).

III. *"Massachusetts" or "Humane" Rule.*

Judge hears all the evidence and rules on voluntariness before allowing confession into evidence; if he finds the confession voluntary, jury is then instructed that it must also find that the confession was voluntary before it may consider it.

ALASKA: *Smith* v. *United States,* 268 F. 2d 416, 420–421 (C. A. 9th Cir. 1959).

Arizona: *State* v. *Hudson,* 89 Ariz. 103, 106, 358 P. 2d 332, 333–334 (1960); *State* v. *Pulliam,* 87 Ariz. 216, 220–223, 349 P. 2d 781, 784 (1960); *State* v. *Hood,* 69 Ariz. 294, 299–300, 213 P. 2d 368, 371–372 (1950); *State* v. *Johnson,* 69 Ariz. 203, 206, 211 P. 2d 469, 471 (1949). But see *State* v. *Federico,* 94 Ariz. 413, 385 P. 2d 706 (1963), vacated and remanded on authority of the present case *sub nom. Owen* v. *Arizona, post,* p. 574; *State* v. *Owen,* 94 Ariz. 404, 409, 385 P. 2d 700, 703 (1963), vacated and remanded on authority of the present case *sub nom. Owen* v. *Arizona, post,* p. 574; *State* v. *Preis,* 89 Ariz. 336, 338, 362 P. 2d 660, 661, cert. denied, 368 U. S. 934 (1961) (seem to state or follow New York rule).

California: *People* v. *Bevins,* 54 Cal. 2d 71, 76–77, 351 P. 2d 776, 779–780 (1960); *People* v. *Crooker,* 47 Cal. 2d 348, 353–355, 303 P. 2d 753, 757–758 (1956), aff'd *sub nom. Crooker* v. *California,* 357 U. S. 433 (1958); *People* v. *Gonzales,* 24 Cal. 2d 870, 876–877, 151 P. 2d 251, 254–255 (1944); *People* v. *Appleton,* 152 Cal. App. 2d 240, 244, 313 P. 2d 154, 156 (Dist. Ct. App. 1957) (trial judge may follow Massachusetts rule after he has found confession to be voluntary). Cf. *People* v. *Childers,* 154 Cal. App. 2d 17, 20, 315 P. 2d 480, 482 (Dist. Ct. App. 1957) (states Massachusetts rule without qualification).

Delaware: *Wilson* v. *State,* 49 Del. 37, 48, 109 A. 2d 381, 387 (1954), cert. denied, 348 U. S. 983 (1955).

Hawaii: *Territory* v. *Young,* 37 Haw. 189, 193 (1945) (*semble*); *Territory* v. *Alcosiba,* 36 Haw. 231, 235 (1942) (*semble*).

Idaho: *State* v. *Van Vlack,* 57 Idaho 316, 342–343, 65 P. 2d 736, 748 (1937). But cf. *State* v. *Dowell,* 47 Idaho 457, 464, 276 P. 39, 41 (1929); *State* v. *Andreason,* 44

Idaho 396, 401–402, 257 P. 370, 371 (1927) (seem to state "orthodox" rule).

MAINE: *State* v. *Robbins,* 135 Me. 121, 121–122, 190 A. 630, 631 (1937); *State* v. *Grover,* 96 Me. 363, 365–367, 52 A. 757, 758–759 (1902).

MARYLAND: *Parker* v. *State,* 225 Md. 288, 291, 170 A. 2d 210, 211 (1961); *Presley* v. *State,* 224 Md. 550, 559, 168 A. 2d 510, 515 (1961), cert. denied, 368 U. S. 957 (1962); *Hall* v. *State,* 223 Md. 158, 169–170, 162 A. 2d 751, 757 (1960); *Linkins* v. *State,* 202 Md. 212, 221–224, 96 A. 2d 246, 250–252 (1953); *Smith* v. *State,* 189 Md. 596, 603–606, 56 A. 2d 818, 821–822 (1948). But cf. *Grammer* v. *State,* 203 Md. 200, 218–219, 100 A. 2d 257, 265 (1953), cert. denied, 347 U. S. 938 (1954); *Jones* v. *State,* 188 Md. 263, 270–271, 52 A. 2d 484, 487–488 (1947); *Peters* v. *State,* 187 Md. 7, 15–16, 48 A. 2d 586, 590 (1946); *Nicholson* v. *State,* 38 Md. 140, 155–157 (1873) (not disapproved in later cases, appear to state "orthodox" rule).

MASSACHUSETTS: *Commonwealth* v. *Sheppard,* 313 Mass. 590, 603–604, 48 N. E. 2d 630, 639 (1943); *Commonwealth* v. *Preece,* 140 Mass. 276, 277, 5 N. E. 494, 495 (1885).

NEBRASKA: *Cramer* v. *State,* 145 Neb. 88, 97–98, 15 N. W. 2d 323, 328–329 (1944); *Schlegel* v. *State,* 143 Neb. 497, 500, 10 N. W. 2d 264, 266 (1943); cf. *Gallegos* v. *State,* 152 Neb. 831, 837–840, 43 N. W. 2d 1, 5–6 (1950) (*semble*), aff'd on another point *sub nom. Gallegos* v. *Nebraska,* 342 U. S. 55 (1951).

NEW HAMPSHIRE: *State* v. *Squires,* 48 N. H. 364, 369–370 (1869) (seems to hold that trial judge may in his discretion follow the Massachusetts rule; otherwise he may follow the "orthodox" rule).

NEW JERSEY: *State* v. *Tassiello,* 39 N. J. 282, 291–292, 188 A. 2d 406, 411–412 (1963); *State* v. *Smith,* 32 N. J.

501, 557–560, 161 A. 2d 520, 550–552 (1960), cert. denied, 364 U. S. 936 (1961).

Oklahoma: *Williams* v. *State,* 93 Okla. Cr. 260, 265, 226 P. 2d 989, 993 (1951); *Lyons* v. *State,* 77 Okla. Cr. 197, 233–237, 138 P. 2d 142, 162–163 (1943), aff'd on another point *sub nom. Lyons* v. *Oklahoma,* 322 U. S. 596 (1944); *Wood* v. *State,* 72 Okla. Cr. 364, 374–375, 116 P. 2d 728, 733 (1941). But cf. *Cornell* v. *State,* 91 Okla. Cr. 175, 183–184, 217 P. 2d 528, 532–533 (1950); *Pressley* v. *State,* 71 Okla. Cr. 436, 444–446, 112 P. 2d 809, 813–814 (1941); *Rowan* v. *State,* 57 Okla. Cr. 345, 362, 49 P. 2d 791, 798 (1935) (cases which appear to state the "orthodox" rule and are nevertheless cited with approval in the first-named group of decisions).

Rhode Island: *State* v. *Boswell,* 73 R. I. 358, 361, 56 A. 2d 196, 198 (1947); *State* v. *Mariano,* 37 R. I. 168, 186–187, 91 A. 21, 29 (1914).

APPENDIX B TO OPINION OF MR. JUSTICE BLACK.

Rules Followed in the Federal Judicial Circuits to Determine Voluntariness of Confessions.

In *Wilson* v. *United States,* 162 U. S. 613, 624 (1896) this Court said that in federal criminal trials "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant." This language appears to sanction either the "orthodox" rule or the Massachusetts rule. The federal courts in the various circuits, however, often citing *Wilson,* have given it varying interpretations.

Cases are cited below subject to the same qualifications set forth in Appendix A, *supra.*

I. *Wigmore or "Orthodox" Rule.*

FIRST CIRCUIT: *Kemler* v. *United States,* 133 F. 2d 235, 239–240 (1943).

FIFTH CIRCUIT: *Andrews* v. *United States,* 309 F. 2d 127, 129 (1962), cert. denied, 372 U. S. 946 (1963); *Schaffer* v. *United States,* 221 F. 2d 17, 21 (1955); *Wagner* v. *United States,* 110 F. 2d 595, 596 (1940), cert. denied, 310 U. S. 643 (1940). But cf. *Duncan* v. *United States,* 197 F. 2d 935, 937–938, cert. denied, 344 U. S. 885 (1952); *Patterson* v. *United States,* 183 F. 2d 687, 689–690 (1950) (appear to state Massachusetts rule).

TENTH CIRCUIT: *McHenry* v. *United States,* 308 F. 2d 700, 704 (1962), cert. denied, 374 U. S. 833 (1963). But cf. *United States* v. *Ruhl,* 55 F. Supp. 641, 644–645 (D. C. D. Wyo. 1944), aff'd, 148 F. 2d 173, 175 (1945) (appears to follow Massachusetts rule).

II. *"New York" Rule.*

SECOND CIRCUIT: *United States* v. *Leviton,* 193 F. 2d 848, 852 (1951), cert. denied, 343 U. S. 946 (1952); but cf. *United States* v. *Gottfried,* 165 F. 2d 360, 367 (1948), cert. denied, 333 U. S. 860 (1948) ("orthodox" rule); *United States* v. *Lustig,* 163 F. 2d 85, 88–89, cert. denied, 332 U. S. 775 (1947) ("orthodox" rule); *United States* v. *Aviles,* 274 F. 2d 179, 192, cert. denied, 362 U. S. 974, 982 (1960) (appears to hold no error to follow Massachusetts rule).

THIRD CIRCUIT: *United States* v. *Anthony,* 145 F. Supp. 323, 335–336 (D. C. M. D. Pa. 1956) (quotes discretionary rule of *Wilson* v. *United States, supra,* but

seems to apply New York rule and cites Pennsylvania cases following it).

SIXTH CIRCUIT: *Anderson* v. *United States,* 124 F. 2d 58, 67 (1941), rev'd on another point, 318 U. S. 350 (1943); *McBryde* v. *United States,* 7 F. 2d 466, 467 (1925).

SEVENTH CIRCUIT: *United States* v. *Echeles,* 222 F. 2d 144, 154, cert. denied, 350 U. S. 828 (1955); *Cohen* v. *United States,* 291 F. 368, 369 (1923); but cf. *Murphy* v. *United States,* 285 F. 801, 807–808 (1923), cert. denied, 261 U. S. 617 (1923) (appears to state "orthodox" rule).

EIGHTH CIRCUIT: *Hayes* v. *United States,* 296 F. 2d 657, 670 (1961), cert. denied, 369 U. S. 867 (1962); *Shores* v. *United States,* 174 F. 2d 838, 842 (1949).

DISTRICT OF COLUMBIA CIRCUIT: *Pea* v. *United States,* 116 U. S. App. D. C. 410, 324 F. 2d 442 (1963), vacated and remanded on authority of the present case, *post,* p. 571; *Muschette* v. *United States,* 116 U. S. App. D. C. 239, 240, 322 F. 2d 989, 990 (1963), vacated and remanded on authority of the present case, *post,* p. 569; *Wright* v. *United States,* 102 U. S. App. D. C. 36, 45, 250 F. 2d 4, 13 (1957); *Catoe* v. *United States,* 76 U. S. App. D. C. 292, 295, 131 F. 2d 16, 19 (1942); *McAffee* v. *United States,* 70 App. D. C. 142, 145, 105 F. 2d 21, 24 (1939), 72 App. D. C. 60, 65, 111 F. 2d 199, 204, cert. denied, 310 U. S. 643 (1940); cf. *Sawyer* v. *United States,* 112 U. S. App. D. C. 381, 303 F. 2d 392, 393 (1962).

III. *"Massachusetts" Rule.*

FOURTH CIRCUIT: *Denny* v. *United States,* 151 F. 2d 828, 833 (1945), cert. denied, 327 U. S. 777 (1946) (appears to follow *Wilson* v. *United States,* 162 U. S. 613, 624 (1896), and apply Massachusetts rule).

NINTH CIRCUIT: *Leonard* v. *United States,* 278 F. 2d 418, 420–421 (1960) (*semble*); *Smith* v. *United States,* 268 F. 2d 416, 420–421 (1959). But cf. *Pon Wing Quong* v. *United States,* 111 F. 2d 751, 757 (1940) ("orthodox" rule).

MR. JUSTICE CLARK, dissenting.

The Court examines the validity, under the Fourteenth Amendment, of New York's procedure to determine the voluntariness of a confession. However, as I read the record, New York's procedure was not invoked in the trial court or attacked on appeal and is not properly before us. The New York procedure providing for a preliminary hearing could be set in motion, and its validity questioned, only if objection was made to the admissibility of the confession. It is clear that counsel for petitioner in the trial court—a lawyer of 50 years' trial experience in the criminal courts, including service on the bench—did not object to the introduction of the statements made by the petitioner or ask for a preliminary hearing. His contention was that the circumstances of the sedation went to the "weight" of the statements, not to their admissibility. This is shown by his cross-examination of the State's doctor and by the dialogue at the bench thereafter.[1] And, even after this dialogue, petitioner's counsel

[1] "The Court: Judge Healy raised the point in cross-examination that sedation of a kind was administered to the patient.

"Mr. Healy: Some kind.

"The Court: And therefore he is going to contend and he does now that the confession hasn't the weight the law requires. Is that your purpose?

"Mr. Healy: That's correct. There are two, one statement and another statement. One statement to the police and one statement to the District Attorney.

[*Footnote 1 is continued on p. 424*]

never made any motion to strike the statements or any objection to their use by the jury, but challenged only the weight to be given them. This is further shown by his failure to raise the constitutionality of New York's practice at any time before verdict or thereafter on his motion for a new trial. Nor was it raised or passed upon by New York's Court of Appeals. That court's amended remittitur shows that the constitutional questions passed upon were whether the "confession was coerced" and whether the judge erred in failing to instruct the jury that, "in determining the voluntary nature of the confession, they were to consider his physical condition at the time thereof." 10 N. Y. 2d 816, 178 N. E. 2d 234.

Still, the Court strikes down the New York rule of procedure which we approved in *Stein* v. *New York*, 346 U. S. 156 (1953). The trial judge had no opportunity to pass upon the statements because no objection was raised and no hearing was requested. I agree with the Court that "[a] defendant objecting to the admission of a confession is entitled to a fair hearing . . . ." However, I cannot see why the Court reaches out and strikes down a rule which was not invoked and which is therefore not

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"The Court: Well, the one to the police was what hour, I would like to know, and the one to the District Attorney was what hour?

"Mr. Healy: The one to the police.

"Mr. Schor: To the police, to Detective Kaile, at two o'clock.

"The Court: Get the statement.

"Mr. Healy: The statement that I raised the point about. This is the statement taken by the District Attorney, by Mr. Postal.

"The Court: Yes.

"Mr. Healy: Mr. Lentini being the hearing reporter. That was taken at 3:55.

"The Court: That's the time that you say he was in no mental condition to make the statement?

"Mr. Healy: That's correct.

"The Court: Is that correct?

"Mr. Healy: That's correct."

applicable to this case. In reaching out for this question the Court apparently relies on *Fay* v. *Noia,* 372 U. S. 391 (1963). While that case seems to have turned into a legal "Mother Hubbard" I fail to see how it could govern this situation.

The Court seems to imply that New York's procedure "injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness." I think not. The judge clearly covered this in his charge:

> "If you determine that it was a confession, the statement offered here, and if you determine that Jackson made it, and if you determine that it is true; if you determine that it is accurate, before you may use it, the law still says you must find that it is voluntary, and the prosecution has the burden of proving that it was a voluntary confession."

This language is just the opposite of that used in *Rogers* v. *Richmond,* 365 U. S. 534 (1961), the case upon which the Court places principal reliance.[2] There the jurors were told to use the confession if they found it "in

[2] "No confession or admission of an accused is admissible in evidence unless made freely and voluntarily and not under the influence of promises or threats. The fact that a confession was procured by the employment of some artifice or deception does not exclude the confession if it was not calculated, that is to say, if the artifice or deception was not calculated to procure an untrue statement. The motive of a person in confessing is of no importance provided the particular confession does not result from threats, fear or promises made by persons in actual or seeming authority. The object of evidence is to get at the truth, and a trick or device which has no tendency to produce a confession except one in accordance with the truth does not render the confession inadmissible . . . . The rules which surround the use of a confession are designed and put into operation because of the desire expressed in the law that the confession, if used, be probably a true confession." At 542.

accord with the truth . . . ." And Connecticut's highest court held that the question was whether the conduct "induced the defendant to confess falsely that he had committed the crime being investigated." 143 Conn. 167, at 173, 120 A. 2d 409, at 412. Here the judge warned the jury that *even* if they found the statements true, they must *also* find them voluntary before they may use them. And the proof of voluntariness was placed on the State. As my Brother BLACK says, the Court, in striking down New York's procedure, thus "challenge[s] the soundness of the Founders' great faith in jury trials." I too regret this "downgrading of trial by jury" and join in Section I of Brother BLACK's opinion. To me it appears crystal-clear that the charge amply protected Jackson from the possibility that the jury might have confused the question of voluntariness with the question of truth. Dependence on jury trials is the keystone of our system of criminal justice and I regret that the Court lends its weight to the destruction of this great safeguard to our liberties.

But even if the trial judge had instructed the jury to consider truth or falsity, the order here should be for a new trial, as in *Rogers* v. *Richmond, supra.* There the Court of Appeals was directed to hold the case a reasonable time "in order to give the State opportunity to *retry* petitioner . . . ." At 549. (Emphasis supplied.) But the Court does not do this. It strikes down New York's procedure and then tells New York—not to retry the petitioner—merely to have the trial judge hold a hearing on the admissibility of the confession and enter a definitive determination on that issue, as under the Massachusetts rule. This does not cure the error which the Court finds present. If the trial court did so err, this Court is making a more grievous error in amending New York's rule here and then requiring New York to apply it *ex post facto* without benefit of a full trial. Surely under the

reasoning of the Court, the petitioner would be entitled to a new trial.

Believing that the constitutionality of New York's rule is not ripe for decision here, I dissent. If I am in error on this, then I join my Brother HARLAN. His dissent is unanswerable.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

Even under the broadest view of the restrictive effect of the Fourteenth Amendment, I would not have thought it open to doubt that the States were free to allocate the trial of issues, whether in criminal or civil cases, between judge and jury as they deemed best. The Court now holds, however, that New York's long-standing practice of leaving to the jury the resolution of reasonably disputed factual issues surrounding a criminal defendant's allegation that his confession was coerced violates due process. It is held that the Constitution permits submission of the question of coercion to the trial jury only if preceded by a determination of "voluntariness" by the trial judge—or by another judge or another jury not concerned with the ultimate issue of guilt or innocence.[1]

The Court does make one bow to federalism in its opinion: New York need not retry Jackson if it, rather than the federal *habeas corpus* court, now finds, in accordance with the new ground rules, the confession to have been voluntary. I doubt whether New York, which in Jackson's original trial faithfully followed the teachings of this Court which were then applicable, will find much comfort in this gesture.

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[1] Whether or not the Court would permit the trial jury to render a special verdict on the issue of coercion and, having found the confession involuntary, go on to hear the evidence on and determine the question of guilt is unclear. See *ante,* pp. 379–380 and p. 391, n. 19.

Today's holding is the more surprising because as recently as 1953 the Court held precisely the opposite in *Stein* v. *New York,* 346 U. S. 156, and in 1958 and again in 1959 implicitly accepted the constitutionality of the New York rule, *Payne* v. *Arkansas,* 356 U. S. 560, 568, note 15; *Spano* v. *New York,* 360 U. S. 315, 324.[2]

I respectfully dissent.

I.

The narrow issue of this case should not be swept up and carried along to a conclusion in the wake of broader constitutional doctrines that are not presently at stake. New York and the States which follow a like procedure do not contest or tacitly disregard either of the two "axioms" with which the Court commences its argument, *ante,* pp. 376–377. It is not open to dispute, and it is not disputed here, that a coerced confession may not be any part of the basis of a conviction. Nor is there question that a criminal defendant is entitled to a "fair hearing and a reliable determination" of his claim that his confession was coerced. *Id.,* at 377. The true issue is simply whether New York's procedure for implementing those two undoubted axioms, within the framework of its own trial practice, falls below the standards of fair play which the Federal Constitution demands of the States.

New York's method of testing a claim of coercion is described in the Court's opinion, *ante,* at pp. 377–378. It requires the trial judge "to reject a confession if a verdict that it was freely made would be against the weight of the evidence." *People* v. *Leyra,* 302 N. Y. 353, 362, 98 N. E. 2d 553, 558. The heart of the procedure, however, is reliance upon the jury to resolve disputed questions of

[2] Indeed, in his petition for certiorari to review the judgment of the New York Court of Appeals, 10 N. Y. 2d 780, 177 N. E. 2d 59, which this Court denied, 368 U. S. 949, the petitioner did not even challenge the constitutionality of the New York procedure.

fact concerning the circumstances in which the confession was made. Where there are facts *"permitting different conclusions* it is left for the jury, under a proper submission, to say whether or not there was coercion . . . ." *Id.*, at 364, 98 N. E. 2d, at 559.

This choice of a jury rather than a court determination of the issue of coercion has its root in a general preference for submission to a jury of disputed issues of fact, a preference which has found expression in a state legislative determination, see New York Code of Criminal Procedure, § 419,[3] and in the practice in that State "followed from an early day in a long line of cases." *People* v. *Doran,* 246 N. Y. 409, 416, 159 N. E. 379, 381, see cases cited therein at 416–417, 159 N. E., at 381–382. Thus by statutory enactment as well as by undeviating judicial approbation, New York has evinced a deliberate procedural policy. One may wonder how this Court can strike down such a deep-seated state policy without giving a moment of attention to its origins or justification.

At the core of this decision is the Court's unwillingness to entrust to a jury the "exceedingly sensitive task," *ante,* p. 390, of determining the voluntariness of a confession. In particular, the Court hypothesizes a variety of ways in which the jury, wittingly or not, "may" have disregarded its instructions, and comes up with two possibilities: (1) that the jury will base a determination that a confession was voluntary on belief that it is true; (2) that, despite its belief that a confession was involuntary, the jury will rely on the confession as a basis for concluding that the defendant is guilty. These are, of course, possi-

[3] "On the trial of an indictment for any other crime than libel, questions of law are to be decided by the court, saving the right of the defendant to except; questions of fact by the jury. And although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court."

bilities that the New York practice, in effect the jury system, will *not* work as intended, not possibilities that, working as it should, the system will nevertheless produce the wrong result.

The Court's distrust of the jury system in this area of criminal law stands in curious contrast to the many pages in its reports in which the right to trial by jury has been extolled in every context, and affords a queer basis indeed for a new departure in federal regulation of state criminal proceedings. The Court has repeatedly rejected "speculation that the jurors disregarded clear instructions of the court in arriving at their verdict," *Opper* v. *United States,* 348 U. S. 84, 95,[4] as a ground for reversing a conviction or, *a fortiori,* as the reason for adopting generally a particular trial practice. "Our theory of trial relies upon the ability of a jury to follow instructions." *Ibid.* Two of the Court's past cases, especially, show how foreign the premises of today's decision are to principles which have hitherto been accepted as a matter of course.

In *Leland* v. *Oregon,* 343 U. S. 790, the appellant was charged with murder in the first degree. His defense was insanity.

> "In conformity with the applicable state law, the trial judge instructed the jury that, although appellant was charged with murder in the first degree, they might determine that he had committed a lesser crime included in that charged. They were further instructed that his plea of not guilty put in issue every material and necessary element of the lesser degrees of homicide, as well as of the offense charged in the indictment. The jury could have returned any of five verdicts: (1) guilty of murder in the first

[4] The Court does not question the sufficiency of the trial judge's instructions in this case.

> degree, if they found beyond a reasonable doubt that appellant did the killing purposely and with deliberate and premeditated malice; (2) guilty of murder in the second degree, if they found beyond a reasonable doubt that appellant did the killing purposely and maliciously, but without deliberation and premeditation; (3) guilty of manslaughter, if they found beyond a reasonable doubt that appellant did the killing without malice or deliberation, but upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible; (4) not guilty, if, after a careful consideration of all the evidence, there remained in their minds a reasonable doubt as to the existence of any of the necessary elements of each degree of homicide; and (5) not guilty by reason of insanity, if they found beyond a reasonable doubt that appellant was insane at the time of the offense charged." *Id.*, at 793–794 (footnotes omitted).

These complex instructions,[5] which required the jurors to keep in mind and apply the most subtle distinctions, were complicated still further by the law of Oregon regarding the burden of proof on an insanity defense:

> ". . . [The] instructions, and the charge as a whole, make it clear that the burden of proof of guilt, and of all the necessary elements of guilt, was placed squarely upon the State. As the jury was told, this burden did not shift, but rested upon the State throughout the trial, just as, according to the in-

[5] Their full complexity is not revealed even by the passage quoted. Since the law permitted two different verdicts of guilty of murder in the first degree, the difference being the inclusion or not of a recommendation as to punishment, a total of six possible verdicts was submitted to the jury for its consideration. *Leland* v. *Oregon*, *supra*, at 793, n. 4.

> structions, appellant was presumed to be innocent until the jury was convinced beyond a reasonable doubt that he was guilty. The jurors were to consider separately the issue of legal sanity *per se*—an issue set apart from the crime charged, to be introduced by a special plea and decided by a special verdict. On this issue appellant had the burden of proof under the statute in question here." *Id.*, at 795–796 (footnotes omitted).

The jury found the appellant guilty and sentenced him to death.

On appeal, the appellant argued that "the instructions may have confused the jury as to the distinction between the State's burden of proving premeditation and the other elements of the charge and appellant's burden of proving insanity." *Id.*, at 800. This Court responded:

> "We think the charge to the jury was as clear as instructions to juries ordinarily are or reasonably can be, and, with respect to the State's burden of proof upon all the elements of the crime, the charge was particularly emphatic. Juries have for centuries made the basic decisions between guilt and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think that to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so." *Ibid.*

Every factor on which the Court relies in the present case to show the inadequacy of a jury verdict on the coerced confession issue and some factors which the Court

does not mention, were present in *Leland:* the factual issue was extremely complex, and required the jury to make a hazardous inference concerning the defendant's mental state, which inference in turn depended on exceedingly subtle distinctions; the instructions to the jury were themselves complex, their complexity being necessitated by the complexity of the issues; the crime charged was particularly heinous and likely to have aroused the community's and, in particular, the jurors' anger; the defendant had beyond question committed the act charged; the possible, and as it turned out actual, penalty was death.

I am at a loss to understand how the Court, which refused to recognize the possibility of jury inadequacy in *Leland,* can accept that possibility here not only as a basis for reversing the judgment in this case—involving far simpler questions of fact and easily understood instructions—but as the premise for invalidating a state rule of criminal procedure of general application resting on an entirely rational state policy of long standing. Why is it not true here, as it was in *Leland,* that "to condemn the operation of . . . [the jury] system here would be to condemn the system generally"? *Ibid.*

The second case is *Delli Paoli* v. *United States,* 352 U. S. 232. There the petitioner was tried jointly with four codefendants by *federal* authorities for a *federal* crime. The Government introduced in evidence the confession of another defendant, which was made after the conspiracy had ended and could not, therefore, be used against the petitioner. The jury was warned when the confession was admitted and again in the charge that it was to be considered only against the confessor and not against his codefendants. In fact, however, by reason of repeated express references to the petitioner and extensive corroborative detail, the confession implicated the petitioner as completely as it did the confessor. Rejecting the peti-

tioner's contention that admission of the confession was reversible error, the Court said:

> "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice." *Id.*, at 242.

In *Delli Paoli,* the jury was instructed that it might give such credence as it chose to a clearly voluntary and apparently reliable confession when it considered its verdict as to one defendant, but that it must entirely disregard the same confession when it considered its verdict as to any other defendant; this despite the fact that the crime charged was a conspiracy and the confession named other defendants and described their acts in detail. In the present case, the Court believes that a jury "may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession," *ante,* p. 382. How can it well be said that this policy is more difficult for a jury to understand than the policy behind the rule applied in *Delli Paoli?* So too, the Court finds danger in this case "that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness." *Id.*, at 383. But was there not greater danger in *Delli Paoli* that one defendant's confession of his and his codefendants' guilt would infect the jury's deliberations bearing on the guilt of the codefendants? And was

it not more "difficult, if not impossible," *ante,* p. 389, for the jurors to lodge the evidence in the right mental compartments in a trial of five defendants than here, in a trial of one?

The danger that a jury will be unable or unwilling to follow instructions is not, of course, confined to joint trials or trials involving special issues such as insanity or the admissibility of a confession. It arises whenever evidence admissible for one purpose is inadmissible for another, and the jury is admonished that it may consider the evidence only with respect to the former. *E. g., Moffett* v. *Arabian American Oil Co., Inc.,* 184 F. 2d 859. More broadly, it arises every time a counsel or the trial judge misspeaks himself at trial and the judge instructs the jury to disregard what it has heard. *E. g., Carr* v. *Standard Oil Co.,* 181 F. 2d 15. In short, the fears which guide the Court's opinion grow out of the very nature of the jury system.

Jury waywardness, if it occurs, does not ordinarily trench on rights so fundamental to criminal justice as the right not to be convicted by the use of a coerced confession. The presence of a constitutional claim in this case, however, does not provide a valid basis for distinguishing it from the other situations discussed above. There is not the least suggestion in the Court's opinion that the nature of the claim has anything to do with the trustworthiness of the evidence involved; nor could there be, since the Court's rule is entirely unconnected with the reliability of a confession. Nor, as the *Delli Paoli* and *Leland* cases amply attest, are factual issues underlying constitutional claims necessarily more beyond the jury's competence than issues underlying other claims which, albeit nonconstitutional, are nevertheless of equally vital concern to the defendant involved. Finally, *Delli Paoli* was tried in the federal courts, where this Court has general "supervisory authority" over the administration of crim-

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inal justice, *McNabb* v. *United States,* 318 U. S. 332, 340–341, obviating any suggestion that this Court has *power* to act here which it lacks in other situations.

To show that this Court acts inconsistently with its own prior decisions does not, of course, demonstrate that it acts incorrectly. In this instance, however, the Court's constant refusal in the past to accept as a rationale for decision the dangers of jury incompetence or waywardness, because to do so would be to "condemn the system generally," *Leland, supra,* at 800, does demonstrate the lack of constitutional foundation for its decision. It can hardly be suggested that a rationale which the Court has so consistently and so recently rejected, even as the basis for an exercise of its supervisory powers over federal courts, and which even now it does not attack so much as disregard, furnishes the clear constitutional warrant which alone justifies interference with state criminal procedures.

II.

The hollowness of the Court's holding is further evidenced by its acceptance of the so-called "Massachusetts rule," see *ante,* pp. 378–379 and note 8, under which the trial judge decides the question of voluntariness and, if he decides against the defendant, then submits the question to the jury for its independent decision.[6] Whatever their theoretical variance, in practice the New York and Massachusetts rules are likely to show a distinction without a difference. Indeed, some commentators, and sometimes the courts themselves, have been unable to see two distinct rules.[7]

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[6] *E. g., Commonwealth* v. *Sheppard,* 313 Mass. 590, 604, 48 N. E. 2d 630, 639–640.

[7] The majority of this Court itself proclaims its inability to distinguish clearly between the States which do and those which do not follow the rule now found by it to be constitutionally required. See

The Court finds significance in the fact that under the Massachusetts rule "the judge's conclusions are clearly evident from the record," and "his findings upon disputed issues of fact are expressly stated or may be ascertainable from the record." *Ante,* pp. 378–379. It is difficult to see wherein the significance lies. The "judge's conclusions" are no more than the admission or exclusion of the confession. If the confession is admitted, his findings of fact, *if* they can be ascertained, will, realistically, either have no effect on review of the conviction for constitutional correctness or will serve only to buttress an independent conclusion that the confession was not

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ante, pp. 378–379, note 9. In Appendix A to the Court's opinion, the rules in 14 States are listed as "doubtful."

Annotations in 85 ALR 870 and 170 ALR 567 recognize only two general practices, dividing the States into those in which "voluntariness [is] solely for [the] court" (the so-called "orthodox" rule, *ante,* p. 378) and those in which "voluntariness [is] ultimately for [the] jury," with some jurisdictions listed as "doubtful." Massachusetts and New York are both listed as jurisdictions in which the question is ultimately for the jury. See also Ritz, Twenty-Five Years of State Criminal Confession Cases in the U. S. Supreme Court, 19 Wash. & Lee L. Rev. 35, 55–57 (1962). Although recognizing the difference between the two rules, Professor Ritz states that "the distinctions in the different views may be more semantical than real." *Id.,* at 57 (footnote omitted). He asks:

"Is the trial judge's finding under the New York View that a confession is 'not involuntary' so that it may go to the jury very much different from the trial judge's finding under the Massachusetts View that a confession is 'voluntary,' with the jury given an opportunity to pass again on the same question?" *Id.,* at 57, n. 120.

In Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317 (1954), the distinction between the rules is defended, but the author states that "the formal distinction between the New York and Massachusetts procedures is often blurred in appellate opinions," *id.,* at 323–324, and that ". . . it is sometimes difficult to determine which of two procedures is being approved, or whether a distinction between the two is even recognized." *Id.,* at 324 (footnote omitted).

coerced. Indeed, unless the judge's findings of fact are stated with particularity, the Massachusetts rule is indistinguishable from the New York rule from the standpoint of federal direct or collateral review of the constitutional question. Whichever procedure is used, the reviewing court is required to give weight to the state determination and reverse only if the confessions are coerced as a matter of law. See *Lisenba* v. *California,* 314 U. S. 219, 236–238; *Payne* v. *Arkansas,* 356 U. S. 560, 561–562.[8]

The heart of the supposed distinction is the requirement under the Massachusetts rule that the judge resolve disputed questions of fact and actually determine the issue of coercion; under the New York rule, the judge decides only whether a jury determination of voluntariness would be "against the weight of the evidence." See, *supra,* p. 428. Since it is only the exclusion of a confession which is conclusive under the Massachusetts rule, it is likely that where there is doubt—the only situation in which the theoretical difference between the two rules would come into play—a trial judge will resolve the doubt in favor of admissibility, relying on the final determination by the jury.

The fundamental rights which are a part of due process do not turn on nice theoretical distinctions such as those existing between the New York and Massachusetts rules.

III.

My disagreement with the majority does not concern the wisdom of the New York procedure. It may be that in the abstract the problems which are created by leaving to the jury the question of coercion should weigh more heavily than traditional use of the jury system. Be that

[8] If the Court's point is that under the New York rule there is no way of knowing whether the jury has addressed itself specially to the coerced confession issue at all the point simply raises again the fear of jury error discussed in the first section of this opinion.

as it may, "the states are free to allocate functions as between judge and jury as they see fit." *Stein, supra,* at 179. I, like the Court in *Stein,* believe that this Court has no authority to "strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom." *Ibid.* This principle, alone here relevant, was founded on a solid constitutional approach the loss of which will do serious disservice to the healthy working of our federal system in the criminal field.

It should not be forgotten that in this country citizens must look almost exclusively to the States for protection against most crimes. The States are charged with responsibility for marking the area of criminal conduct, discovering and investigating such conduct when it occurs, and preventing its recurrence. In this case, for example, the crime charged—murder of a policeman who was attempting to apprehend the defendant, in flight from an armed robbery—is wholly within the cognizance of the States. Limitations on the States' exercise of their responsibility to prevent criminal conduct should be imposed only where it is demonstrable that their own adjustment of the competing interests infringes rights fundamental to decent society. The New York rule now held unconstitutional is surely not of that character.

IV.

A final word should be said about the separate question of the application of today's new federally imposed rule of criminal procedure to trials long since concluded. The Court apparently assumes the answer to this question, for I find nothing in its opinion to suggest that its holding will not be applied retroactively.

To say, as the Court does, that New York was "not without support in the decisions of this Court," *ante,* p. 395, when it tried Jackson according to its existing rules

does not give the State its due. Those rules had been directly considered and explicity approved by this Court in *Stein* just seven years before Jackson was tried. They were implicitly reaffirmed by this Court in *Spano, supra,* little more than one year before the trial. If the concept of due process has as little stability as this case suggests, so that the States cannot be sure from one year to the next what this Court, in the name of due process, will require of them, surely they are entitled at least to be *heard* on the question of retroactivity. See my dissenting opinion in *Pickelsimer* v. *Wainwright,* 375 U. S. 2.

I would affirm.[9]

[9] Like the Court, *ante,* p. 392, n. 20, I reject petitioner's contention that looking only to the undisputed evidence his confession must be deemed involuntary as a matter of law.

UNITED STATES *v.* CONTINENTAL CAN CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 367. Argued April 28, 1964.—Decided June 22, 1964.

The Government seeks an order requiring the divestiture, as a violation of § 7 of the Clayton Act, by Continental Can Company (CCC), the second largest producer of metal containers, of the assets acquired in 1956 of Hazel-Atlas Glass Company (HAG), the third largest producer of glass containers. CCC, which had a history of acquiring other companies, produced no glass containers in 1955, but shipped 33% of all metal containers sold in this country. HAG, which produced no metal containers, shipped 9.6% of the glass containers that year. The geographic market was held by the District Court to be the entire country. The Government had urged ten product markets, including the can industry, the glass container industry, and various lines of commerce defined by the end use of the containers. The District Court found three product markets, metal containers, glass containers, and metal and glass beer containers. Although finding interindustry competition between metal, glass and plastic containers, the District Court held them to be separate lines of commerce. Holding that the Government had failed to prove reasonable probability of lessening competition in any line of commerce, the District Court dismissed the complaint at the end of the Government's case. *Held:*

1. Interindustry competition between glass and metal containers may provide the basis for defining a relevant product market. Pp. 447–458.

(a) The competition protected by § 7 is not limited to that between identical products. P. 452.

(b) Cross-elasticity of demand and interchangeability of use are used to recognize competition where it exists, not to obscure it. *Brown Shoe Co.* v. *United States*, 370 U. S. 326. P. 453.

(c) There has been insistent, continuous, effective and substantial end-use competition between metal and glass containers; and though interchangeability of use may not be so complete and cross-elasticity of demand not so immediate as in the case of some intra-industry mergers, the long-run results bring the competition between them within § 7. Pp. 453–455.

(d) There is a large area of effective competition between metal and glass containers, which implies one or more other lines of commerce encompassing both industries. Pp. 456–457.

(e) If an area of effective competition cuts across industry lines, the relevant line of commerce must do likewise. P. 457.

(f) Based on the present record, the interindustry competition between glass and metal containers warrants treating the combined glass and metal container industries and all end uses for which they compete as a relevant product market. P. 457.

(g) Complete interindustry competitive overlap is not required before § 7 is applicable and some noncompetitive segments in a proposed market area do not prevent its identification as a line of commerce. P. 457.

(h) That there may be a broader product market, including other competing containers, does not prevent the existence of a submarket of cans and glass containers. Pp. 457–458.

2. On the basis of the evidence so far presented the merger between CCC and HAG violates § 7 because it will have a probable anticompetitive effect within the relevant line of commerce. Pp. 458–466.

(a) In determining whether a merger will have probable anticompetitive effect, it must be looked at functionally in the context of the market involved, its structure, history and future. P. 458.

(b) Where a merger is of such magnitude as to be inherently suspect, detailed market analysis and proof of likely lessening of competition are not required in view of § 7's purpose of preventing undue concentration. P. 458.

(c) The product market of the combined metal and glass container industries was dominated by six companies, of which CCC ranked second and HAG sixth. P. 461.

(d) The 25% of the product market held by the merged firms approaches the percentage found presumptively bad in *United States* v. *Philadelphia National Bank,* 374 U. S. 321, and nearly the same as that involved in *United States* v. *Aluminum Co. of America,* 377 U. S. 271, and the addition to CCC's share is larger here than in *Aluminum Co.* P. 461.

(e) Where there has been a trend toward concentration in an industry, any further concentration should be stopped. P. 461.

(f) Where an industry is already highly concentrated, it is important to prevent even slight increases therein. Pp. 461–462.

(g) The argument that CCC's and HAG's products were not in direct competition at the time of the merger and that therefore the merger could have no effect on competition ignores the fact that the removal of HAG as an independent factor in the glass container industry and in the combined metal and glass container market foreclosed its potential competition with CCC, neglects the further fact that CCC, already a dominant firm in an oligopolistic market, has increased its power and effectiveness, and fails to consider the triggering effect that a merger of such large companies has on the rest of the industry which seeks to follow the pattern with anticompetitive results. Pp. 462–465.

217 F. Supp. 761, reversed and remanded.

Ralph S. Spritzer argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum* and *Arthur J. Murphy, Jr.*

Helmer R. Johnson argued the cause for appellees. With him on the brief was *Mark F. Hughes.*

Mr. Justice White delivered the opinion of the Court.

In 1956, Continental Can Company, the Nation's second largest producer of metal containers, acquired all of the assets, business and good will of Hazel-Atlas Glass Company, the Nation's third largest producer of glass containers, in exchange for 999,140 shares of Continental's common stock and the assumption by Continental of all the liabilities of Hazel-Atlas. The Government brought this action seeking a judgment that the acquisition violated § 7 of the Clayton Act [1] and requesting an

[1] Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Celler-Kefauver Antimerger Act, 64 Stat. 1125, 15 U. S. C. § 18, provides in relevant part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of com-

appropriate divestiture order. Trying the case without a jury, the District Court found that the Government had failed to prove reasonable probability of anticompetitive effect in any line of commerce, and accordingly dismissed the complaint at the close of the Government's case. *United States* v. *Continental Can Co.*, 217 F. Supp. 761 (D. C. S. D. N. Y.). We noted probable jurisdiction to consider the specialized problems incident to the application of § 7 to interindustry mergers and acquisitions.[2] 375 U. S. 893. We reverse the decision of the District Court.

I.

The industries with which this case is principally concerned are, as found by the trial court, the metal can industry, the glass container industry and the plastic container industry, each producing one basic type of container made of metal, glass, and plastic, respectively.

Continental Can is a New York corporation organized in 1913 to acquire all the assets of three metal container

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merce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[2] Both parties and the District Court refer to this as an interindustry merger. The word "industry" is susceptible of more than one meaning. It might be defined in terms of end uses for which various products compete; so defined it would be roughly equivalent to the concept of a "line of commerce." According to this interpretation the glass and metal container businesses, to the extent they compete, are in the same industry. On the other hand, "industry" might also denote an aggregate of enterprises employing similar production and marketing facilities and producing products having markedly similar characteristics. In many instances, the segments of economic endeavor embraced by these two concepts of "industry" will be substantially coextensive, since those who employ the same types of machinery to turn out the same general product often compete in the same market. Since this is not such a case it will be helpful to use the word "industry" as referring to similarity of production facilities and products. So viewed, "interindustry competition" becomes a meaningful concept.

manufacturers. Since 1913 Continental has acquired 21 domestic metal container companies as well as numerous others engaged in the packaging business, including producers of flexible packaging; a manufacturer of polyethylene bottles and similar plastic containers; 14 producers of paper containers and paperboard; four companies making closures for glass containers; and one—Hazel-Atlas—producing glass containers. In 1955, the year prior to the present merger, Continental, with assets of $382 million, was the second largest company in the metal container field, shipping approximately 33% of all such containers sold in the United States. It and the largest producer, American Can Company, accounted for approximately 71% of all metal container shipments. National Can Company, the third largest, shipped approximately 5%, with the remaining 24% of the market being divided among 75 to 90 other firms.[3]

During 1956, Continental acquired not only the Hazel-Atlas Company but also Robert Gair Company, Inc.—a leading manufacturer of paper and paperboard products—and White Cap Company—a leading producer of vacuum-type metal closures for glass food containers—so that Continental's assets rose from $382 million in 1955

[3] The District Court found that the basic raw material used in the manufacture of cans, and the major cost factor bearing on their price is tin-coated steel (tin plate). In some instances uncoated steel (blackplate) or aluminum is used instead of tin plate. Other raw materials include soldering compounds, paints, varnishes, lithographic inks, paper and cartons for packaging. Cans are rigid and unbreakable, can be hermetically sealed and are impermeable to gases. They are lighter than glass containers, can be heat-processed faster, and are not chemically inert.

Forty-nine members of the metal can industry are organized in a trade association known as the Can Manufacturers Institute which maintains a professional staff of three. Acting largely through committees, it deals with various technical problems of the industry and carries out some promotional activities emphasizing the advantages of the metal can.

to more than $633 million in 1956, and its net sales and operating revenues during that time increased from $666 million to more than $1 billion.

Hazel-Atlas was a West Virginia corporation which in 1955 had net sales in excess of $79 million and assets of more than $37 million. Prior to the absorption of Hazel-Atlas into Continental the pattern of dominance among a few firms in the glass container industry was similar to that which prevailed in the metal container field. Hazel-Atlas, with approximately 9.6% of the glass container shipments in 1955, was third. Owens-Illinois Glass Company had 34.2% and Anchor-Hocking Glass Company 11.6%, with the remaining 44.6% being divided among at least 39 other firms.[4]

After an initial attempt to prevent the merger under a 1950 consent decree failed, the terms of the decree being

[4] According to the findings of the District Court, glass containers are made principally from sand, lime, and soda ash, and the major factor in determining their price is the cost of labor. Glass containers are rigid, breakable, and chemically inert. They can be hermetically sealed and, unlike many cans, can be easily resealed after they have been opened. The industry recognizes two basic types of containers, the wide mouth and the narrow neck. Members of this industry also have a trade association, the Glass Container Manufacturers Institute, which, through its 45 employees and its standing committees, carries on such activities as market research and promotion, technical research, package design and specifications, the development of standard testing and quality control procedures, problems of freight rates, labor relations, and liaison work with government. In recent decades the expansion of the glass container industry has been more rapid than, and often realized at the expense of, the metal can industry. During World War II, for example, substantial increments in the market served by glass container manufacturers were made possible by the short supply of tin plate.

The third industry found by the District Court to be involved in this multi-industry competitive picture was the plastic container industry, which, though a relative newcomer, has enjoyed impressive growth since making its debut in the mid-1940's. Its dollar sales volume is small compared with that of its metal and glass counterparts, but its growth has been and continues to be steady and rapid.

held inapplicable to the proposed acquisition, the Government moved for a preliminary injunction against its consummation and sought a temporary restraining order pending the determination of its motion. The temporary restraining order was denied, and on the same day the merger was accomplished. The Government then withdrew its motion for a preliminary injunction and continued the action as one for divestiture.

At the conclusion of the Government's case, Continental moved for dismissal of the complaint. After the District Court had granted the motion under Rule 41 (b) of the Federal Rules of Civil Procedure but before a formal opinion was filed, this Court handed down its decision in *Brown Shoe Co.* v. *United States,* 370 U. S. 294; additional briefs directed to the applicability of *Brown Shoe* were filed. The trial judge held that under the guidelines laid down by *Brown Shoe* the Government had not established its right to relief under § 7 of the Clayton Act. This appeal followed.

II.

We deal first with the relevant market. It is not disputed here, and the District Court held, that the geographical market is the entire United States. As for the product market, the court found, as was conceded by the parties, that the can industry and the glass container industry were relevant lines of commerce. Beyond these two product markets, however, the Government urged the recognition of various other lines of commerce, some of them defined in terms of the end uses for which tin and glass containers were in substantial competition. These end-use claims were containers for the beer industry, containers for the soft drink industry, containers for the canning industry, containers for the toiletry and cosmetic industry, containers for the medicine and health industry, and containers for the household and chemical industry. 217 F. Supp., at 778–779.

The court, in dealing with these claims, recognized that there was interindustry competition and made findings as to its extent and nature:

> "[T]here was substantial and vigorous inter-industry competition between these three industries and between various of the products which they manufactured. Metal can, glass container and plastic container manufacturers were each seeking to enlarge their sales to the thousands of packers of hundreds of varieties of food, chemical, toiletry and industrial products, ranging from ripe olives to fruit juices to tuna fish to smoked tongue; from maple syrup to pet food to coffee; from embalming fluid to floor wax to nail polish to aspirin to veterinary supplies, to take examples at random.
>
> "Each industry and each of the manufacturers within it was seeking to improve their products so that they would appeal to new customers or hold old ones." 217 F. Supp., at 780–781.

Furthermore the court found that:

> "Hazel-Atlas and Continental were part of this overall industrial pattern, each in a recognized separate industry producing distinct products but engaged in inter-industry competition for the favor of various end users of their products." *Id.*, at 781.

The court, nevertheless, with one exception—containers for beer—rejected the Government's claim that existing competition between metal and glass containers had resulted in the end-use product markets urged by the Government: "The fact that there is inter-industry or inter-product competition between metal, glass and plastic containers is not determinative of the metes and bounds of a relevant product market." *Ibid.* In the trial court's view, the Government failed to make "appropriate distinctions . . . between inter-industry or overall com-

modity competition and the type of competition between products with reasonable interchangeability of use and cross-elasticity of demand which has Clayton Act significance." *Id.,* at 781–782. The interindustry competition, concededly present, did not remove this merger from the category of the conglomerate combination, "in which one company in two separate industries combined with another in a third industry for the purpose of establishing a diversified line of products." *Id.,* at 782.

We cannot accept this conclusion. The District Court's findings having established the existence of three product markets—metal containers, glass containers and metal and glass beer containers—the disputed issue on which that court erred is whether the admitted competition between metal and glass containers for uses other than packaging beer was of the type and quality deserving of § 7 protection and therefore the basis for defining a relevant product market. In resolving this issue we are instructed on the one hand that "[f]or every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range." *Times-Picayune* v. *United States,* 345 U. S. 594, 612, n. 31. On the other hand it is improper "to require that products be fungible to be considered in the relevant market." *United States* v. *du Pont,* 351 U. S. 377, 394. In defining the product market between these terminal extremes, we must recognize meaningful competition where it is found to exist. Though the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it," there may be "within this broad market, well-defined submarkets . . . which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 325. Concededly these guidelines offer no precise formula for judgment and they necessitate, rather than avoid, careful consideration based upon the entire record.

It is quite true that glass and metal containers have different characteristics which may disqualify one or the other, at least in their present form, from this or that particular use; that the machinery necessary to pack in glass is different from that employed when cans are used; that a particular user of cans or glass may pack in only one or the other container and does not shift back and forth from day to day as price and other factors might make desirable; and that the competition between metal and glass containers is different from the competition between the can companies themselves or between the products of the different glass companies. These are relevant and important considerations but they are not sufficient to obscure the competitive relationships which this record so compellingly reveals.

Baby food was at one time packed entirely in metal cans. Hazel-Atlas played a significant role in inducing the shift to glass as the dominant container by designing "what has become the typical baby food jar." According to Continental's estimate, 80% of the Nation's baby food now moves in glass containers. Continental has not been satisfied with this contemporary dominance by glass, however, and has made intensive efforts to increase its share of the business at the expense of glass. In 1954, two years before the merger, the Director of Market Research and Promotion for the Glass Container Manufacturers Institute concluded, largely on the basis of Continental's efforts to secure more baby food business, that "the can industry is beginning to fight back more aggressively in this field where it is losing ground to glass." In cooperation with some of the baby food companies Continental carried out what it called a Baby Food Depth Survey in New York and Los Angeles to discover specific reasons for the preference of glass-packed baby food. Largely in response to this and other in-depth surveys, advertising campaigns were conducted which were de-

signed to overcome mothers' prejudices against metal containers.[5]

In the soft drink business, a field which has been, and is, predominantly glass territory, the court recognized that the metal can industry had "[a]fter considerable initial difficulty . . . developed a can strong enough to resist the pressures generated by carbonated beverages" and "made strenuous efforts to promote the use of metal cans for carbonated beverages as against glass bottles." 217 F. Supp., at 798. Continental has been a major factor in this rivalry. It studied the results of market tests to determine the extent to which metal cans could "penetrate this tremendous market," and its advertising has centered around the advantages of cans over glass as soft drink containers, emphasizing such features as convenience in stacking and storing, freedom from breakage and lower distribution costs resulting from the lighter weight of cans.

The District Court found that "[a]lthough at one time almost all packaged beer was sold in bottles, in a relatively short period the beer can made great headway and may well have become the dominant beer container." 217 F. Supp., at 795. Regardless of which industry may have the upper hand at a given moment, however, an

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[5] In 1952 Continental ran a series of advertisements emphasizing the following "5 reasons why cans are an ideal container for baby foods:"

"1. ECONOMICAL. Baby food in cans is usually priced as low or lower than baby food packed in other containers.

"2. STERILE. Processing sterilizes the inside, and light, dust and germs can't get into a hermetically sealed can.

"3. EXTRA SAFETY. Cans are sealed to stay sealed until the consumer opens them.

"4. SHATTERPROOF. Steel and tin won't break, shatter or chip.

"5. SAFE FOR LEFT-OVERS. Food can be safely left in the can, just keep it covered and under refrigeration."

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intense competitive battle on behalf of the beer can and the beer bottle is being waged both by the industry trade associations and by individual container manufacturers, one of the principal protagonists being Continental. Technological development has been an important weapon in this battle. A significant factor in the growth of the beer can appears to have been its no-return feature. The glass industry responded with the development of a lighter and cheaper one-way bottle.

In the food canning, toiletry and cosmetic, medicine and health, and household and chemical industries the existence of vigorous competition was also recognized below. In the case of food it was noted that one type of container has supplanted the other in the packing of some products and that in some instances similar products are packaged in two or more different types of containers. In the other industries "glass container, plastic container and metal container manufacturers are each seeking to promote their lines of containers at the expense of other lines, . . . all are attempting to improve their products or to develop new ones so as to have a wider customer appeal," 217 F. Supp., at 804, the result being that "manufacturers from time to time may shift a product from one type of container to another." *Id.*, at 805.

In the light of this record and these findings, we think the District Court employed an unduly narrow construction of the "competition" protected by § 7 and of "reasonable interchangeability of use or the cross-elasticity of demand" in judging the facts of this case. We reject the opinion below insofar as it holds that these terms as used in the statute or in *Brown Shoe* were intended to limit the competition protected by § 7 to competition between identical products, to the kind of competition which exists, for example, between the metal containers of one company and those of another, or between the several manufacturers of glass containers. Certainly, that

the competition here involved may be called "inter-industry competition" and is between products with distinctive characteristics does not automatically remove it from the reach of § 7.

Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to "recognize competition where, in fact, competition exists." *Brown Shoe Co.* v. *United States,* 370 U. S., at 326. In our view there is and has been a rather general confrontation between metal and glass containers and competition between them for the same end uses which is insistent, continuous, effective and quantitywise very substantial. Metal has replaced glass and glass has replaced metal as the leading container for some important uses; both are used for other purposes; each is trying to expand its share of the market at the expense of the other; [6] and each is attempting to preempt for itself every use for which its product is physically suitable, even though some such uses have traditionally been regarded as the exclusive domain of the competing industry.[7] In differing degrees

[6] Consumer preferences for glass or metal are often regional and traceable to factors other than the intrinsic superiority of the preferred container. For example, the one-way beer bottle was highly successful in Baltimore—due in part to the efforts of "a highly motivated leading brewer"—but failed to make headway in Detroit. And though glass appears to have about 80% of the Nation's baby food business, as of the time of the merger cans had over 60% of the business west of the Mississippi. According to one opinion in the record, all Canadian baby food moves in cans. And an official of the Glass Container Manufacturers Institute reported to that body that pickles, preserves, and jams are packed in tin cans in Canada.

[7] Ford Sammis & Company, a firm of market economists, conducted for the Glass Container Manufacturers Institute market surveys of 28 different product classifications. On the basis of over 3¼ million individual answers to questions asked in more than 12,000 personal interviews, Ford Sammis concluded the following:

"Every consumer product tends to standardize on a single type of container. Glass has become the standard, traditional container for

for different end uses manufacturers in each industry take into consideration the price of the containers of the opposing industry in formulating their own pricing

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a host of products, including catsup, salad dressings, salad oil, instant coffee, prune juice, mayonnaise, peanut butter, jams and syrup. Other products have standardized on tin cans—regular coffee, evaporated milk, dog food, and most fruits, vegetables and juices.

"However, no traditional market is ever secure for any type of container. Marketers are apt to try out new containers at any time, in their constant search for ways to increase sales.

"When this happens, the result is a period of container competition, which may run through one or more of three separate stages."

1. Stage 1, according to the Sammis report, occurs when a new type of container is first introduced by a secondary brand. Thus "[a] new container can become a potent sales force for a brand, if strong consumer preference exists (or is promoted) for that type of container. Recognizing this, secondary brands are constantly trying out new types of containers as sales incentive. While leading brands are ordinarily satisfied to maintain the status quo, secondary brands are willing to gamble to improve their positions."

2. The second stage comes about in this manner: "If a secondary brand increases its sales during the period when it is introducing a new type of container, the sales increase is usually attributed to the new container, by marketer and competitors alike. Advertising, product changes or other factors may actually be more important than the new container, but circumstantial evidence points to the container.

"Leading brands are not prone to sit idly by while competitors cut into their share of the market. They tend to cover competitors' bets by offering both traditional and new types of containers to their customers. This creates Stage 2 of container competition."

3. "When leading brands are available in a choice of containers, consumers' container preference is no longer in conflict with their brand preferences. They can have the brand they want in the container they want. Sales of leading brands under these circumstances seek the level of consumer preference for each type of container.

"If preference for one type of container greatly exceeds preference for the other type, the products then tends [*sic*] eventually to standardize once again on a single type of container—the container most

policy.[8] Thus, though the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within § 7's competition-preserving proscriptions.

Moreover, price is only one factor in a user's choice between one container or the other. That there are price differentials between the two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue. Whether a packager will use glass or cans may depend not only on the price of the package but also upon other equally important considerations. The consumer, for example, may begin to prefer one type of container over the other and the manufacturer of baby food cans may therefore find that his problem is the housewife rather

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consumers prefer. This process is subject to promotion of container by brand marketers or container manufacturers. The alternate outcome can be favorable to either the new or the traditional container."

[8] The chairman of the board of Owens-Illinois Glass Co. testified that he takes into account the price of metal containers in pricing glass containers for beer, soft drinks, and household and chemical products, and to a lesser degree for toiletries and cosmetics. In assessing the likelihood that it could "penetrate [the] tremendous market" for soft drink containers Continental concluded "[a]ssuming that the merchandising factors are favorable and that the product quality is well received, the upper limit on market acceptance will then be determined by *price*." Continental also stated in an intercompany memordandum that in the fight between the beer can and the one-way bottle "[t]he key factor, in our estimation, is *pricing*," and concluded that a reduction in the price of one-way beer bottles was to "be regarded as a further attempt on the part of the glass manufacturers to maintain their position in the one-way package field."

than the packer or the price of his cans.[9] This may not be price competition but it is nevertheless meaningful competition between interchangeable containers.

We therefore conclude that the area of effective competition between the metal and glass container industry is far broader than that of containers for beer. It is true that the record in this case does not identify with particularity all end uses for which competition exists and all those for which competition may be non-existent, too remote, or too ephemeral to warrant § 7 application. Nor does the record furnish the exact quantitative share of the relevant market which is enjoyed by the individual participating can and glass companies. But "[t]he 'market,' as most concepts in law or economics, cannot be measured by metes and bounds. . . . Obviously no magic inheres in numbers." *Times-Picayune* v. *United States,* 345 U. S. 594, 611–612. "Industrial activities cannot be confined to trim categories." *United States* v. *du Pont,* 351 U. S. 377, 395. The claimed deficiencies in the record cannot sweep aside the existence of a large area of effective competition between the makers of cans and the makers of glass containers. We know enough to conclude that the rivalry between cans and glass containers is pervasive and that the area of competitive overlap between these two product markets is broad enough to make the position of the individual companies within their own industries very relevant to the merger's impact within the broader competitive area that embraces both of the merging firms' respective industries.

Glass and metal containers were recognized to be two separate lines of commerce. But given the area of effec-

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[9] An official of the Glass Container Manufacturers Institute described that organization's advertising program as three-pronged, directed at the packer, the retailer, and the ultimate consumer.

tive competition between these lines, there is necessarily implied one or more other lines of commerce embracing both industries. Since the purpose of delineating a line of commerce is to provide an adequate basis for measuring the effects of a given acquisition, its contours must, as nearly as possible, conform to competitive reality. Where the area of effective competition cuts across industry lines, so must the relevant line of commerce; otherwise an adequate determination of the merger's true impact cannot be made.

Based on the evidence thus far revealed by this record we hold that the interindustry competition between glass and metal containers is sufficient to warrant treating as a relevant product market the combined glass and metal container industries and all end uses for which they compete. There may be some end uses for which glass and metal do not and could not compete, but complete interindustry competitive overlap need not be shown. We would not be true to the purpose of the Clayton Act's line of commerce concept as a framework within which to measure the effect of mergers on competition were we to hold that the existence of noncompetitive segments within a proposed market area precludes its being treated as a line of commerce.

This line of commerce was not pressed upon the District Court. However, since it is coextensive with the two industries, which were held to be lines of commerce, and since it is composed largely, if not entirely, of the more particularized end-use lines urged in the District Court by the Government, we see nothing to preclude us from reaching the question of its prima facie existence at this stage of the case.

Nor are we concerned by the suggestion that if the product market is to be defined in these terms it must include plastic, paper, foil and any other materials competing for the same business. That there may be a

broader product market made up of metal, glass and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic or cans and glass together, for "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co.* v. *United States,* 370 U. S., at 325.

III.

We approach the ultimate judgment under § 7 having in mind the teachings of *Brown Shoe,* supplemented by their application and elaboration in *United States* v. *Philadelphia National Bank,* 374 U. S. 321, and *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651. The issue is whether the merger between Continental and Hazel-Atlas will have probable anticompetitive effect within the relevant line of commerce. Market shares are the primary indicia of market power but a judgment under § 7 is not to be made by any single qualitative or quantitative test. The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future. Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of § 7's design to prevent undue concentration. Moreover, the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent. See *United States* v. *El Paso Natural Gas Co., supra.*

Continental occupied a dominant position in the metal can industry. It shipped 33% of the metal cans shipped by the industry and together with American shipped about 71% of the industry total. Continental's share amounted to 13 billion metal containers out of a total of 40 billion and its $433 million gross sales of metal con-

tainers amounted to 31.4% of the industry's total gross of $1,380,000,000. Continental's total assets were $382 million, its net sales and operating revenues $666 million.

In addition to demonstrating the dominant position of Continental in a highly concentrated industry, the District Court's findings clearly revealed Continental's vigorous efforts all across the competitive front between metal and glass containers. Continental obviously pushed metal containers wherever metal containers could be pushed. Its share of the beer can market ran from 43% in 1955 to 46% in 1957. Its share of both beer can and beer bottle shipments, disregarding the returnable bottle factor, ran from 36% in 1955 to 38% in 1957. Although metal cans have so far occupied a relatively small percentage of the soft drink container field, Continental's share of this can market ranged from 36% in 1955 to 26% in 1957 and its portion of the total shipments of glass and metal soft drink and beverage containers, disregarding the returnable bottle factor, was 7.2% in 1955, approximately 5.4% in 1956 and approximately 6.2% in 1957 (for 1956 and 1957 these figures include Hazel-Atlas' share). In the category covering all nonfood products, Continental's share was approximately 30% of the total shipments of metal containers for such uses.

Continental's major position in the relevant product market—the combined metal and glass container industries—prior to the merger is undeniable. Of the 59 billion containers shipped in 1955 by the metal (39¾ billion) and glass (19⅓ billion) industries, Continental shipped 21.9%, to a great extent dispersed among all of the end uses for which glass and metal compete.[10] Of the six largest firms in the product market, it ranked second.

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[10] Determination of market shares is made somewhat more difficult in this case than in the ordinary intraindustry merger because the indices of total production of the two industries are expressed differently, the metal container industry reporting to the Census

When Continental acquired Hazel-Atlas it added significantly to its position in the relevant line of commerce. Hazel-Atlas was the third largest glass container manufacturer in an industry in which the three top companies controlled 55.4% of the total shipments of glass containers. Hazel-Atlas' share was 9.6%, which amounted to 1,857,000,000 glass containers out of a total of 19⅓ billion industrial total. Its annual sales amounted to $79 million, its assets exceeded $37 million and it had 13 plants variously located in the United States. In terms of total containers shipped, Hazel-Atlas ranked sixth in the relevant line of commerce, its almost 2 billion containers being 3.1% of the product market total.

Bureau in terms of tinplate consumed in manufacture, and the glass container industry in terms of units of containers. On the basis of figures and data supplied by the Census Bureau and the Can Manufacturers Institute the Government has derived a conversion factor showing the relationship between tinplate consumption and total containers manufactured, thereby permitting a comparison of the relative positions of the firms competing within the glass and metal container line of commerce. It would appear that the District Court relied on figures disclosed by application of this factor, since it found that American and Continental shipped approximately 38% and 33%, respectively, of the metal cans sold in the United States. 217 F. Supp., at 773.

Continental objects to the use of this conversion scheme, however, arguing that it ignores such considerations as size of cans and the returnable feature of some types of bottles. We are not persuaded. Since different systems of statistical notation are employed by these industries, a common referential standard is an absolute prerequisite to a comparison of market shares. Consistent with this Court's declarations in other cases concerning the high degree of relevance of market shares to the effect of mergers on competition, we believe that slight variations one way or the other which may inhere in the use of a conversion formula should not blind us to the broad significance of the resulting percentages. In the compilation of statistics "precision in detail is less important than the accuracy of the broad picture presented." *Brown Shoe Co.* v. *United States*, 370 U. S., at 342, n. 69.

The evidence so far presented leads us to conclude that the merger between Continental and Hazel-Atlas is in violation of § 7. The product market embracing the combined metal and glass container industries was dominated by six firms having a total of 70.1% of the business.[11] Continental, with 21.9% of the shipments, ranked second within this product market, and Hazel-Atlas, with 3.1%, ranked sixth. Thus, of this vast market—amounting at the time of the merger to almost $3 billion in annual sales—a large percentage already belonged to Continental before the merger. By the acquisition of Hazel-Atlas stock Continental not only increased its own share more than 14% from 21.9% to 25%, but also reduced from five to four the most significant competitors who might have threatened its dominant position. The resulting percentage of the combined firms approaches that held presumptively bad in *United States* v. *Philadelphia National Bank,* 374 U. S. 321, and is almost the same as that involved in *United States* v. *Aluminum Co. of America,* 377 U. S. 271. The incremental addition to the acquiring firm's share is considerably larger than in *Aluminum Co.* The case falls squarely within the principle that where there has been a "history of tendency toward concentration in the industry" tendencies toward further concentration "are to be curbed in their incipiency." *Brown Shoe Co.* v. *United States,* 370 U. S., at 345, 346. Where "concentration is already great, the importance of pre-

[11] The six largest firms, and their respective percentages of the relevant market as of the year prior to the merger are:

American Can Co.	26.8%
Continental Can Co.	21.9%
Owens-Illinois Glass Co.	11.2%
Anchor-Hocking Glass Co.	3.8%
National Can Co.	3.3%
Hazel-Atlas Glass Co.	3.1%
Total	70.1%

venting even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 365, n. 42; *United States* v. *Aluminum Co. of America, supra.*

Continental insists, however, that whatever the nature of interindustry competition in general, the types of containers produced by Continental and Hazel-Atlas at the time of the merger were for the most part not in competition with each other and hence the merger could have no effect on competition. This argument ignores several important matters.

First: The District Court found that both Continental and Hazel-Atlas were engaged in interindustry competition characteristic of the glass and metal can industries. While the position of Hazel-Atlas in the beer and soft drink industries was negligible in 1955, its position was quite different in other fields. Hazel-Atlas made both wide-mouthed glass jars and narrow-necked containers but more of the former than the latter. Both are used in packing food, medicine and health supplies, household and industrial products and toiletries and cosmetics, among others, and Hazel-Atlas' position in supplying the packaging needs of these industries was indeed important. In 1955, it shipped about 8% of the narrow-necked bottles and about 14% of the wide-mouthed glass containers for food; about 10% of the narrow-necked and 40% of the wide-mouthed glass containers for the household and chemical industry; about 9% of the narrow-necked and 28% of the wide-mouthed glass containers for the toiletries and cosmetics industry; and about 6% of the narrow-necked and 25% of the wide-mouthed glass containers for the medicine and health industry. Continental, as we have said, in 1955 shipped 30% of the containers used for these same nonfood purposes. In these industries the District Court found that the glass container and metal

container manufacturers were each seeking to promote their lines of containers at the expense of the other lines and that all were attempting to improve their products or to develop new ones so as to have a wider customer appeal. We think it quite clear that Continental and Hazel-Atlas were set off directly against one another in this process and that the merger therefore carries with it the probability of foreclosing actual and potential competition between these two concerns. Hazel-Atlas has been removed as an independent factor in the glass industry and in the line of commerce which includes both metal cans and glass containers.

We think the District Court erred in placing heavy reliance on Continental's management of its Hazel-Atlas division after the merger while Continental was under some pressure because of the pending government antitrust suit. Continental acquired by the merger the power to guide the development of Hazel-Atlas consistently with Continental's interest in metal containers; contrariwise it may find itself unwilling to push metal containers to the exclusion of glass for those end uses where Hazel-Atlas is strong. It has at the same time acquired the ability, know-how and the capacity to satisfy its customers' demands whether they want metal or glass containers. Continental need no longer lose customers to glass companies solely because consumer preference, perhaps triggered by competitive efforts by the glass container industry, forces the packer to turn from cans to glass. And no longer does a Hazel-Atlas customer who has normally packed in glass have to look elsewhere for metal containers if he discovers that the can rather than the jar will answer some of his pressing problems.

Second: Continental would view these developments as representing an acceptable effort by it to diversify its product lines and to gain the resulting competitive advantages, thereby strengthening competition which it

declared the antitrust laws are designed to promote. But we think the answer is otherwise when a dominant firm in a line of commerce in which market power is already concentrated among a few firms makes an acquisition which enhances its market power and the vigor and effectiveness of its own competitive efforts.

Third: A merger between the second and sixth largest competitors in a gigantic line of commerce is significant not only for its intrinsic effect on competition but also for its tendency to endanger a much broader anticompetitive effect by triggering other mergers by companies seeking the same competitive advantages sought by Continental in this case. As the Court said in *Brown Shoe*, "[i]f a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares." 370 U. S., at 343–344.

Fourth: It is not at all self-evident that the lack of current competition between Continental and Hazel-Atlas for some important end uses of metal and glass containers significantly diminished the adverse effect of the merger on competition. Continental might have concluded that it could effectively insulate itself from competition by acquiring a major firm not presently directing its market acquisition efforts toward the same end uses as Continental, but possessing the potential to do so. Two examples will illustrate. Both soft drinks and baby food are currently packed predominantly in glass, but Continental has engaged in vigorous and imaginative promotional activities attempting to overcome consumer preferences for glass and secure a larger share of these two markets for its tin cans. Hazel-Atlas was not at the time of the merger a significant producer of either of these containers, but with comparatively little difficulty, if it were an independent firm making independent business judg-

ments, it could have developed its soft drink and baby food capacity. The acquisition of Hazel-Atlas by a company engaged in such intense efforts to effect a diversion of business from glass to metal in both of these lines cannot help but diminish the likelihood of Hazel-Atlas realizing its potential as a significant competitor in either line. Our view of the record compels us to disagree with the District Court's conclusion that Continental, as a result of the merger, was not "likely to cease being an innovator in either [the glass or metal container] line." 217 F. Supp., at 790. It would make little sense for one entity within the Continental empire to be busily engaged in persuading the public of metal's superiority over glass for a given end use, while the other is making plans to increase the Nation's total glass container output for that same end use. Thus, the fact that Continental and Hazel-Atlas were not substantial competitors of each other for certain end uses at the time of the merger may actually enhance the long-run tendency of the merger to lessen competition.

We think our holding is consonant with the purpose of § 7 to arrest anticompetitive arrangements in their incipiency. Some product lines are offered in both metal and glass containers by the same packer. In such areas the interchangeability of use and immediate interindustry sensitivity to price changes would approach that which exists between products of the same industry. In other lines, as where one packer's products move in one type container while his competitor's move in another, there are inherent deterrents to customer diversion of the same type that might occur between brands of cans or bottles. But the possibility of such transfers over the long run acts as a deterrent against attempts by the dominant members of either industry to reap the possible benefits of their position by raising prices above the competitive

level or engaging in other comparable practices. And even though certain lines are today regarded as safely within the domain of one or the other of these industries, this pattern may be altered, as it has been in the past. From the point of view not only of the static competitive situation but also the dynamic long-run potential, we think that the Government has discharged its burden of proving prima facie anticompetitive effect. Accordingly the judgment is reversed and the case remanded for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE GOLDBERG, concurring.

I fully agree with the Court that "[s]ince the purpose of delineating a line of commerce is to provide an adequate basis for measuring the effects of a given acquisition, its contours must, as nearly as possible, conform to competitive reality." *Ante,* at p. 457. I also agree that "on the evidence thus far revealed by this record," there has been a prima facie showing "that the interindustry competition between glass and metal containers . . . [warrants] treating as a relevant product market the combined glass and metal container industries and all end uses for which they compete." *Ibid.* I wish to make it clear, however, that, as I read the opinion of the Court, the Court does not purport finally to decide the determinative line of commerce. Since the District Court "dismissed the complaint at the close of the Government's case," *ante,* at p. 444, upon remand it will be open to the defendants not only to rebut the prima facie inference that metal and glass containers may be considered together as a line of commerce but also to prove that plastic or other containers in fact compete with metal and glass to such an extent that as a matter of "competitive reality" they must be considered as part of the determinative line of commerce.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Measured by any antitrust yardsticks with which I am familiar, the Court's conclusions are, to say the least, remarkable. Before the merger which is the subject of this case, Continental Can manufactured metal containers and Hazel-Atlas manufactured glass containers.[1] The District Court found, with ample support in the record, that the Government had wholly failed to prove that the merger of these two companies would adversely affect competition in the metal container industry, in the glass container industry, or between the metal container industry and the glass container industry. Yet this Court manages to strike down the merger under § 7 of the Clayton Act, because, in the Court's view, it is anticompetitive.[2] With all respect, the Court's conclusion is based on erroneous analysis, which makes an abrupt and unwise departure from established antitrust law.

I agree fully with the Court that "we must recognize meaningful competition where it is found," *ante*, p. 449, and that "inter-industry" competition, such as that involved in this case, no less than "intra-industry" competition is protected by § 7 from anticompetitive mergers. As

[1] Both companies manufactured other related products which for present purposes may be disregarded. See the description of the two companies in the opinion of the District Court, 217 F. Supp. 761, 769–770.

[2] Section 7 of the Clayton Act, as amended by the Act of December 29, 1950, 64 Stat. 1125, 15 U. S. C. § 18, provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

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this Court has, in effect, recognized in past cases, the concept of an "industry," or "line of commerce," is not susceptible of reduction to a precise formula. See *Brown Shoe Co., Inc.*, v. *United States*, 370 U. S. 294, 325; *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 394–396; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 611. It would, therefore, be artificial and inconsistent with the broad protective purpose of § 7, see *Brown Shoe, supra,* at 311–323, to attempt to differentiate between permitted and prohibited mergers merely by asking whether a probable reduction in competition, if it is found, will be within a single "industry" or between two or more "industries."

Recognition that the purpose of § 7 is not to be thwarted by limiting its protection to intramural competition within strictly defined "industries," does not mean, however, that the concept of a "line of commerce" is no longer serviceable. More precisely, it does not, as the majority seems to think, entail the conclusion that wherever "meaningful competition" exists, a "line of commerce" is to be found. The Court declares the initial question of this case to be "whether the admitted competition between metal and glass containers for uses other than packaging beer was of the type and quality deserving of § 7 protection and *therefore* the basis for defining a relevant product market." *Ante,* p. 449. (Emphasis added.) And the Court's answer is similarly phrased: ". . . [W]e hold that *the interindustry competition* between glass and metal containers *is sufficient to warrant treating as a relevant product market* the combined glass and metal container industries and all end uses for which they compete." *Ante,* p. 457. (Emphasis added.) Quite obviously, such a conclusion simply reads the "line of commerce" element out of § 7, and destroys its usefulness as an aid to analysis.

The distortions to which this approach leads are evidenced by the Court's application of it in this case.

Having found that there is "interindustry competition between glass and metal containers" the Court concludes that "the combined glass and metal container industries" is the relevant line of commerce or "product market" in which anticompetitive effects must be measured. *Ante,* p. 457. Applying that premise, the Court then notes Continental's "dominant position" in the *metal can industry, ante,* p. 458, and finds that Continental has a "major position" in the "relevant product market—*the combined metal and glass container industries," ante,* p. 459. (Emphasis added.) Hazel-Atlas, being the third largest producer of *glass containers,* is found to rank sixth in the relevant product market—again, the combined metal and glass container industries. *Ante,* p. 460. This "evidence," coupled with the market shares of Continental and Hazel-Atlas in the combined product market,[3] leads the Court to conclude that the merger violates § 7.

"The resulting percentage of the combined firms," the Court says, "approaches that held presumptively bad in *United States* v. *Philadelphia National Bank,* 374 U. S. 321." *Ante,* p. 461. The *Philadelphia Bank* case, which involved the merger of two banks plainly engaged in the same line of commerce,[4] is, however, entirely distinct from the present situation, which involves two separate industries. The bizarre result of the Court's ap-

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[3] The Court confesses to some difficulty in determining market shares. See *ante,* pp. 459–460, n. 10.

[4] "We have no difficulty in determining the 'line of commerce' (relevant product or services market) . . . in which to appraise the probable competitive effects of appellees' proposed merger. We agree with the District Court that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' . . . composes a distinct line of commerce. . . . In sum, it is clear that commercial banking is a market 'sufficiently inclusive to be meaningful in terms of trade realities.' *Crown Zellerbach Corp.* v. *Federal Trade Comm'n,* 296 F. 2d 800, 811 (C. A. 9th Cir. 1961)." 374 U. S., at 356–357.

proach is that market percentages of a nonexistent market enable the Court to dispense with "elaborate proof of market structure, market behavior and probable anti-competitive effects," *ante,* p. 458. As I shall show, the Court has "dispensed with" proof which, given heed, shows how completely fanciful its market-share analysis is.

In fairness to the District Court it should be said that it did not err in failing to consider the "line of commerce" on which this Court now relies. For the Government did not even suggest that such a line of commerce existed until it got to this Court.[5] And it does not seriously suggest even now that such a line of commerce exists.[6] The truth

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[5] In the District Court, the Government relied on 10 "lines of commerce." In addition to "the packaging industry," "the can industry," "the glass container industry," and "metal closures" (not relevant here), the Government argued that there were six "lines of commerce" which were defined by the end product for which the containers were used, *e. g.*, "containers for the beer industry." See 217 F. Supp., at 778–779.

[6] Although the Government makes the suggestion, which the Court now accepts, that wherever there is competition there is a "line of commerce," so that "the 'line of commerce' within which the merger's effect on competition should be appraised is the production and sale of containers used for all purposes for which metal or glass containers may be used . . ." (Brief, p. 18), it concedes the artificiality of this approach and, in so doing, itself rejects the market-share analysis adopted by the Court. The Government states that its suggested test of illegality of a merger involving inter-industry competition "omits analysis of statistics regarding market shares simply because those traditional yardsticks are generally unavailable to measure the full consequences which an interindustry merger would have on competition." (Brief, p. 22.)

The test which the Government advocates is that it "can satisfy its burden of showing that the merger may have the effect of substantially lessening competition by proving (a) the existence of substantial competition between two industries; (b) a high degree of concentration in either or both of the competing industries; and (c) the dominant positions of each of the merging companies in its respective industry." (Brief, p. 22.) This approach, which has at least the virtue of facing up to its own logic, frankly disavows atten-

is that "glass and metal containers" form a distinct line of commerce only in the mind of this Court.

The District Court found, and this Court accepts the finding, that this case "deals with three separate and distinct industries manufacturing separate and distinct types of products": metal, glass, and plastic containers. 217 F. Supp., at 780.

> "Concededly there was substantial and vigorous inter-industry competition between these three industries and between various of the products which they manufactured. Metal can, glass container and plastic container manufacturers were each seeking to enlarge their sales to the thousands of packers of hundreds of varieties of food, chemical, toiletry and industrial products, ranging from ripe olives to fruit juices to tuna fish to smoked tongue; from maple syrup to pet food to coffee; from embalming fluid to floor wax to nail polish to aspirin to veterinary supplies, to take examples at random.
>
> "Each industry and each of the manufacturers within it was seeking to improve their products so that they would appeal to new customers or hold old ones. Hazel-Atlas and Continental were part of this overall industrial pattern, each in a recognized separate industry producing distinct products but engaged in inter-industry competition for the favor of various end users of their products." 217 F. Supp., at 780–781.

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tion to a "line of commerce." The effect of the Court's approach is not markedly different from that of the Government's test, see *infra*, p. 476, and there is some suggestion in the last few pages of the Court's opinion that the Court appreciates this. As discussed hereafter, however, there is nothing in the Court's opinion to support adoption of the Government's *"per se"* approach, and the facts developed in the District Court demonstrate that, so far as one can tell from this case at least, a *per se* approach to the problem of inter-industry competition is wholly inappropriate.

Only this Court will not be "concerned," *ante,* p. 457, that without support in reason or fact, it dips into this network of competition and establishes metal and glass containers as a separate "line of commerce," leaving entirely out of account all other kinds of containers: "plastic, paper, foil and any other materials competing for the same business," *ibid.*[7] *Brown Shoe, supra,* on which the Court relies for this travesty of economics, *ante,* p. 458, spoke of *"well-defined* submarkets" within a broader market, and said that "the boundaries of such a submarket" were to be determined by *"practical indicia,"* 370 U. S., at 325.[8] (Emphasis added.) Since the Court here provides its own definition of a market, unrelated to any market reality whatsoever, *Brown Shoe* must in this case be regarded as a bootstrap.

The Court is quite wrong when it says that the District Court "employed an unduly narrow construction of the 'competition' protected by § 7" and that it held that "the competition protected by § 7 [is limited] to competition between identical products," *ante,* p. 452. Quite to the contrary, the District Court expressly stated that

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[7] If the competition between metal and glass containers is sufficient to constitute them collectively a "line of commerce," why does their competition with plastic containers and "other materials competing for the same business" not require that all such containers be included in the same line of commerce? The Court apparently concedes that the competition is multilateral.

[8] The "practical indicia" specified by the Court were: "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U. S., at 325 (footnote omitted). While many of these factors weigh *against* the Court's conclusion that metal and glass containers should be combined in a single line of commerce, not one of them speaks for the Court's conclusion that they should be segregated from all other kinds of containers and together form a separate line of commerce.

"Section 7 is applicable to conglomerate mergers where the facts warrant," 217 F. Supp., at 783 (footnote omitted).[9] The difference between the District Court and this Court lies rather in the District Court's next sentence: "But there must be evidence that the facts warrant such application." *Ibid.*

If attention is paid to the conclusions of the court below, it is obvious that this Court's analysis has led it to substitute a meaningless figure—the merged companies' share of a nonexistent "market"—for the sound, careful factual findings of the District Court.

The District Court found: [10]

(1) With respect to the merger's effect on competition within the metal container industry, that "prior to its acquisition Hazel-Atlas did not manufacture or sell metal cans . . . ." 217 F. Supp., at 770.

(2) With respect to the merger's effect on competition within the glass container industry, that "Continental did not, directly or through subsidiaries, manufacture or sell glass containers . . . ." *Ibid.*

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[9] The District Court observed also that "relevant markets are neither economic abstractions nor artificial conceptions." 217 F. Supp., at 768. In this respect, in view of the majority's present opinion, the district judge must, I suppose, be deemed to have erred.

[10] This summary of the District Court's findings includes only so much as is relevant to the majority's opinion. The District Court gave detailed attention to each of the Government's contentions, in an opinion of 48 pages. Its conclusions were summarized in the following statement:

"Viewing the evidence as a whole, quite apart from theory, there was a total failure by the Government to establish the essential elements of a violation of Section 7. As will be apparent from a discussion of the proof relating to each specific line of commerce, the Government did not lay either the statistical or testimonial foundations required to establish its case. It was this failure of proof which required the dismissal of the complaint and entry of judgment for the defendants." 217 F. Supp., at 787.

(3) With respect to the merger's effect on the metal container industry's efforts to compete with the glass container industry,

> "The Government fared no better on its claim that as a result of the merger Continental was likely to lose the incentive to push can sales at the expense of glass. The Government introduced no evidence showing either that there had been or was likely to be any slackening of effort to push can sales. On the contrary, as has been pointed out, the object of the merger was diversification, and Continental was actively promoting intra-company competition between its various product lines. Since by far the largest proportion of Continental's business was in metal cans, it scarcely seemed likely that cans would suffer at the expense of glass.
>
> "Moreover, subsequent to the merger Continental actively engaged in a vigorous research and promotion program in both its metal and glass container lines. *In the light of the record and of the competitive realities, the notion that it was likely to cease being an innovator in either line is patently absurd.*" 217 F. Supp., at 790 (footnote omitted). (Emphasis added.)

(4) With respect to the merger's effect on the glass container industry's efforts to compete with the metal container industry,

> "In addition the Government advanced the converse of the proposition which it urged with respect to the metal can line—that as a result of the merger Continental was likely to lose the incentive to push glass container sales at the expense of cans. In view of what has been said concerning the purpose of Continental's diversification program and the course it pursued after the merger, it is no more likely that Continental would slacken its efforts to promote glass

> than that it would slacken its efforts to promote cans. Indeed, if it had planned to do so there would have been little, if any, point to acquiring Hazel-Atlas, a major glass container producer." 217 F. Supp., at 793.

It is clear from the foregoing that the District Court fully considered the possibility that a merger of leading producers in two industries between which there was competition would dampen the inter-industry rivalry. The basis of the decision below was not, therefore, an erroneous belief that § 7 did not reach such competition but a careful study of the Government's proof, which led to the conclusion that "in the light of the record and of the competitive realities, the notion that . . . [the merged company] was likely to cease being an innovator in either line is patently absurd."

Surely this failure of the Court's mock-statistical analysis to reflect the facts as found on the record demonstrates what the Government concedes,[11] and what one would in any event have thought to be obvious: When a merger is attacked on the ground that competition *between* two distinct industries, or lines of commerce, will be affected, the shortcut "market share" approach developed in the *Philadelphia Bank* case, see 374 U. S., at 362–365; *ante*, p. 458, has no place. In such a case, the legality of the merger must surely depend, as it did below, on an inquiry into competitive effects in the actual lines of commerce which are involved. In this case, the result depends—or should depend—on the impact of the merger in the two lines of commerce here involved: the metal container industry and the glass container industry.[12] As the find-

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[11] See note 6, *supra*.

[12] The Government urged other lines of commerce below, see note 5, *supra*, but has abandoned all of them here except "containers for the canning industry," a line of commerce defined by end use and including "all metal cans and glass containers for the end uses of 'canning'

ings of the District Court which are quoted above make plain, reference to these two actual lines of commerce does not preclude protection of inter-industry competition. Indeed, by placing the merged company in the setting of other companies in each of the respective lines of commerce which are also engaged in inter-industry competition, this approach is far more likely than the Court's to give § 7 full, but not artificial, scope.

The Court's spurious market-share analysis should not obscure the fact that the Court is, in effect, laying down a *"per se"* rule that mergers between two large companies in related industries are presumptively unlawful under § 7. Had the Court based this new rule on a conclusion that such mergers are inherently likely to dampen inter-industry competition or that so few mergers of this kind would fail to have that effect that a *"per se"* rule is justified, I could at least understand the thought process which lay behind its decision. It would, of course, be inappropriate to prescribe *per se* rules in the first case to present a problem, cf. *White Motor Co.* v. *United States,* 372 U. S. 253, let alone a case in which the facts suggest that a *per se* rule is unsound. And to lay down a rule on either of the bases suggested would require a much more careful look at the nature of competition between industries than the Court's casual glance in that direction.

In any event, the Court does not take this tack. It chooses instead to invent a line of commerce the existence of which no one, not even the Government, has imagined; for which businessmen and economists will look in vain; a line of commerce which sprang into existence only when the merger took place and will cease to exist when the

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food." 217 F. Supp., at 799. The District Court gave detailed reasons, which the record fully supports, for rejecting the Government's contention that this was a distinct line of commerce. See 217 F. Supp., at 799–802.

merger is undone. I have no idea where § 7 goes from here, nor will businessmen or the antitrust bar. Hitherto, it has been thought that the validity of a merger was to be tested by examining its effect in identifiable, "well-defined" (*Brown Shoe, supra,* at 325) markets. Hereafter, however slight (or even nonexistent) the competitive impact of a merger on any actual market, businessmen must rest uneasy lest the Court create some "market," in which the merger presumptively dampens competition, out of bits and pieces of real ones. No one could say that such a fear is unfounded, since the Court's creative powers in this respect are declared to be as extensive as the competitive relationships between industries. This is said to be recognizing "meaningful competition where it is found to exist." It is in fact imagining effects on competition where none has been shown.

I would affirm the judgment of the District Court.

ESCOBEDO *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 615. Argued April 29, 1964.—Decided June 22, 1964.

Petitioner, a 22-year-old of Mexican extraction, was arrested with his sister and taken to police headquarters for interrogation in connection with the fatal shooting, about 11 days before, of his brother-in-law. He had been arrested shortly after the shooting, but had made no statement, and was released after his lawyer obtained a writ of habeas corpus from a state court. Petitioner made several requests to see his lawyer, who, though present in the building, and despite persistent efforts, was refused access to his client. Petitioner was not advised by the police of his right to remain silent and, after persistent questioning by the police, made a damaging statement to an Assistant State's Attorney which was admitted at the trial. Convicted of murder, he appealed to the State Supreme Court, which affirmed the conviction. *Held:* Under the circumstances of this case, where a police investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect in police custody who has been refused an opportunity to consult with his counsel and who has not been warned of his constitutional right to keep silent, the accused has been denied the assistance of counsel in violation of the Sixth and Fourteenth Amendments; and no statement extracted by the police during the interrogation may be used against him at a trial. *Crooker* v. *California,* 357 U. S. 433, and *Cicenia* v. *Lagay,* 357 U. S. 504, distinguished, and to the extent that they may be inconsistent with the instant case, they are not controlling. Pp. 479–492.

28 Ill. 2d 41, 190 N. E. 2d 825, reversed and remanded.

Barry L. Kroll argued the cause for petitioner. With him on the brief was *Donald M. Haskell.*

James R. Thompson argued the cause for respondent. With him on the brief were *Daniel P. Ward* and *Elmer C. Kissane.*

Bernard Weisberg argued the cause for the American Civil Liberties Union, as *amicus curiae,* urging reversal. With him on the brief was *Walter T. Fisher.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon* v. *Wainwright,* 372 U. S. 335, 342, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation.

On the night of January 19, 1960, petitioner's brother-in-law was fatally shot. In the early hours of the next morning, at 2:30 a. m., petitioner was arrested without a warrant and interrogated. Petitioner made no statement to the police and was released at 5 that afternoon pursuant to a state court writ of habeas corpus obtained by Mr. Warren Wolfson, a lawyer who had been retained by petitioner.

On January 30, Benedict DiGerlando, who was then in police custody and who was later indicted for the murder along with petitioner, told the police that petitioner had fired the fatal shots. Between 8 and 9 that evening, petitioner and his sister, the widow of the deceased, were arrested and taken to police headquarters. En route to the police station, the police "had handcuffed the defendant behind his back," and "one of the arresting officers told defendant that DiGerlando had named him as the one who shot" the deceased. Petitioner testified, without contradiction, that the "detectives said they had us pretty well, up pretty tight, and we might as well admit to this crime," and that he replied, "I am sorry but I would like to have advice from my lawyer." A police officer testified that although petitioner was not formally charged "he was in custody" and "couldn't walk out the door."

Shortly after petitioner reached police headquarters, his retained lawyer arrived. The lawyer described the ensuing events in the following terms:

> "On that day I received a phone call [from "the mother of another defendant"] and pursuant to that phone call I went to the Detective Bureau at 11th and State. The first person I talked to was the Sergeant on duty at the Bureau Desk, Sergeant Pidgeon. I asked Sergeant Pidgeon for permission to speak to my client, Danny Escobedo. . . . Sergeant Pidgeon made a call to the Bureau lockup and informed me that the boy had been taken from the lockup to the Homicide Bureau. This was between 9:30 and 10:00 in the evening. Before I went anywhere, he called the Homicide Bureau and told them there was an attorney waiting to see Escobedo. He told me I could not see him. Then I went upstairs to the Homicide Bureau. There were several Homicide Detectives around and I talked to them. I identified myself as Escobedo's attorney and asked permission to see him. They said I could not. . . . The police officer told me to see Chief Flynn who was on duty. I identified myself to Chief Flynn and asked permission to see my client. He said I could not. . . . I think it was approximately 11:00 o'clock. He said I couldn't see him because they hadn't completed questioning. . . . [F]or a second or two I spotted him in an office in the Homicide Bureau. The door was open and I could see through the office. . . . I waved to him and he waved back and then the door was closed, by one of the officers at Homicide.[1] There were four or five officers milling

[1] Petitioner testified that this ambiguous gesture "could have meant most anything," but that he "took it upon [his] own to think that [the lawyer was telling him] not to say anything," and that the lawyer "wanted to talk" to him.

> around the Homicide Detail that night. As to whether I talked to Captain Flynn any later that day, I waited around for another hour or two and went back again and renewed by [*sic*] request to see my client. He again told me I could not. . . . I filed an official complaint with Commissioner Phelan of the Chicago Police Department. I had a conversation with every police officer I could find. I was told at Homicide that I couldn't see him and I would have to get a writ of habeas corpus. I left the Homicide Bureau and from the Detective Bureau at 11th and State at approximately 1:00 A. M. [Sunday morning] I had no opportunity to talk to my client that night. I quoted to Captain Flynn the Section of the Criminal Code which allows an attorney the right to see his client." [2]

Petitioner testified that during the course of the interrogation he repeatedly asked to speak to his lawyer and that the police said that his lawyer "didn't want to see" him. The testimony of the police officers confirmed these accounts in substantial detail.

Notwithstanding repeated requests by each, petitioner and his retained lawyer were afforded no opportunity to consult during the course of the entire interrogation. At one point, as previously noted, petitioner and his attorney came into each other's view for a few moments but the attorney was quickly ushered away. Petitioner testified "that he heard a detective telling the attorney the latter would not be allowed to talk to [him] 'until they

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[2] The statute then in effect provided in pertinent part that: "All public officers . . . having the custody of any person . . . restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney . . . whom such person . . . may desire to see or consult . . . ." Ill. Rev. Stat. (1959), c. 38, § 477. Repealed as of Jan. 1, 1964, by Act approved Aug. 14, 1963, H. B. No. 851.

were done' " and that he heard the attorney being refused permission to remain in the adjoining room. A police officer testified that he had told the lawyer that he could not see petitioner until "we were through interrogating" him.

There is testimony by the police that during the interrogation, petitioner, a 22-year-old of Mexican extraction with no record of previous experience with the police, "was handcuffed" [3] in a standing position and that he "was nervous, he had circles under his eyes and he was upset" and was "agitated" because "he had not slept well in over a week."

It is undisputed that during the course of the interrogation Officer Montejano, who "grew up" in petitioner's neighborhood, who knew his family, and who uses "Spanish language in [his] police work," conferred alone with petitioner "for about a quarter of an hour. . . ." Petitioner testified that the officer said to him "in Spanish that my sister and I could go home if I pinned it on Benedict DiGerlando," that "he would see to it that we would go home and be held only as witnesses, if anything, if we had made a statement against DiGerlando . . . , that we would be able to go home that night." Petitioner testified that he made the statement in issue because of this assurance. Officer Montejano denied offering any such assurance.

A police officer testified that during the interrogation the following occurred:

> "I informed him of what DiGerlando told me and when I did, he told me that DiGerlando was [lying] and I said, 'Would you care to tell DiGerlando that?' and he said, 'Yes, I will.' So, I

[3] The trial judge justified the handcuffing on the ground that it "is ordinary police procedure."

> brought . . . Escobedo in and he confronted DiGerlando and he told him that he was lying and said, 'I didn't shoot Manuel, you did it.' "

In this way, petitioner, for the first time, admitted to some knowledge of the crime. After that he made additional statements further implicating himself in the murder plot. At this point an Assistant State's Attorney, Theodore J. Cooper, was summoned "to take" a statement. Mr. Cooper, an experienced lawyer who was assigned to the Homicide Division to take "statements from some defendants and some prisoners that they had in custody," "took" petitioner's statement by asking carefully framed questions apparently designed to assure the admissibility into evidence of the resulting answers. Mr. Cooper testified that he did not advise petitioner of his constitutional rights, and it is undisputed that no one during the course of the interrogation so advised him.

Petitioner moved both before and during trial to suppress the incriminating statement, but the motions were denied. Petitioner was convicted of murder and he appealed the conviction.

The Supreme Court of Illinois, in its original opinion of February 1, 1963, held the statement inadmissible and reversed the conviction. The court said:

> "[I]t seems manifest to us, from the undisputed evidence and the circumstances surrounding defendant at the time of his statement and shortly prior thereto, that the defendant understood he would be permitted to go home if he gave the statement and would be granted an immunity from prosecution."

Compare *Lynumn* v. *Illinois,* 372 U. S. 528.
The State petitioned for, and the court granted, rehearing. The court then affirmed the conviction. It said: "[T]he

officer denied making the promise and the trier of fact believed him. We find no reason for disturbing the trial court's finding that the confession was voluntary." [4] 28 Ill. 2d 41, 45–46, 190 N. E. 2d 825, 827. The court also held, on the authority of this Court's decisions in *Crooker* v. *California,* 357 U. S. 433, and *Cicenia* v. *Lagay,* 357 U. S. 504, that the confession was admissible even though "it was obtained after he had requested the assistance of counsel, which request was denied." 28 Ill. 2d, at 46, 190 N. E. 2d, at 827. We granted a writ of certiorari to consider whether the petitioner's statement was constitutionally admissible at his trial. 375 U. S. 902. We conclude, for the reasons stated below, that it was not and, accordingly, we reverse the judgment of conviction.

In *Massiah* v. *United States,* 377 U. S. 201, this Court observed that "a Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when

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[4] Compare *Haynes* v. *Washington,* 373 U. S. 503, 515 (decided on the same day as the decision of the Illinois Supreme Court here), where we said:

"Our conclusion is in no way foreclosed, as the State contends, by the fact that the state trial judge or the jury may have reached a different result on this issue.

"It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an *independent* determination here, see, *e. g., Ashcraft* v. *Tennessee,* 322 U. S. 143, 147–148; 'we cannot escape the responsibility of making our own examination of the record,' *Spano* v. *New York,* 360 U. S. 315, 316." (Emphasis in original.)

legal aid and advice would help him.' " *Id.*, at 204, quoting DOUGLAS, J., concurring in *Spano* v. *New York*, 360 U. S. 315, 326.

The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of "an unsolved crime." *Spano* v. *New York*, 360 U. S. 315, 327 (STEWART, J., concurring). Petitioner had become the accused, and the purpose of the interrogation was to "get him" to confess his guilt despite his constitutional right not to do so. At the time of his arrest and throughout the course of the interrogation, the police told petitioner that they had convincing evidence that he had fired the fatal shots. Without informing him of his absolute right to remain silent in the face of this accusation, the police urged him to make a statement.[5] As this Court observed many years ago:

> "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have nat-

[5] Although there is testimony in the record that petitioner and his lawyer had previously discussed what petitioner should do in the event of interrogation, there is no evidence that they discussed what petitioner should, or could, do in the face of a false accusation that he had fired the fatal bullets.

> urally arisen, that by denying there was hope of removing the suspicion from himself." *Bram* v. *United States,* 168 U. S. 532, 562.

Petitioner, a layman, was undoubtedly unaware that under Illinois law an admission of "mere" complicity in the murder plot was legally as damaging as an admission of firing of the fatal shots. *Illinois* v. *Escobedo,* 28 Ill. 2d 41, 190 N. E. 2d 825. The "guiding hand of counsel" was essential to advise petitioner of his rights in this delicate situation. *Powell* v. *Alabama,* 287 U. S. 45, 69. This was the "stage when legal aid and advice" were most critical to petitioner. *Massiah* v. *United States, supra,* at 204. It was a stage surely as critical as was the arraignment in *Hamilton* v. *Alabama,* 368 U. S. 52, and the preliminary hearing in *White* v. *Maryland,* 373 U. S. 59. What happened at this interrogation could certainly "affect the whole trial," *Hamilton* v. *Alabama, supra,* at 54, since rights "may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Ibid.* It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.

The New York Court of Appeals, whose decisions this Court cited with approval in *Massiah,* 377 U. S. 201, at 205, has recently recognized that, under circumstances such as those here, no meaningful distinction can be drawn between interrogation of an accused before and after formal indictment. In *People* v. *Donovan,* 13 N. Y. 2d 148, 193 N. E. 2d 628, that court, in an opinion by Judge Fuld, held that a "confession taken from a defendant, during a period of detention [prior to indictment], after his attorney had requested and been denied access

to him" could not be used against him in a criminal trial.[6] *Id.*, at 151, 193 N. E. 2d, at 629. The court observed that it "would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police." *Id.*, at 152, 193 N. E. 2d, at 629.[7]

In *Gideon* v. *Wainwright,* 372 U. S. 335, we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial.[8] The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination." *In re Groban,* 352 U. S.

[6] The English Judges' Rules also recognize that a functional rather than a formal test must be applied and that, under circumstances such as those here, no special significance should be attached to formal indictment. The applicable Rule does not permit the police to question an accused, except in certain extremely limited situations not relevant here, at any time after the defendant "has been charged *or informed that he may be prosecuted.*" [1964] Crim. L. Rev. 166–170 (emphasis supplied). Although voluntary statements obtained in violation of these rules are not automatically excluded from evidence the judge may, in the exercise of his discretion, exclude them. "Recent cases suggest that perhaps the judges have been tightening up [and almost] inevitably, the effect of the new Rules will be to stimulate this tendency." *Id.*, at 182.

[7] Canon 9 of the American Bar Association's Canon of Professional Ethics provides that:

"A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." See Broeder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483, 599–604.

[8] Twenty-two States, including Illinois, urged us so to hold.

330, 344 (BLACK, J., dissenting).[9] "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.' " *Ex parte Sullivan,* 107 F. Supp. 514, 517–518.

It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment,[10] and "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts* v. *Indiana,* 338 U. S. 49, 59 (Jackson, J., concurring in part and dissenting in part). This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed. *Massiah* v. *United States, supra,* at 204; *Hamilton* v. *Alabama, supra; White* v. *Maryland, supra.* The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. See Note, 73 Yale L. J. 1000, 1048–1051 (1964).

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement

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[9] The Soviet criminal code does not permit a lawyer to be present during the investigation. The Soviet trial has thus been aptly described as "an appeal from the pretrial investigation." Feifer, Justice in Moscow (1964), 86.

[10] See Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Cal. L. Rev. 11, 43 (1962).

which comes to depend on the "confession" will, in the long run, be less reliable [11] and more subject to abuses [12] than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:

> "[*A*]*ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." 8 Wigmore, Evidence (3d ed. 1940), 309. (Emphasis in original.)

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[11] See Committee Print, Subcommittee to Investigate Administration of the Internal Security Act, Senate Committee on the Judiciary, 85th Cong., 1st Sess., reporting and analyzing the proceedings at the XXth Congress of the Communist Party of the Soviet Union, February 25, 1956, exposing the false confessions obtained during the Stalin purges of the 1930's. See also *Miller* v. *United States*, 320 F. 2d 767, 772–773 (opinion of Chief Judge Bazelon); Lifton, Thought Reform and the Psychology of Totalism (1961); Rogge, Why Men Confess (1959); Schein, Coercive Persuasion (1961).

[12] See Stephen, History of the Criminal Law, quoted in 8 Wigmore, Evidence (3d ed. 1940), 312; Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation, District of Columbia (1962).

This Court also has recognized that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . . ." *Haynes* v. *Washington,* 373 U. S. 503, 519.

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights.[13] If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[14]

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the sus-

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[13] Cf. Report of Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), 10–11: "The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. . . . Persons [denied access to counsel] are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that [this situation is] detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community."

[14] The accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial. See *Johnson* v. *Zerbst,* 304 U. S. 458. But no knowing and intelligent waiver of any constitutional right can be said to have occurred under the circumstances of this case.

pect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon* v. *Wainwright,* 372 U. S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Crooker v. *California,* 357 U. S. 433, does not compel a contrary result. In that case the Court merely rejected the absolute rule sought by petitioner, that "every state denial of a request to contact counsel [is] an infringement of the constitutional right *without regard to the circumstances of the case.*" *Id.,* at 440. (Emphasis in original.) In its place, the following rule was announced:

> "[S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, . . . *but also if he is deprived of counsel for any part of the pretrial proceedings,* provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice. . . .' The latter determination necessarily depends upon all the circumstances of the case." 357 U. S., at 439–440. (Emphasis added.)

The Court, applying "these principles" to "the sum total of the circumstances [there] during the time petitioner was without counsel," *id.,* at 440, concluded that he had not been fundamentally prejudiced by the denial of his request for counsel. Among the critical circumstances which distinguish that case from this one are that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and

not to "say anything" in response to the questions, *id.*, at 437, and that petitioner there, but not here, was a well-educated man who had studied criminal law while attending law school for a year. The Court's opinion in *Cicenia* v. *Lagay,* 357 U. S. 504, decided the same day, merely said that the "contention that petitioner had a constitutional right to confer with counsel is disposed of by *Crooker* v. *California* . . . ." That case adds nothing, therefore, to *Crooker.* In any event, to the extent that *Cicenia* or *Crooker* may be inconsistent with the principles announced today, they are not to be regarded as controlling.[15]

Nothing we have said today affects the powers of the police to investigate "an unsolved crime," *Spano* v. *New York,* 360 U. S. 315, 327 (STEWART, J., concurring), by gathering information from witnesses and by other "proper investigative efforts." *Haynes* v. *Washington,* 373 U. S. 503, 519. We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.

The judgment of the Illinois Supreme Court is reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN, dissenting.

I would affirm the judgment of the Supreme Court of Illinois on the basis of *Cicenia* v. *Lagay,* 357 U. S. 504,

[15] The authority of *Cicenia* v. *Lagay,* 357 U. S. 504, and *Crooker* v. *California,* 357 U. S. 433, was weakened by the subsequent decisions of this Court in *Hamilton* v. *Alabama,* 368 U. S. 52, *White* v. *Maryland,* 373 U. S. 59, and *Massiah* v. *United States,* 377 U. S. 201 (as the dissenting opinion in the last-cited case recognized).

decided by this Court only six years ago. Like my Brother WHITE, *post,* p. 495, I think the rule announced today is most ill-conceived and that it seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement.

MR. JUSTICE STEWART, dissenting.

I think this case is directly controlled by *Cicenia* v. *Lagay,* 357 U. S. 504, and I would therefore affirm the judgment.

Massiah v. *United States,* 377 U. S. 201, is not in point here. In that case a federal grand jury had indicted Massiah. He had retained a lawyer and entered a formal plea of not guilty. Under our system of federal justice an indictment and arraignment are followed by a trial, at which the Sixth Amendment guarantees the defendant the assistance of counsel.* But Massiah was released on bail, and thereafter agents of the Federal Government deliberately elicited incriminating statements from him in the absence of his lawyer. We held that the use of these statements against him at his trial denied him the basic protections of the Sixth Amendment guarantee. Putting to one side the fact that the case now before us is not a federal case, the vital fact remains that this case does not involve the deliberate interrogation of a defendant after the initiation of judicial proceedings against him. The Court disregards this basic difference between the present case and Massiah's, with the bland assertion that "that fact should make no difference." *Ante,* p. 485.

It is "that fact," I submit, which makes all the difference. Under our system of criminal justice the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment, marks the

*"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

point at which a criminal investigation has ended and adversary proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial. Among those guarantees are the right to a speedy trial, the right of confrontation, and the right to trial by jury. Another is the guarantee of the assistance of counsel. *Gideon* v. *Wainwright,* 372 U. S. 335; *Hamilton* v. *Alabama,* 368 U. S. 52; *White* v. *Maryland,* 373 U. S. 59.

The confession which the Court today holds inadmissible was a voluntary one. It was given during the course of a perfectly legitimate police investigation of an unsolved murder. The Court says that what happened during this investigation "affected" the trial. I had always supposed that the whole purpose of a police investigation of a murder was to "affect" the trial of the murderer, and that it would be only an incompetent, unsuccessful, or corrupt investigation which would not do so. The Court further says that the Illinois police officers did not advise the petitioner of his "constitutional rights" before he confessed to the murder. This Court has never held that the Constitution requires the police to give any "advice" under circumstances such as these.

Supported by no stronger authority than its own rhetoric, the Court today converts a routine police investigation of an unsolved murder into a distorted analogue of a judicial trial. It imports into this investigation constitutional concepts historically applicable only after the onset of formal prosecutorial proceedings. By doing so, I think the Court perverts those precious constitutional guarantees, and frustrates the vital interests of society in preserving the legitimate and proper function of honest and purposeful police investigation.

Like my Brother CLARK, I cannot escape the logic of my Brother WHITE's conclusions as to the extraordinary implications which emanate from the Court's opinion in

this case, and I share their views as to the untold and highly unfortunate impact today's decision may have upon the fair administration of criminal justice. I can only hope we have completely misunderstood what the Court has said.

MR. JUSTICE WHITE, with whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

In *Massiah* v. *United States,* 377 U. S. 201, the Court held that as of the date of the indictment the prosecution is disentitled to secure admissions from the accused. The Court now moves that date back to the time when the prosecution begins to "focus" on the accused. Although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel, cf. *Gideon* v. *Wainright,* 372 U. S. 335; *Griffin* v. *Illinois,* 351 U. S. 12; *Douglas* v. *California,* 372 U. S. 353, or has asked to consult with counsel in the course of interrogation. Cf. *Carnley* v. *Cochran,* 369 U. S. 506. At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel. The decision is thus another major step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not. It does of course put us one step "ahead" of the English judges who have had the good sense to leave the matter a discretionary one with the trial court.* I reject this step and

* "[I]t seeems from reported cases that the judges have given up enforcing their own rules, for it is no longer the practice to exclude evidence obtained by questioning in custody. . . . A traditional principle of 'fairness' to criminals, which has quite possibly lost some of

the invitation to go farther which the Court has now issued.

By abandoning the voluntary-involuntary test for admissibility of confessions, the Court seems driven by the notion that it is uncivilized law enforcement to use an accused's own admissions against him at his trial. It attempts to find a home for this new and nebulous rule of due process by attaching it to the right to counsel guaranteed in the federal system by the Sixth Amendment and binding upon the States by virtue of the due process guarantee of the Fourteenth Amendment. *Gideon* v. *Wainwright, supra.* The right to counsel now not only entitles the accused to counsel's advice and aid in preparing for trial but stands as an impenetrable barrier to any interrogation once the accused has become a suspect. From that very moment apparently his right to counsel attaches, a rule wholly unworkable and impossible to administer unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side. I would not abandon the Court's prior cases defining with some care and analysis the circumstances requiring the presence or aid of counsel and substitute the amorphous and wholly unworkable principle that counsel is constitutionally required whenever he would or could be helpful. *Hamilton* v. *Alabama,* 368 U. S. 52; *White* v. *Maryland,* 373 U. S. 59; *Gideon* v.

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the reason for its existence, is maintained in words while it is disregarded in fact. . . .

"The reader may be expecting at this point a vigorous denunciation of the police and of the judges, and a plea for a return to the Judges' Rules as interpreted in 1930. What has to be considered, however, is whether these Rules are a workable part of the machinery of justice. Perhaps the truth is that the Rules have been abandoned, by tacit consent, just because they are an unreasonable restriction upon the activities of the police in bringing criminals to book." Williams, Questioning by the Police: Some Practical Considerations, [1960] Crim. L. Rev. 325, 331–332. See also [1964] Crim. L. Rev. 161–182.

Wainwright, supra. These cases dealt with the requirement of counsel at proceedings in which definable rights could be won or lost, not with stages where probative evidence might be obtained. Under this new approach one might just as well argue that a potential defendant is constitutionally entitled to a lawyer before, not after, he commits a crime, since it is then that crucial incriminating evidence is put within the reach of the Government by the would-be accused. Until now there simply has been no right guaranteed by the Federal Constitution to be free from the use at trial of a voluntary admission made prior to indictment.

It is incongruous to assume that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth Amendment, which is now applicable to the States. *Malloy* v. *Hogan,* 378 U. S. 1. That amendment addresses itself to the very issue of incriminating admissions of an accused and resolves it by proscribing only compelled statements. Neither the Framers, the constitutional language, a century of decisions of this Court nor Professor Wigmore provides an iota of support for the idea that an accused has an absolute constitutional right not to answer even in the absence of compulsion—the constitutional right not to incriminate himself by making voluntary disclosures.

Today's decision cannot be squared with other provisions of the Constitution which, in my view, define the system of criminal justice this Court is empowered to administer. The Fourth Amendment permits upon probable cause even compulsory searches of the suspect and his possessions and the use of the fruits of the search at trial, all in the absence of counsel. The Fifth Amendment and state constitutional provisions authorize, indeed require, inquisitorial grand jury proceedings at which a potential defendant, in the absence of counsel,

is shielded against no more than compulsory incrimination. *Mulloney* v. *United States,* 79 F. 2d 566, 578 (C. A. 1st Cir.); *United States* v. *Benjamin,* 120 F. 2d 521, 522 (C. A. 2d Cir.); *United States* v. *Scully,* 225 F. 2d 113, 115 (C. A. 2d Cir.); *United States* v. *Gilboy,* 160 F. Supp. 442 (D. C. M. D. Pa.). A grand jury witness, who may be a suspect, is interrogated and his answers, at least until today, are admissible in evidence at trial. And these provisions have been thought of as constitutional safeguards to persons suspected of an offense. Furthermore, until now, the Constitution has permitted the accused to be fingerprinted and to be identified in a line-up or in the courtroom itself.

The Court chooses to ignore these matters and to rely on the virtues and morality of a system of criminal law enforcement which does not depend on the "confession." No such judgment is to be found in the Constitution. It might be appropriate for a legislature to provide that a suspect should not be consulted during a criminal investigation; that an accused should never be called before a grand jury to answer, even if he wants to, what may well be incriminating questions; and that no person, whether he be a suspect, guilty criminal or innocent bystander, should be put to the ordeal of responding to orderly noncompulsory inquiry by the State. But this is not the system our Constitution requires. The only "inquisitions" the Constitution forbids are those which compel incrimination. Escobedo's statements were not compelled and the Court does not hold that they were.

This new American judges' rule, which is to be applied in both federal and state courts, is perhaps thought to be a necessary safeguard against the possibility of extorted confessions. To this extent it reflects a deep-seated distrust of law enforcement officers everywhere, unsupported by relevant data or current material based upon our own

experience. Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do, but I have somewhat more faith than the Court evidently has in the ability and desire of prosecutors and of the power of the appellate courts to discern and correct such violations of the law.

The Court may be concerned with a narrower matter: the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him. But this worry hardly calls for the broadside the Court has now fired. The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him. When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances. See *Ward* v. *Texas,* 316 U. S. 547; *Haley* v. *Ohio,* 332 U. S. 596; *Payne* v. *Arkansas,* 356 U. S. 560. I would continue to do so. But in this case Danny Escobedo knew full well that he did not have to answer and knew full well that his lawyer had advised him not to answer.

I do not suggest for a moment that law enforcement will be destroyed by the rule announced today. The need for peace and order is too insistent for that. But it will be crippled and its task made a great deal more difficult, all in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution.

736-666 O-65—34

APTHEKER ET AL. *v.* SECRETARY OF STATE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 461. Argued April 21, 1964.—Decided June 22, 1964.

Appellants, native-born citizens and residents of the United States, are ranking officials of the Communist Party of the United States. After hearings under State Department regulations, appellants' passports were revoked under § 6 of the Subversive Activities Control Act of 1950, which provides that when a Communist organization is registered, or under final order to register, it shall be unlawful for any member with knowledge or notice thereof to apply for or use a passport. Appellants filed suit asking that § 6 be declared unconstitutional as a violation of the Due Process Clause of the Fifth Amendment and that the Secretary of State be ordered to issue passports to them. A three-judge District Court denied relief. *Held:*

1. Section 6 is unconstitutional on its face, for it too broadly and indiscriminately transgresses the liberty guaranteed by the Fifth Amendment. Pp. 505–514.

(a) The right to travel at home and abroad is an important aspect of liberty of which a citizen cannot be deprived without due process of law. *Kent* v. *Dulles,* 357 U. S. 116, followed. P. 505.

(b) Under existing laws, denial of a passport effectively prohibits travel anywhere in the world outside the Western Hemisphere. P. 507.

(c) Though the underlying purpose of § 6 is the protection of national security, the attainment of that end cannot be realized by unduly infringing upon constitutional freedoms. Pp. 508–509.

(d) Section 6 applies to every member of a "Communist-action" or "Communist-front" organization whether or not he believes or knows that he is associated with such an organization or that the organization seeks to further the aims of world Communism. Pp. 509–510.

(e) Also irrelevant under § 6 is the member's degree of activity and his commitment to the organization's purposes. P. 510.

(f) Section 6 creates an irrebuttable presumption that all members of Communist organizations will engage in activities endangering our security if given passports. P. 511.

(g) The proscription of § 6 applies regardless of the traveler's purpose or destination. Pp. 511–512.

(h) Congress could have chosen less drastic means of achieving the national security objective without such sweeping abridgment of liberty. Pp. 512–514.

2. Section 6 cannot be held constitutional as applied to these appellants, for such a "construction" would require substantial rewriting of the statute and would inject an element of vagueness into its scope. Since freedom of travel is closely akin to freedom of speech and association, appellants should not be required to demonstrate that Congress could not have written a statute constitutionally prohibiting their travel. Pp. 515–517.

219 F. Supp. 709, reversed and remanded.

John J. Abt and *Joseph Forer* argued the cause and filed briefs for appellants.

Abram Chayes argued the cause for appellee. With him on the brief were *Solicitor General Cox, Assistant Attorney General Yeagley, Bruce J. Terris, Kevin T. Maroney, Lee B. Anderson* and *Thomas Ehrlich.*

Osmond K. Fraenkel filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This appeal involves a single question: the constitutionality of § 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U. S. C. § 785. Section 6 provides in pertinent part that:

> "(a) When a Communist organization [1] . . . is registered, or there is in effect a final order of the Board requiring such organization to register, it shall

[1] Paragraph 5 of § 3 of the Act provides that: "For the purposes of this subchapter . . . [t]he term 'Communist organization' means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization." 64 Stat. 990, as amended, 68 Stat. 777, 50 U. S. C. § 782.

be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

"(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

"(2) to use or attempt to use any such passport." [2]

Section 6 became effective, with respect to appellants, on October 20, 1961, when a final order of the Subversive Activities Control Board issued directing the Communist Party of the United States to register under § 7 of the Subversive Activities Control Act. The registration order had been upheld earlier in 1961 by this Court's decision in *Communist Party of the United States* v. *Subversive Activities Control Board,* 367 U. S. 1. Prior to issuance of the final registration order both appellants, who are native-born citizens and residents of the United States, had held valid passports. Subsequently, on January 22, 1962, the Acting Director of the Passport Office notified appellants that their passports were revoked because the Department of State believed that their use of the passports would violate § 6. Appellants were also

[2] Section 6 (b) provides that:

"When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization."

The criminal penalties for violations of § 6 are specified in § 15 (c) of the Act which provides in pertinent part that:

"Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment." 64 Stat. 1003, 50 U. S. C. § 794 (c).

notified of their right to seek administrative review of the revocations under Department of State regulations.

Appellants requested and received hearings to review the revocations of their passports. The respective hearing examiners concluded that "the Department of State had reason to believe that [appellants are] within the purview of Section 6 (a)(2) of the Subversive Activities Control Act . . . and as a result thereof . . . use of a passport would be in violation of the law." On the basis of this conclusion the examiners recommended that the passport revocations be sustained.[3] Both appellants appealed to the Board of Passport Appeals which recommended affirmance of the revocations. The Secretary of State subsequently approved the recommendations of the Board. The Secretary stated that he "relied solely on the evidence in the record" and that, as the basis of his decision, he:

> "specifically adopted as his own the [Board's] finding of fact that 'at all material times [appellants were members] of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act.' "

Appellants thereupon filed separate complaints seeking declaratory and injunctive relief in the United States District Court for the District of Columbia. The complaints, which have been considered together, asked that judgments be entered declaring § 6 of the Subversive Activities Control Act unconstitutional and ordering the Secretary of State to issue passports to appellants. Each appellant-plaintiff alleged that § 6 was unconstitutional as, *inter alia,* "a deprivation without due process of law

[3] Appellants do not question that the hearings afforded them procedural due process of law. Cf. *Greene* v. *McElroy,* 360 U. S. 474.

of plaintiff's constitutional liberty to travel abroad, in violation of the Fifth Amendment to the Constitution of the United States." [4] Appellants conceded that the Secretary of State had an adequate basis for finding that they were members of the Communist Party of the United States and that the action revoking their passports was proper if § 6 was constitutional. The parties agreed that all administrative remedies had been exhausted and that it would be futile, and indeed a criminal offense, for either appellant to apply for a passport while remaining a member of the Communist Party.

The three-judge District Court, which was convened to review the constitutional question, rejected appellants' contentions, sustained the constitutionality of § 6 of the Control Act, and granted the Secretary's motion for summary judgment. 219 F. Supp. 709. The court concluded that:

> "the enactment by Congress of section 6, which prohibits these plaintiffs from obtaining passports so long as they are members of an organization—in this case the Communist Party—under a final order to register with the Attorney General . . . is a valid exercise of the power of Congress to protect and preserve our Government against the threat posed by the world Communist movement and that the regu-

[4] Each complaint further alleged that § 6 was unconstitutional as: "(b) an abridgement of plaintiff's freedoms of speech, press and assembly, in violation of the First Amendment, (c) a penalty imposed on plaintiff without a judicial trial, and therefore a bill of attainder, in violation of Article I, section 9 of the Constitution, (d) a deprivation of plaintiff's right to trial by jury as required by the Fifth and Sixth Amendments and Article III, section 2, clause 3 of the Constitution, and (e) the imposition of a cruel and unusual punishment in violation of the Eighth Amendment."

Our disposition of this case makes it unnecessary to review these contentions.

latory scheme bears a reasonable relation thereto." *Id.*, at 714.

This Court noted probable jurisdiction. 375 U. S. 928.

Appellants attack § 6, both on its face and as applied, as an unconstitutional deprivation of the liberty guaranteed in the Bill of Rights. The Government, while conceding that the right to travel is protected by the Fifth Amendment, contends that the Due Process Clause does not prevent the reasonable regulation of liberty and that § 6 is a reasonable regulation because of its relation to the danger the world Communist movement presents for our national security. Alternatively, the Government argues that "whether or not denial of passports to some members of the Communist Party might be deemed not reasonably related to national security, surely Section 6 was reasonable as applied to the top-ranking Party leaders involved here."

We hold, for the reasons stated below, that § 6 of the Control Act too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment.

I.

In 1958 in *Kent* v. *Dulles,* 357 U. S. 116, 127, this Court declared that the right to travel abroad is "an important aspect of the citizen's 'liberty' " guaranteed in the Due Process Clause of the Fifth Amendment. The Court stated that:

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, . . . may be as close to the heart of the

> individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." [5] *Id.*, at 125–126.

In *Kent*, however, the Court concluded that Congress had not conferred authority upon the Secretary of State to deny passports because of alleged Communist beliefs and associations. Therefore, although the decision protected the constitutional right to travel, the Court did not examine "the extent to which it can be curtailed." *Id.*, at 127. The Court, referring to § 6 of the Subversive Activities Control Act, noted that "the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective." *Id.*, at 130. Two years later in *Communist Party of the United States* v. *Subversive Activities Control Board, supra,* this Court reviewed and upheld the registration requirement of § 7 of the Control Act. The Court, however, did not pass upon the "various consequences of the Party's registration for its individual members," *id.*, at 70, because:

> "It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future *apply for a passport,* or seek government or defense-facility or labor-union employment, or, being an alien, become a party to a naturalization or a denaturalization proceeding. None of these things may happen. If they do, appropriate administrative and judicial procedures will be available to test the constitutionality of applications of particular sections of the Act to particular persons in

[5] In *Bolling* v. *Sharpe,* 347 U. S. 497, 499–500, this Court stated that: "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."

particular situations. Nothing justifies previsioning those issues now." *Id.*, at 79. (Emphasis added.)

The present case, therefore, is the first in which this Court has been called upon to consider the constitutionality of the restrictions which § 6 imposes on the right to travel.

The substantiality of the restrictions cannot be doubted. The denial of a passport, given existing domestic and foreign laws, is a severe restriction upon, and in effect a prohibition against, world-wide foreign travel. Present laws and regulations make it a crime for a United States citizen to travel outside the Western Hemisphere or to Cuba without a passport. By its plain import § 6 of the Control Act effectively prohibits travel anywhere in the world outside the Western Hemisphere by members of any "Communist organization"—including "Communist-action" and "Communist-front" organizations.[6] The restrictive effect of the legislation cannot be gainsaid by emphasizing, as the Government seems to do, that a member of a registering organization could recapture his freedom to travel by simply in good faith abandoning his membership in the organization. Since freedom of association is itself guaranteed in the First Amendment,[7] restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.

Although previous cases have not involved the constitutionality of statutory restrictions upon the right to travel

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[6] See note 1, *supra.*

[7] *E. g., Brotherhood of Railroad Trainmen* v. *Virginia State Bar,* 377 U. S. 1; *Gibson* v. *Florida Legislative Investigation Comm.,* 372 U. S. 539; *NAACP* v. *Button,* 371 U. S. 415; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293; *Shelton* v. *Tucker,* 364 U. S. 479; *Bates* v. *City of Little Rock,* 361 U. S. 516; *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449; *Schneider* v. *State,* 308 U. S. 147.

abroad, there are well-established principles by which to test whether the restrictions here imposed are consistent with the liberty guaranteed in the Fifth Amendment. It is a familiar and basic principle, recently reaffirmed in *NAACP* v. *Alabama,* 377 U. S. 288, 307, that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." See, *e. g., NAACP* v. *Button,* 371 U. S. 415, 438; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293; *Shelton* v. *Tucker,* 364 U. S. 479, 488; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 239; *Martin* v. *Struthers,* 319 U. S. 141, 146–149; *Cantwell* v. *Connecticut,* 310 U. S. 296, 304–307; *Schneider* v. *State,* 308 U. S. 147, 161, 165. In applying this principle the Court in *NAACP* v. *Alabama, supra,* referred to the criteria enunciated in *Shelton* v. *Tucker, supra,* at 488:

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

This principle requires that we consider the congressional purpose underlying § 6 of the Control Act.[8]

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[8] The purpose of the Act is stated in § 2. 64 Stat. 987, 50 U. S. C. § 781. Congress found, as is generally stated in § 2 (1), that there "exists a world Communist movement . . . whose purpose it is, by treachery, deceit, infiltration . . . , espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." Congress concluded, as stated in § 2 (15), that the "Communist organization in the United States" and the world Communist movement present a

The Government emphasizes that the legislation in question flows, as the statute itself declares, from the congressional desire to protect our national security. That Congress under the Constitution has power to safeguard our Nation's security is obvious and unarguable. Cf. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 159–160. As we said in *Mendoza-Martinez,* "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Id.,* at 160. At the same time the Constitution requires that the powers of government "must be so exercised as not, in attaining a permissible end, unduly to infringe" a constitutionally protected freedom. *Cantwell* v. *Connecticut, supra,* at 304.

Section 6 provides that any member of a Communist organization which has registered or has been ordered to register commits a crime if he attempts to use or obtain a United States passport. The section applies to members who act "with knowledge or notice" that the organization is under a final registration order. "Notice" is specifically defined in § 13 (k). That section provides that publication in the Federal Register of the fact of registration or of issuance of a final registration order "shall constitute notice to all members of such organization that such order has become final." Thus the terms of § 6 apply whether or not the member actually knows or believes that he is associated with what is deemed to be a "Communist-action" or a "Communist-front" organi-

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danger to the security of the United States, a danger requiring legislative action. The congressional purpose in adopting § 6 is more specifically stated in § 2 (8):

"Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."

zation. The section also applies whether or not one knows or believes that he is associated with an organization operating to further aims of the world Communist movement and "to establish a Communist totalitarian dictatorship in the countries throughout the world . . . ." 64 Stat. 987, 50 U. S. C. § 781 (1). The provision therefore sweeps within its prohibition both knowing and unknowing members. In related contexts this Court has had occasion to consider the substantiality of the relationship between an individual and a group where, as here, the fact of membership in that group has been made the sole criterion for limiting the individual's freedom. In *Wieman* v. *Updegraff,* 344 U. S. 183, the Court held that the due process guarantee of the Constitution was violated when a State, in an attempt to bar disloyal individuals from its employ, excluded persons solely on the basis of organizational memberships without regard to their knowledge concerning the organizations to which they had belonged. The Court concluded that: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." *Id.,* at 191.

Section 6 also renders irrelevant the member's degree of activity in the organization and his commitment to its purpose. These factors, like knowledge, would bear on the likelihood that travel by such a person would be attended by the type of activity which Congress sought to control. As the Court has elsewhere noted, "men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." Cf. *Schneiderman* v. *United States,* 320 U. S. 118, 136. It was in this vein that the Court in *Schware* v. *Board of Bar Examiners,* 353 U. S., at 246, stated that even "[a]ssuming that some members of the Communist Party . . . had illegal aims and engaged in illegal activities, it cannot auto-

matically be inferred that all members shared their evil purposes or participated in their illegal conduct." Section 6, however, establishes an irrebuttable presumption that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States.[9]

In addition to the absence of criteria linking the bare fact of membership to the individual's knowledge, activity or commitment, § 6 also excludes other considerations which might more closely relate the denial of passports to the stated purpose of the legislation. The prohibition of § 6 applies regardless of the purposes for which an individual wishes to travel. Under the statute it is a crime for a notified member of a registered organization to apply for a passport to travel abroad to visit a sick relative, to receive medical treatment, or for any other wholly innocent purpose.[10] In determining whether

[9] The provision in question cannot, as the Government admits, be limited by adopting an interpretation analogous to this Court's interpretation of the so-called "membership clause" in the Smith Act. In *Scales* v. *United States*, 367 U. S. 203, the Smith Act, which imposes criminal penalties for membership, was interpreted to include only " 'active' members having also a guilty knowledge and intent." *Id.*, at 228. The membership clause in that case, however, explicitly required "that a defendant must have knowledge of the organization's illegal advocacy." *Id.*, at 221. That requirement was intimately connected with the construction limiting membership to "active" members. With regard to the Control Act, however, as the Government concedes, "neither the words nor history of Section 6 suggests limiting its application to 'active' members."

[10] In denying appellants passports the Secretary of State made no finding as to their purposes in traveling abroad. The statute, as noted, supports the Secretary's implicit conclusion that such a finding was irrelevant. Appellants, however, in their respective complaints stated their purposes. Appellant Aptheker alleged that:

"He desires to travel to countries of Europe and elsewhere for study and recreation, to observe social, political and economic conditions

there has been an abridgment of the Fifth Amendment's guarantee of liberty, this Court must recognize the danger of punishing a member of a Communist organization "for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto* v. *United States,* 367 U. S. 290, 299–300; *Scales* v. *United States,* 367 U. S. 203, 229–230. In addition it must be noted that § 6 applies to a member regardless of the security-sensitivity of the areas in which he wishes to travel. As a result, if a notified member of a registered organization were to apply for a passport to visit a relative in Ireland, or to read rare manuscripts in the Bodleian Library of Oxford University, the applicant would be guilty of a crime; whereas, if he were to travel to Canada or Latin America to carry on criminal activities directed against the United States, he could do so free from the prohibitive reach of § 6.

In determining the constitutionality of § 6, it is also important to consider that Congress has within its power "less drastic" [11] means of achieving the congressional ob-

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abroad, and thereafter to write, publish, teach and lecture in this country about his observations. He also desires to travel abroad in order to attend meetings of learned societies and to fulfill invitations to lecture abroad."

Appellant Flynn alleged that:

"[She] desires to travel to countries of Europe and elsewhere for recreation and study, to observe social, political and economic conditions abroad, and thereafter to write, publish and lecture about her observations."

[11] The abridgment of liberty involved in this case is more "drastic" than, and distinguishable from, that involved in *American Communications Assn.* v. *Douds,* 339 U. S. 382. In *Douds* the Court upheld § 9 (h) of the National Labor Relations Act as amended by the Taft-Hartley Act, 61 Stat. 136, 146, 29 U. S. C. § 159 (h), which conditions trade-union access to the facilities of the National Labor Rela-

jective of safeguarding our national security. *Shelton* v. *Tucker,* 364 U. S., at 488. The Federal Employee Loyalty Program, which was before this Court in *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, provides an example. Under Executive Order No. 9835, membership in a Communist organization is not considered conclusive but only as one factor to be weighed in determining the loyalty of an applicant or employee.[12]

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tions Board upon the submission of non-Communist affidavits by officers of the union. Although the requirement undoubtedly discouraged unions from choosing officers with Communist affiliations, it did not prohibit their election and did not affect basic individual rights to work and to union membership.

[12] In 1950 the Assistant to the Attorney General of the United States, Peyton Ford, expressed to Congress the views of the Department of Justice with regard to a proposed government loyalty bill which predicated a conclusive presumption of disloyalty on the fact of organizational membership. Mr. Ford said:

"A world of difference exists, from the standpoint of sound policy and constitutional validity, between making, as the bill would, membership in an organization designated by the Attorney General a felony, and recognizing such membership, as does the employee loyalty program under Executive Order 9835, as merely one piece of evidence pointing to possible disloyalty. The bill would brand the member of a listed organization a felon, no matter how innocent his membership; the loyalty program enables the member to respond to charges against him and to show, in a manner consistent with American concepts of justice and fairness, that his membership is innocent and does not reflect upon his loyalty.

". . . It does not appear, therefore, necessary, even if constitutionally possible, to add to existing law and regulations at the present time a penal statute such as proposed in the bill.

"The foregoing comments represent the considered views of this Department, having in mind that it is the duty of the Attorney General to protect the rights of individuals guaranteed by the Constitution, as well as to protect the Government from subversion." Hearings on H. R. 3903 and H. R. 7595 before the House Committee on Un-American Activities, 81st Cong., 2d Sess., 2125.

It is relevant to note that less than a month after the decision in *Kent* v. *Dulles, supra,* President Eisenhower sent a message to Congress stating that: "Any limitations on the right to travel can only be tolerated in terms of overriding requirements of our national security, and must be subject to substantive and procedural guaranties." Message from the President—Issuance of Passports, H. Doc. No. 417, 85th Cong., 2d Sess.; 104 Cong. Rec. 13046. The legislation which the President proposed did not make membership in a Communist organization, without more, a disqualification for obtaining a passport. S. 4110, H. R. 13318, 85th Cong., 2d Sess. Irrespective of views as to the validity of this or other such proposals, they demonstrate the conviction of the Executive Branch that our national security can be adequately protected by means which, when compared with § 6, are more discriminately tailored to the constitutional liberties of individuals.

In our view the foregoing considerations compel the conclusion that § 6 of the Control Act is unconstitutional on its face. The section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel. The section therefore is patently not a regulation "narrowly drawn to prevent the supposed evil," cf. *Cantwell* v. *Connecticut,* 310 U. S., at 307, yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms, *NAACP* v. *Button,* 371 U. S., at 438.

II.

The Government alternatively urges that, if § 6 cannot be sustained on its face, the prohibition should nevertheless be held constitutional as applied to these particular appellants. The Government argues that "surely Section 6 was reasonable as applied to the top-ranking Party leaders involved here." [13] It is not disputed that appellants are top-ranking leaders: Appellant Aptheker is editor of *Political Affairs,* the "theoretical organ" of the Party in this country and appellant Flynn is chairman of the Party.[14]

It must be remembered that "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ." or judicially rewriting it. *Scales* v. *United States, supra,* at 211. To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting. The situation here is different from that in cases such as *United States* v. *National Dairy Products Corp.,* 372 U. S. 29, where the Court is called upon to consider the content

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[13] The Government recognizes, however, that: "Membership, or even leadership, in the Communist Party is not automatically a crime." Brief for Petitioner on Petition for a Writ of Certiorari, p. 11, *United States* v. *Communist Party of the United States,* No. 1027, O. T. 1963, *cert. denied,* 377 U. S. 968.

[14] For appellants' alleged purposes in traveling, see note 10, *supra.*

of allegedly vague statutory language. Here, in contrast, an attempt to "construe" the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.

Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP* v. *Button,* 371 U. S. 415, and *Thornhill* v. *Alabama,* 310 U. S. 88. In *NAACP* v. *Button* the Court stated that:

> "[I]n appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U. S. 88, 97–98; *Winters* v. *New York,* [333 U. S. 507], 518–520. Cf. *Staub* v. *City of Baxley,* 355 U. S. 313. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus* v. *Search Warrant,* 367 U. S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 371 U. S., at 432–433.

For essentially the same reasons this Court had concluded that the constitutionality of the statute in *Thornhill* v. *Alabama* should be judged on its face:

> "An accused, after arrest and conviction under such a statute [on its face unconstitutionally abridging freedom of speech], does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him." 310 U. S., at 98.[15]

Similarly, since freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants in this case should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel.[16]

Accordingly the judgment of the three-judge District Court is reversed and the cause remanded for proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK, concurring.

Section 6 of the Subversive Activities Control Act makes it a felony for a member of a "Communist," "Communist-action," or "Communist-front" organization to apply for, use, or attempt to use a passport for travel

[15] See Freund, The Supreme Court of the United States (1961), pp. 67–69; Note, 61 Harv. L. Rev. 1208 (1948); Note, 109 U. Pa. L. Rev. 67, 75–85 (1960).

[16] Nor in our opinion should the Secretary of State or other government officers be exposed to the risk of criminal penalties for violating § 6 (b) by issuing a passport to a member of a registered Communist-action organization who is subsequently found by a court to be a person whose travel, contrary to the belief of the government officer, could constitutionally be prohibited.

abroad. I concur in the Court's holding that this section of the Act is unconstitutional, but not on the ground that the Due Process Clause of the Fifth Amendment, standing alone, confers on all our people a constitutional liberty to travel abroad at will. Without reference to other constitutional provisions, Congress has, in my judgment, broad powers to regulate the issuance of passports under its specific power to regulate commerce with foreign nations. The Due Process Clauses of the Fifth and Fourteenth Amendments do mean to me, however, that neither the Secretary of State nor any other government agent can deny people in this country their liberty to travel or their liberty to do anything else except in accordance with the "law of the land" as declared by the Constitution or by valid laws made pursuant to it. For reasons stated in my dissenting opinion in *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 137, I think the whole Act, including § 6, is not a valid law, that it sets up a comprehensive statutory plan which violates the Federal Constitution because (1) it constitutes a "Bill of Attainder," which Art. I, § 9, of the Constitution forbids Congress to pass; (2) it penalizes and punishes appellants and restricts their liberty on legislative and administrative fact-findings that they are subversives, and in effect traitors to their country, without giving them the benefit of a trial according to due process, which requires a trial by jury before an independent judge, after an indictment, and in accordance with all the other procedural protections of the Fourth, Fifth, and Sixth Amendments; and (3) it denies appellants the freedom of speech, press, and association which the First Amendment guarantees.

The Subversive Activities Control Act is supposed to be designed to protect this Nation's "internal security." This case offers another appropriate occasion to point out that the Framers thought (and I agree) that the best way

to promote the internal security of our people is to protect their First Amendment freedoms of speech, press, religion and assembly, and that we cannot take away the liberty of groups whose views most people detest without jeopardizing the liberty of all others whose views, though popular today, may themselves be detested tomorrow.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add only a few words to indicate what I think is the basic reach of the problem before us.

We noted in *Kent* v. *Dulles,* 357 U. S. 116, 126, that "freedom of movement," both internally and abroad, is "deeply engrained" in our history. I would not suppose that a Communist, any more than an indigent, could be barred from traveling interstate. I think that a Communist, the same as anyone else, has this right. Being a Communist certainly is not a crime; and while traveling may increase the likelihood of illegal events happening, so does being alive. If, as I think, the right to move freely from State to State is a privilege and immunity of national citizenship (see *Edwards* v. *California,* 314 U. S. 160, 178), none can be barred from exercising it, though anyone who uses it as an occasion to commit a crime can of course be punished. But the right remains sacrosanct, only illegal conduct being punishable.

Free movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interests of security. That is why riding boxcars carries extreme penalties in Communist lands. That is why the ticketing of people and the use of identification papers are routine matters under totalitarian regimes, yet abhorrent in the United States.

Freedom of movement, at home and abroad, is important for job and business opportunities—for cultural,

political, and social activities—for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.

Freedom of movement is kin to the right of assembly and to the right of association. These rights may not be abridged, *De Jonge* v. *Oregon,* 299 U. S. 353; *NAACP* v. *Alabama,* 357 U. S. 449, 460–462, only illegal conduct being within the purview of crime in the constitutional sense.

War may be the occasion for serious curtailment of liberty. Absent war, I see no way to keep a citizen from traveling within or without the country, unless there is power to detain him. *Ex parte Endo,* 323 U. S. 283. And no authority to detain exists except under extreme conditions, *e. g.,* unless he has been convicted of a crime or unless there is probable cause for issuing a warrant of arrest by standards of the Fourth Amendment. This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.

America is of course sovereign; but her sovereignty is woven in an international web that makes her one of the family of nations. The ties with all the continents are close—commercially as well as culturally. Our concerns are planetary, beyond sunrises and sunsets. Citizenship implicates us in those problems and perplexities, as

well as in domestic ones. We cannot exercise and enjoy citizenship in world perspective without the right to travel abroad; and I see no constitutional way to curb it unless, as I said, there is the power to detain.

MR. JUSTICE CLARK, whom MR. JUSTICE HARLAN joins and whom MR. JUSTICE WHITE joins in part, dissenting.

I.

The Court refuses to consider the constitutionality of § 6 of the Subversive Activities Control Act as applied to the appellants in this case, Elizabeth Gurley Flynn, the Chairman of the Communist Party of the United States, and Herbert Aptheker, the editor of the Party's "theoretical organ," *Political Affairs*. Instead, the Court declares the section invalid on its face under the Fifth Amendment. This is contrary to the long-prevailing practice of this Court. As we said in *United States* v. *Raines*, 362 U. S. 17, 20–21 (1960):

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—'the gravest and most delicate duty that this Court is called on to perform.' [Holmes, J., in *Blodgett* v. *Holden*, 275 U. S. 142, 148.] *Marbury* v. *Madison*, 1 Cranch 137, 177–180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered,

one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. *United States* v. *Wurzbach,* 280 U. S. 396; *Heald* v. *District of Columbia,* 259 U. S. 114, 123; *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217; *Collins* v. *Texas,* 223 U. S. 288, 295–296; *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 160–161. Cf. *Voeller* v. *Neilston Warehouse Co.,* 311 U. S. 531, 537; *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 513; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 558; *Blackmer* v. *United States,* 284 U. S. 421, 442; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54–55; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Tyler* v. *Judges of the Court of Registration,* 179 U. S. 405; *Ashwander* v. *TVA,* 297 U. S. 288, 347–348 (concurring opinion)."

Indeed, only last Term we specifically held in *United States* v. *National Dairy Products Corp.,* 372 U. S. 29, 36 (1963):

"In this connection we also note that the approach to 'vagueness' governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' . . . . [In

other cases we also consider the statute] in the light of the conduct to which it is applied."

The Court says that *National Dairy* is not apposite, citing *Thornhill* v. *Alabama,* 310 U. S. 88, and *NAACP* v. *Button,* 371 U. S. 415. But *Thornhill* and *Button* are First Amendment cases, while the holding of this case is based on the Fifth Amendment's guarantee of the right to travel abroad. *Kent* v. *Dulles,* 357 U. S. 116, 127 (1958). Consequently they are not apposite here.

As applied to the prosecution of the Communist Party's top dignitaries, the section is clearly constitutional. The only objections the Court finds to the language of Congress are that it makes the section applicable: (1) "whether or not the member [of the Party] actually knows or believes that he is associated with what is deemed to be a 'Communist-action' or a 'Communist-front' organization"; (2) "whether or not one knows or believes that he is associated with an organization operating to further aims of the world Communist movement and 'to establish a Communist totalitarian dictatorship in the countries throughout the world . . . .'" Let us discuss these objections seriatim:

(1) There is a finding here—not under attack—that Mrs. Flynn "was an active, participating and continuous member of the Communist Party of the United States; was active in the Party's affairs and its organization; and indeed was and still is one of its principal officials." Likewise there is a finding—not under attack—as to Aptheker that he "[Aptheker] makes it quite clear in his own words that he has been a member of the Communist Party since 1939 and that he is very proud of this association and will do whatever he can to further the aims and goals of the Party." The record shows that both Flynn and Aptheker were witnesses in behalf of the Party in the registration proceeding which resulted in

the Party's being ordered to register as a Communist-action organization. *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1 (1961). In addition, Mrs. Flynn was convicted under the Smith Act. See *United States* v. *Flynn,* 216 F. 2d 354 (1954). In view of these circumstances, no one could say with truth that the appellants did not know that they were associated with a Communist-action organization. In fact, neither appellant claims lack of notice or knowledge of the requirements of the section.

(2) As to knowledge that the Communist Party is involved in a world Communist movement aimed at establishing a totalitarian Communist dictatorship in countries throughout the world, Congress made specific findings in the Subversive Activities Control Act of 1950 (the very statute under which the hearing was held at which petitioners testified for the Party) and in the Communist Control Act of 1954 that: "the Communist Party of the United States . . . is in fact an instrumentality of a conspiracy to overthrow the Government of the United States," 68 Stat. 775; "the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement," *ibid.;* this control is in a "Communist dictatorship of a foreign country," whose purpose is "to establish a Communist totalitarian dictatorship in the countries throughout the world," 64 Stat. 987; and this is to be accomplished by "action organizations" in various countries which seek "the overthrow of existing governments by any available means," *id.,* at 988. These findings of the Congress, like those of the Examiner which are not under attack here, are binding on this Court. *Communist Party* v. *Control Board, supra.* There we said:

> "It is not for the courts to re-examine the validity of these legislative findings and reject them. See

> *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 590. They are the product of extensive investigation by Committees of Congress over more than a decade and a half. Cf. *Nebbia* v. *New York,* 291 U. S. 502, 516, 530. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan* v. *Press,* 347 U. S. 522, 529; *American Communications Assn.* v. *Douds,* 339 U. S. 382, 388–389." At 94–95.

It is, therefore, difficult for me to see how it can be said rationally that these appellants—top Party functionaries who testified on behalf of the Party in the registration proceeding involved in *Communist Party* v. *Control Board, supra*—did not know that they were "associated with an organization operating to further aims of the world Communist movement and 'to establish a Communist totalitarian dictatorship in the countries throughout the world . . . .'"

How does the Court escape? It says that the section "sweeps within its prohibition both knowing and unknowing members." But we have no "unknowing members" before us. Neither appellant contests these findings. All we have are irrational imaginings: a member of the Party might wish "to visit a relative in Ireland, or to read rare manuscripts in the Bodleian Library of Oxford University . . . ." But no such party is here and no such claim is asserted. It will be soon enough to test this situation when it comes here.

II.

Nor do I believe the section invalid "on its face." While the right to travel abroad is a part of the liberty protected by the Fifth Amendment, the Due Process Clause does not prohibit reasonable regulation of life, liberty or property. Here the restriction is reasonably

related to the national security. As we said in *Barenblatt* v. *United States,* 360 U. S. 109, 127–128 (1959):

> "That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court . . . . In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society,' *Dennis* v. *United States,* 341 U. S. 494, 509."

The right to travel is not absolute. Congress had ample evidence that use of passports by Americans belonging to the world Communist movement is a threat to our national security. Passports were denied to Communists from the time of the Soviet Revolution until the early 30's and then again later in the 40's. In 1950 Congress determined, in the Subversive Activities Control Act, that foreign travel "is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." 64 Stat. 988. The Congress had before it evidence that such use of passports by Communist Party members: enabled the leaders of the world Communist movement in the Soviet Union to give orders to their comrades in the United States and to exchange vital secrets as well; facilitated the training of American Communist leaders by experts in sabotage and the like in Moscow; gave closer central control to the world Communist movement; and, of utmost importance, provided world Communist leaders with passports for Soviet secret agents to use in the United States for espionage purposes.* This evidence afforded the Congress a rational

*In the proceeding which led to the order of the Subversive Activities Control Board directing the Communist Party to register, the Board heard evidence that the present leaders of the Communist Party in the United States have traveled to the Soviet Union on

basis upon which to place the denial of passports to members of the Communist Party in the United States. The denial is reasonably related to the national security. The degree of restraint upon travel is outweighed by the dangers to our very existence.

The remedy adopted by the Congress is reasonably tailored to accomplish the purpose. It may be true that not every member of the Party would endanger our national security by traveling abroad, but which Communist Party member is worthy of trust? Since the Party is a secret, conspiratorial organization subject to rigid discipline by Moscow, the Congress merely determined that it was not wise to take the risk which foreign travel by Communists entailed. The fact that all persons in a class may not engage in harmful conduct does not of itself make the classification invalid. *Westfall* v. *United States,* 274 U. S. 256, 259 (1927); *North American Co.* v. *Securities & Exchange Comm'n,* 327 U. S. 686, 710–711 (1946); *American Communications Assn.* v. *Douds,* 339 U. S. 382, 406 (1950). In *Schneiderman* v. *United States,* 320 U. S. 118, 132, 163, 172 (1943), this Court indicated that Congress might exclude *all* Communists from entering this country. And in *Hawker* v. *New York,* 170 U. S. 189 (1898), the Court upheld a state statute preventing *all* felons from practicing medicine; similarly, *all* aliens may be barred from operating pool halls, *Clarke* v. *Deckebach,* 274 U. S. 392, 396–397 (1927). More onerous burdens than those found in § 6 were placed on *all* union officers (whose organization was enjoying privileges under the National Labor Relations Act), who were barred from their offices (and livelihood in that regard) if they were Communist Party members. *American Communications Assn.* v. *Douds, supra.* Likewise, this

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Party business, have been indoctrinated and trained in Communist strategy and policies and have acted as couriers between the Communist Parties of the two countries.

Court approved the action of the Congress in authorizing deportation of *all* aliens who had been members of the Party. *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 590 (1952); *Galvan* v. *Press,* 347 U. S. 522 (1954). We also upheld the vesting of power in the Attorney General to hold *all* Communist Party members without bail pending determination as to their deportability. *Carlson* v. *Landon,* 342 U. S. 524 (1952). In the realm of state power, Maryland was permitted to require *all* candidates to take an oath that they were not engaged in any attempt to overthrow the Government by force and violence, *Gerende* v. *Board of Supervisors,* 341 U. S. 56 (1951); Los Angeles was allowed to require *all* employees to take a non-Communist oath on penalty of discharge, *Garner* v. *Board of Public Works,* 341 U. S. 716 (1951); New York exercised similar powers over public school employees with our approval, *Adler* v. *Board of Education,* 342 U. S. 485 (1952); the States were permitted to discharge *all* teachers and "security agency" employees who refused to answer questions concerning their Communist affiliations, *Beilan* v. *Board of Public Education,* 357 U. S. 399 (1958); *Lerner* v. *Casey,* 357 U. S. 468 (1958); and California and Illinois were permitted to deny admission to the practice of law of *all* applicants who refused to answer questions as to their Communist affiliations, *Konigsberg* v. *State Bar,* 366 U. S. 36 (1961), and *In re Anastaplo,* 366 U. S. 82 (1961).

Nor do I subscribe to the loose generalization that individual guilt may be conclusively presumed from membership in the Party. One cannot consider the matter in isolation but must relate it to the subject matter involved and the legislative findings upon which the action is based. It is true that in *Scales* v. *United States,* 367 U. S. 203 (1961), the Court found that the intention of the Congress in the Smith Act was "to reach only 'active' members having also a guilty knowledge and intent." At

228. But that was a criminal prosecution under the Smith Act which, of course, carried stricter standards. And, in addition, this requirement, as laid down in *Scales,* was not held to be a constitutional mandate. The Court was merely interpreting a criminal statute which directly prohibits membership in organizations that come within its terms. The Act here does not prohibit membership, but merely restricts members in a field in which the Congress has found danger to our security. Nor is *Wieman* v. *Updegraff,* 344 U. S. 183 (1952), cited by the majority, apposite here. That case dealt with an oath based on membership in organizations on the Attorney General's list of subversive groups. The Act condemned the employee who was a member of any listed organization regardless of whether he actually knew the organization was so listed; furthermore, the statute proscribed past membership in the listed organizations. Here proof of actual membership is necessary and notice of registration or entry of a final order directing registration under the Act is required. Finally, the member of the Party here can avoid the Act's sanctions by terminating his membership, which was not possible in *Wieman.* Appellants also depend on *Adler* v. *Board of Education,* 342 U. S. 485 (1952), which upheld a statute with a rebuttable presumption that members of the Party supported Communist objectives. The Court did not hold that the opportunity to rebut was constitutionally required in the circumstances of that case, but even if it had, *Adler* would not control here. The evidence before Congress as to the danger to national security was of such strength that it warranted the denial of passports, a much less onerous disability than loss of employment.

For these reasons, I would affirm.

MR. JUSTICE WHITE joins in Section I of this dissent and for the reasons stated therein would affirm the judgment.

BERMAN *v.* UNITED STATES.

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

No. 245. Argued March 26, 1964.—Decided June 22, 1964.

Judgment affirmed.

Bernard B. Polak argued the cause for petitioner. On the brief was *Irwin L. Germaise.*

Theodore George Gilinsky argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg.*

PER CURIAM.

The judgment of the Court of Appeals for the Second Circuit is affirmed. *United States* v. *Robinson,* 361 U. S. 220.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE GOLDBERG join, dissenting.

This case seems to me to be decided on the premise that it is more important that the Federal Rules of Criminal Procedure be slavishly followed than that justice be done. I cannot agree to any such principle and therefore dissent.

Petitioner was convicted in the United States District Court for the Southern District of New York on two counts—one of possessing counterfeit currency and one of receiving stolen securities. He was sentenced to concurrent prison terms of two years on each count and a total fine of $2,000. He decided to appeal. Federal Rule of Criminal Procedure 37 (a)(2) requires a notice of appeal to be filed within 10 days. Here the tenth day fell on

Saturday. On the preceding Friday an associate to whom petitioner's attorney had given the notice of appeal for filing left the office with a fever and went home to bed, where he stayed until late Sunday. Because of the associate's illness, the notice was not filed on Saturday; instead, it was filed Monday morning. The Court of Appeals, on motion of the Government, dismissed the appeal on the ground that under Rule 37 (a)(2) and Rule 45 (a) the notice for appeal had been filed one day late. Two days after this dismissal, petitioner, as authorized by Fed. Rule Crim. Proc. 35, moved in the District Court for reduction of the sentence. This motion, with supporting affidavits, pointed out to the District Court that petitioner's appeal had been dismissed because it was one day late. Indeed, a principal ground urged upon the court for acting on the motion was that granting the motion would enable petitioner to appeal from the amended sentence and challenge the validity of the original conviction. The prosecuting attorney objected, saying, "I think he has had his one shot, and it's all over. He has no further right to appeal if the sentence is reduced." The District Judge, stating that his understanding was "contrary" to that of the prosecutor, granted petitioner's motion and, exercising his authority under Rule 35, reduced the sentence on each count from two years to one year and eight months and reduced the fine on each count. The following day, petitioner's counsel filed a second notice of appeal, but again the Court of Appeals granted the Government's motion to dismiss, rejecting the District Court's holding that the time for appeal began to run anew upon the partial rejection of the defendant's Rule 35 motion. This Court now affirms with the simple citation of *United States* v. *Robinson,* 361 U. S. 220. Because I think that *United States* v. *Robinson* should be confined to its particular facts, and for a number of other reasons, I would reverse the judgment of the Court of Appeals.

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In this case petitioner, Berman, has contended since the time of his first appeal that evidence introduced at his trial had been obtained as a result of an unlawful search and seizure and that a statement by way of a confession made by him was involuntary and therefore should have been excluded as a violation of the Fifth Amendment. The most perfunctory review of this record shows that neither of those two questions is frivolous.* In *Fay* v. *Noia,* 372 U. S. 391, this Court, after an exhaustive discussion of the question and the citation of many prior decisions of this Court, held that a defendant who had been convicted by use of a coerced confession in a state court could obtain relief in a federal habeas corpus proceeding notwithstanding the fact of a procedural default in the state courts which barred any challenge to the conviction in those courts. It is unthinkable that the same rule should not be applied in federal courts so as to grant relief to a defendant who has been denied a federally guaranteed right because of his failure to comply with the rule which requires the notice of appeal to be filed within 10 days. It is particularly abhorrent to think that such a rule can be enforced in the federal court where, as here, the sole reason for cutting off the defendant's right of appeal to the Court of Appeals is the fact that, after the defendant has decided to appeal, the lawyer to whom he entrusts the duty of physically transporting his notice of appeal to the Court of Appeals fails to get it there because he is taken ill.

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*In addition to those questions sought to be raised by petitioner in his appeal, this Court's decision in *Jackson* v. *Denno, ante,* p. 368, creates a third. The judge in this case did not himself pass on the voluntariness of Berman's confession; instead, he charged the jury that they must be the "sole judges" of the voluntariness of the confession. In so doing, the judge followed what is called the "New York rule"—a rule which this Court in *Jackson* says is unconstitutional.

Moreover, the Court in the *Robinson* case, which the Court now holds is controlling here, expressly stated, 361 U. S., at 230 n. 14, that the allowance of an appeal after expiration of the prescribed time

> "seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time . . . ; the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U. S. C. § 2255 . . . ."

It is not strange that the Court in *Robinson* directed its attention to § 2255 proceedings since that section expressly provides that "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."

My belief is that, even if Rule 37 (a)(2) is held to require dismissal of this appeal, and I do not think it should be, this Court should remand the case to the Court of Appeals with directions to treat the appeal as an application for collateral relief under 28 U. S. C. § 2255. Such a course was followed in similar circumstances by the Tenth Circuit in *Hixon* v. *United States,* 268 F. 2d 667, where, as here, the appeal was late under Rule 37 (a)(2). And we said in *Bartone* v. *United States,* 375 U. S. 52, 54:

> "Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding. See *Fay* v. *Noia,* 372 U. S. 391. But the situation is dif-

> ferent in federal proceedings, over which both the Courts of Appeals and this Court (*McNabb* v. *United States,* 318 U. S. 332) have broad powers of supervision. It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding."

This is precisely what I think should be done in this case but the Court insists on affirming the harsh action of the Court of Appeals in dismissing the appeal. For a number of reasons, however, I would not affirm that dismissal.

I believe that petitioner's original appeal was timely under Rule 37 (a)(2) if that rule is given a liberal, but permissible, construction more consonant with the ends of justice. The rule says that appeals must be taken "within 10 days" after the entry of the order appealed from. Rule 45 (a) says that the last day of the 10-day period is not to be counted if "it is a Sunday or legal holiday"; in such case, the period runs "until the end of the next day which is neither a Sunday nor a holiday." Neither of these rules says what is to happen if the tenth day is a Saturday, and neither defines what is a "legal holiday." Rule 56, however, sheds some light, for it states that federal courts shall be open for the filing of papers during business hours "on all days except Sundays and legal holidays," and the notes of the Advisory Committee responsible for the language of the Criminal Rules state that "legal holidays" include not only federal holidays but also "holidays prescribed by the *laws of the State where the clerk's office is located.*" (Emphasis supplied.) On this point, New York law is specific. In New York City, where the United States District Court for the Southern District of New York sits, the offices of clerks of courts are closed on Saturdays by a state statute which provides: "Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended

to and including the next business day." N. Y. Judiciary Law, § 282 (1963 Cum. Pocket Part). The practice is the same in other public offices in New York; for example, Saturday is not a business day in the offices of the county clerk in New York City, N. Y. County Law, § 902, or in county offices in other counties, *id.*, § 206–a (1963 Cum. Pocket Part).

The situation, simply put, is this: The Federal Rules say that an appeal must be filed within 10 days. They obviously intend to extend the time when the tenth day falls upon some day upon which the bar is not able or accustomed to filing legal papers in the courts—such as Sundays and legal holidays. The Rules refer practitioners and courts to state laws defining legal holidays, the better to avoid pitfalls for local lawyers who might otherwise lose their clients' cases because of their reliance upon the holiday closings of local courts. At the very outset of the Rules, their authors proclaimed that the Rules "are intended to provide for the just determination of every criminal proceeding" and so commanded courts to construe them so as "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Fed. Rule Crim. Proc. 2. With these principles in mind, how, then, can we take the problem of deciding what happens when the tenth day falls on Saturday—something not expressly covered by the Rules—and treat it as if it were an impersonal, academic exercise in symbolic logic? Here, quite contrary to the Rules' promise, constitutional questions are denied a hearing on appeal because of a draconian interpretation of those very Rules. The associate who became ill stated, by affidavit in the Court of Appeals, that he was not aware that the federal courts did not follow the New York practice of extending time for filing until Monday where it would otherwise run out on Saturday. This affidavit is undisputed. Where the Federal Criminal

Rules are not clear and leave a particular question to a court's interpretation, I fail to see how procedure is simplified, administration of justice is made fairer, and expense and delay are eliminated by choosing the strictest and most rigorous possible interpretation of the Rules.

There is another way in which the Rules could be fairly construed so as to avoid the unjust result the Court here reaches. After the appellate court dismissed the original appeal, petitioner went back to the District Court and made the Rule 35 motion, as stated above. That motion was granted, and the next day petitioner filed a second notice of appeal; again the Court of Appeals dismissed. I think the reasoning of *Corey* v. *United States,* 375 U. S. 169, fits this case. In *Corey,* the petitioner had been committed to custody under 18 U. S. C. § 4208 (b), pending a report from the Bureau of Prisons. Three months later, after the report had been received, Corey was sentenced. Three days after that he filed a notice of appeal, but the Court of Appeals dismissed, holding that the 10 days for appeal had begun running from the time of the original custody order. This Court reversed, holding that an appeal could be taken, at the defendant's option, either from the original order or from the final sentencing. Similarly, in this case I think the fact that petitioner could have appealed from the first judgment of the District Court did not foreclose him from appealing from the second, amended judgment. As we said in *Corey,* 375 U. S., at 175, "simply because a defendant *could* have sought review of his conviction" after the initial order does not mean that Congress intended to deny review from a later order. Furthermore, we have consistently held that once a reviewing court has jurisdiction of one issue of a case (here the reduction of sentence), it may consider questions arising in earlier stages of the case. See *Mercer* v. *Theriot,* 377 U. S. 152, 153; *Urie* v. *Thompson,* 337 U. S. 163, 171–173.

Oddly enough, because the Court now holds there is no appeal from the second order of the District Court, this man convicted of a crime is worse off than a civil litigant, whose timely motion under Fed. Rule Civ. Proc. 73 to "alter or amend" the judgment would cause the time for an appeal to run anew. Moreover, even a motion which is not timely has been held sufficient in civil cases under Rule 73's provision dealing with "excusable neglect." See *Wolfsohn* v. *Hankin,* 376 U. S. 203; *Thompson* v. *Immigration and Naturalization Service,* 375 U. S. 384; *Harris Truck Lines, Inc.,* v. *Cherry Meat Packers, Inc.,* 371 U. S. 215. Surely the rule in criminal cases should not be more strictly applied. Even more odd is the fact that this petitioner, because he had a lawyer, is worse off than a defendant who does not have a lawyer. Cf. *Fallen* v. *United States, ante,* p. 139. The same rule which is being used here to cut off petitioner's appeal says that when a defendant not represented by counsel is sentenced, "the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file" the notice of appeal for the defendant. Here petitioner took the equivalent steps: he executed the notice of appeal for his lawyer on Thursday. But the lawyer's associate fell ill, and the Court of Appeals treated Saturday in a way most apt to confuse and trap even a perfectly healthy New York lawyer familiar with local New York practice. Having several ways in which it could have heard the merits of petitioner's constitutional claim, the Court of Appeals, now followed by this Court I regret to say, chose to interpret the Rules not so as to reach, but rather to defeat, a "just determination" of this case.

Throughout history men have had to suffer from legal systems which worshipped rigid formalities at the expense of justice. It is for this that we remember the Laws of the Medes and Persians and the injustice spawned by the tortuous labyrinth of common-law pleading which it

took the creation of courts of equity to counteract. Of course, any civilized system of judicial administration should have enough looseness in the joints to avert gross denials of a litigant's rights growing out of his lawyer's mistake or even negligence in failing to file the proper kind of pleading at precisely the prescribed moment. Cf. *Link* v. *Wabash R. Co.*, 370 U. S. 626, 636 (dissenting opinion). The Criminal Rules were framed with the declared purpose of ensuring that justice not be thwarted by those with too little imagination to see that procedural rules are not ends in themselves, but simply means to an end: the achievement of equal justice for all. I have no doubt that the disposition of this case would have been very congenial to the climate of Baron Parke's day. I confess, however, that I am uncomfortable with the notion that courts exist to fashion and preserve rules inviolate instead of to apply those rules to do justice to litigants.

DRESNER ET AL. *v.* CITY OF TALLAHASSEE.

CERTIORARI TO THE CIRCUIT COURT OF FLORIDA, SECOND JUDICIAL CIRCUIT.

No. 35. Argued October 23, 1963.—Questions certified to Supreme Court of Florida December 2, 1963.—Decided June 22, 1964.

Certiorari dismissed as improvidently granted.

Howard Dixon and *Carl Rachlin* argued the cause for petitioners. With them on the briefs were *Alfred I. Hopkins* and *Tobias Simon.*

Edward J. Hill and *Roy T. Rhodes* argued the cause for respondent. With them on the brief was *Rivers Buford, Jr.*

PER CURIAM.

The questions which this Court certified to the Supreme Court of Florida, 375 U. S. 136, having been answered in the affirmative, 164 So. 2d 208, the writ of certiorari is dismissed as improvidently granted. 28 U. S. C. § 1257.

ALDRICH *v.* ALDRICH ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 55. Argued October 24, 1963.—Decided November 12, 1963, that questions be certified to Supreme Court of Florida.—Questions certified to Supreme Court of Florida December 16, 1963.—Decided June 22, 1964.

In response to questions certified by this Court, the Florida Supreme Court advised that, although an award of alimony purporting to bind the husband's estate was not proper under Florida law, in the absence of an express prior agreement between the spouses, the failure of the husband, now deceased, to appeal permitted the decree to become final and it is not subject to collateral attack. Accordingly, the West Virginia courts, in probating the husband's estate, must, under the Full Faith and Credit Clause, give the decree as broad a scope as Florida does.

147 W. Va. 269, 127 S. E. 2d 385, reversed and remanded.

Herman D. Rollins argued the cause and filed a brief for petitioner.

Submitted by *Charles M. Love* for respondents on the brief in opposition to the petition for writ of certiorari.

PER CURIAM.

Petitioner, Marguerite Loretta Aldrich, was granted a divorce from M. S. Aldrich by the Circuit Court of Dade County, Florida, in 1945. The jurisdiction of that court to award the divorce was not contested then, nor is it contested in this action. M. S. Aldrich was ordered by the Court to pay petitioner $250 a month as permanent alimony, and the decree provided that "said monthly sum of $250.00 shall, upon the death of said defendant [husband], become a charge upon his estate during her [petitioner's] lifetime . . . ." There was no prior express agreement between the parties that the estate would be bound. Subsequently, the husband petitioned the Florida court for a rehearing, which was denied, but the

court reduced alimony from $250 to $215 per month. No appeal was taken by either party.

M. S. Aldrich died testate, a resident of Putnam County, West Virginia, on May 29, 1958. His will was duly probated in Putnam County and petitioner filed a claim against the estate for alimony which had accrued after the death of her former husband. The appraisal of the estate showed assets of $7,283.50. Petitioner commenced this action in the Circuit Court of Putnam County, West Virginia, in order to have her rights in the estate determined. She also demanded that certain allegedly fraudulent transfers of real and personal property made by M. S. Aldrich be set aside and the properties which were the subject of such transfers administered as a part of the estate, so as to be subject to her claim for alimony under the Florida divorce decree.

On motion for summary judgment by the defendants, the Circuit Court of Putnam County held that the decree of the Florida divorce court was invalid and unenforceable insofar as it purported to impose upon the estate of M. S. Aldrich an obligation to pay alimony accruing after his death. The Supreme Court of Appeals of West Virginia affirmed the judgment, 147 W. Va. 269, 127 S. E. 2d 385. It characterized the controlling question in the case as

> "whether the judgment . . . to the extent that it awards alimony to accrue after the death of M. S. Aldrich and makes the alimony so accruing a charge upon his estate, is a valid judgment which is entitled to full faith and credit in the courts of this state; for if such judgment is not entitled to such full faith and credit the question of its enforcibility against the property and assets formerly owned by M. S. Aldrich becomes unimportant and need not be considered or discussed." 147 W. Va., at 274, 127 S. E. 2d, at 388.

Recognizing that, as required by the Full Faith and Credit Clause, Art. IV, § 1, of the Federal Constitution,

"a judgment of a court of another state has the same force and effect in this state as it has in the state in which it was pronounced," 147 W. Va., at 275, 127 S. E. 2d, at 388, the court also noted that " 'no greater effect is to be given to it than it would have in the state where it was rendered.' " *Ibid.*, 127 S. E. 2d, at 389. Although apparently not questioning the power of Florida to impose a charge upon the estate, the court concluded that such a charge was, absent express agreement by the parties to the divorce, improper under Florida law and that "the judgment awarding such alimony was void and of no force and effect under the law of the State of Florida in which such judgment was rendered and will not be given full faith and credit in the courts of this state." 147 W. Va., at 283, 127 S. E. 2d, at 393. We granted certiorari, 372 U. S. 963, to decide whether West Virginia had complied with the mandate of the Full Faith and Credit Clause.

Being uncertain regarding the relevant law of Florida and believing that law to be determinative of the effect to be given the Florida judgment, we certified (375 U. S. 75, 375 U. S. 249, 251–252) the following questions of state law to the Florida Supreme Court, pursuant to Rule 4.61 of the Florida Appellate Rules:

1. Is a decree of alimony that purports to bind the estate of a deceased husband permissible, in the absence of an express prior agreement between the two spouses authorizing or contemplating such a decree?

2. If such a decree is not permissible, does the error of the court entering it render that court without subject matter jurisdiction with regard to that aspect of the cause?

3. If subject matter jurisdiction is thus lacking, may that defect be challenged in Florida, after the time for appellate review has expired, (i) by the representatives of the estate of the deceased husband or (ii) by persons to whom the deceased husband has allegedly transferred part of his property without consideration?

4. If the decree is impermissible but not subject to such attack in Florida for lack of subject matter juris-

diction by those mentioned in subparagraph 3, may an attack be successfully based on this error of law in the rendition of the decree?

The Florida court, in answer to our certification, has determined that although the award of alimony purporting to bind the estate was not proper under Florida law, the court rendering the decree did not thereby lose its jurisdiction over that part of the case. It further decided that "when the husband failed to take an appeal and give a reviewing court the opportunity to correct the error, the decree of the Circuit Court on such question passed into verity, became final, and is not now subject to collateral attack." 163 So. 2d 276, 284. Having given a negative answer to both the first two questions, the court believed it unnecessary to consider the latter two questions. We accordingly take the passage quoted above as meaning that collateral attack on any ground would not have been sustained.

Given the answers of the Florida court, it becomes plain that the judgment of the Supreme Court of Appeals of West Virginia, based as it was on a misapprehension regarding the law of a sister State, cannot stand. The Florida alimony decree must be treated as if it were perfectly correct under substantive principles of Florida law. It cannot be argued that a rule of law imposing a burden on the estate of a divorced man who has had his day in court violates due process, and if the judgment is binding upon him, it is also binding on those whom Florida law considers to be in privity with him, so long as Florida does not seek to bind those who cannot be bound consistent with due process. That West Virginia must give the decree of alimony as broad a scope as that it has in Florida is clear, see *Johnson* v. *Muelberger,* 340 U. S. 581, and is questioned neither by the Supreme Court of Appeals of West Virginia nor by respondents.

The judgment below is reversed, and the case remanded for proceedings not inconsistent with this opinion.

It is so ordered.

LEONARD *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1017, Misc. Decided June 22, 1964.

Trial of petitioner over his objection by jury some of whose members were selected from panel in whose presence another jury in similar preceding case had announced verdict of his guilt is clearly erroneous.

Certiorari granted; 324 F. 2d 914, reversed and remanded.

John G. Clancy for petitioner.

Solicitor General Cox for the United States.

PER CURIAM.

Petitioner was convicted in separate trials and by different juries of forging and uttering endorsements on government checks, 18 U. S. C. § 495, and of transportation of a forged instrument in interstate commerce, 18 U. S. C. § 2314. The two cases were tried in succession. The jury in the case tried first—forging and uttering endorsements—announced its guilty verdict in open court in the presence of the jury panel from which the jurors who were to try the second case—transportation of a forged instrument—were selected. Petitioner immediately objected to selecting a jury for the second case from among members of the panel who had heard the guilty verdict in the first case. The objection was overruled, and the actual jury which found petitioner guilty in the second case contained five jurors who had heard the verdict in the first case. The conviction in the second case was affirmed on appeal, 324 F. 2d 914, and petitioner now seeks a writ of certiorari.

The Solicitor General, in his brief filed in this Court, states that:

> "The procedure followed by the district court in selecting the jury was, in our view, plainly erroneous.

> Prospective jurors who have sat in the courtroom and heard a verdict returned against a man charged with crime in a similar case immediately prior to the trial of another indictment against him should be automatically disqualified from serving at the second trial, if the objection is raised at the outset."

We agree that under the circumstances of this case the trial court erred in denying petitioner's objection. Accordingly the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, the judgment of conviction is reversed, and the cause is remanded for proceedings in conformity with this opinion.

It is so ordered.

COOPER *v.* PATE, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1134, Misc. Decided June 22, 1964.

Certiorari granted and judgment reversed.
Reported below: 324 F. 2d 165.

Alex Elson and *Bernard Weisberg* for petitioner.

William G. Clark, Attorney General of Illinois, and *Raymond S. Sarnow* and *Edward A. Berman,* Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

The petitioner, an inmate at the Illinois State Penitentiary, brought an action under 28 U. S. C. § 1343 and 42 U. S. C. § 1983, § 1979 of the Revised Statutes, alleging that solely because of his religious beliefs he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners. The District Court granted the respondent's motion to dismiss for failure to state a claim on which relief could be granted and the Court of Appeals affirmed. 324 F. 2d 165 (C. A. 7th Cir.). We reverse the judgment below. Taking as true the allegations of the complaint, as they must be on a motion to dismiss, the complaint stated a cause of action and it was error to dismiss it. See *Pierce* v. *LaVallee,* 293 F. 2d 233 (C. A. 2d Cir.); *Sewell* v. *Pegelow,* 291 F. 2d 196 (C. A. 4th Cir.).

DREWS ET AL. *v.* MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 3. Decided June 22, 1964.

Judgment vacated and case remanded.
Reported below: 224 Md. 186, 167 A. 2d 341.

Robert B. Watts, Francis D. Murnaghan, Jr. and *Jack Greenberg* for appellants.

Thomas B. Finan, Attorney General of Maryland, and *Joseph S. Kaufman,* Deputy Attorney General, for appellee.

PER CURIAM.

The judgment is vacated and the case is remanded to the Court of Appeals of Maryland for consideration in light of *Griffin* v. *Maryland, ante,* p. 130, and *Bell* v. *Maryland, ante,* p. 226.

MR. JUSTICE DOUGLAS would reverse outright on the basis of the views expressed in his opinion in *Bell* v. *Maryland, ante,* p. 242.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent.

736-666 O-65—37

WILLIAMS *v.* NORTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 4. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 253 N. C. 804, 117 S. E. 2d 824.

Leonard B. Boudin, Victor Rabinowitz and *Conrad J. Lynn* for petitioner.

T. W. Bruton, Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted, the judgment vacated and the case remanded to the Supreme Court of North Carolina for consideration in light of *Robinson* v. *Florida, ante,* p. 153.

MR. JUSTICE DOUGLAS would reverse outright on the basis of the views expressed in his opinion in *Bell* v. *Maryland, ante,* p. 242.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent.

ROGERS *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1011, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 325 F. 2d 485.

James T. Moran for petitioner.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Ronald L. Gainer* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case remanded to the United States District Court for the Western District of Oklahoma for resentencing in light of the concessions made by the Solicitor General and upon an examination of the entire record in the case.

GREEN ET AL. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 761. Decided June 22, 1964.

Certiorari granted; judgments vacated; and case remanded.

Jack Greenberg, James M. Nabrit III and *Roland D. Ealey* for petitioners.

Reno S. Harp III, Assistant Attorney General of Virginia, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted, the judgments are vacated and the case remanded to the Supreme Court of Appeals of Virginia for consideration in light of *Peterson* v. *City of Greenville,* 373 U. S. 244, and *Robinson* v. *Florida, ante,* p. 153.

MR. JUSTICE DOUGLAS would reverse outright on the basis of the views expressed in his opinion in *Bell* v. *Maryland, ante,* p. 242.

MITCHELL ET AL. *v.* CITY OF CHARLESTON.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 8. Decided June 22, 1964.

Certiorari granted and judgment reversed.

Reported below: 239 S. C. 376, 123 S. E. 2d 512.

Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Matthew J. Perry, Lincoln C. Jenkins, Jr. and *John H. Wrighten* for petitioners.

Robert L. Clement, Jr. for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *Bouie* v. *City of Columbia, ante,* p. 347.

MR. JUSTICE DOUGLAS would reverse on the basis of the views expressed in his opinion in *Bell* v. *Maryland, ante,* p. 242.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent.

HARRIS ET AL. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 57, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.

Len W. Holt and *Simon Lawrence Cain* for petitioners.

Sol Goodman for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case remanded to the Supreme Court of Appeals of Virginia for consideration in light of *Peterson* v. *City of Greenville,* 373 U. S. 244, and *Robinson* v. *Florida, ante,* p. 153.

MR. JUSTICE DOUGLAS would reverse outright on the basis of the views expressed in his opinion in *Bell* v. *Maryland, ante,* p. 242.

SWANN *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL.

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

No. 297. Decided June 22, 1964.

Judgment reversed and case remanded.

Reported below: 214 F. Supp. 811.

Wm. Reece Smith, Jr. for appellant.

Richard W. Ervin, Attorney General of Florida, *C. Graham Carothers,* Special Assistant Attorney General, and *Edward S. Jaffry* and *Joseph C. Jacobs,* Assistant Attorneys General, for appellees.

PER CURIAM.

The judgment below is reversed. *Reynolds* v. *Sims,* 377 U. S. 533. The case is remanded for further proceedings consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds.*

MR. JUSTICE CLARK would reverse on the grounds stated in his opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 587.

MR. JUSTICE STEWART would remand for further proceedings consistent with the views expressed in his dissenting opinion in *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U. S. 713, 744.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 589.

MEYERS, SECRETARY OF STATE OF WASHINGTON, *v.* THIGPEN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 381. Decided June 22, 1964.

Judgment affirmed on the merits, and case remanded for further proceedings consistent with views stated in *Reynolds* v. *Sims,* 377 U. S. 533.

Reported below: 211 F. Supp. 826.

John J. O'Connell, Attorney General of Washington, *Philip H. Austin,* Assistant Attorney General, and *Lyle L. Iversen,* Special Assistant Attorney General, for appellant.

Vincent H. D. Abbey, Myron L. Borawick and *Stimson Bullitt* for appellees.

PER CURIAM.

The judgment below is affirmed on the merits, insofar as it relates to the apportionment of seats in the Washington Legislature. *Reynolds* v. *Sims,* 377 U. S. 533. The case is remanded for further proceedings, with respect to relief, consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds.* Since no question relating to the correctness of that part of the decision below holding valid the scheme of congressional districting in the State of Washington is presented in this appeal, we do not consider or pass upon that issue.

Mr. JUSTICE CLARK would affirm on the grounds stated in his opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 587.

MR. JUSTICE STEWART would remand for further proceedings consistent with the views expressed in his dissenting opinion in *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U. S. 713, 744.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 589.

LUCAS ET AL. *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

No. 559. Decided June 22, 1964.

Affirmed.

Releford McGriff for appellants.

Richard W. Ervin, Attorney General of Florida, *Edward S. Jaffry* and *Joseph C. Jacobs,* Assistant Attorneys General, and *Wilton R. Miller,* Special Assistant Attorney General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

NOLAN *v.* RHODES, GOVERNOR OF OHIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

No. 454. Decided June 22, 1964.*

Judgment reversed and cases remanded.

Reported below: 218 F. Supp. 953.

Kenneth G. Weinberg and *Stewart R. Jaffy* for appellant in No. 454.

William B. Saxbe, Attorney General of Ohio, and *Hugh A. Sherer* for appellees in No. 454.

Jerome Goldman, Robert P. Goldman and *Harris Weston* for appellants in No. 455.

William B. Saxbe, Attorney General of Ohio, *Gerald A. Donahue,* First Assistant Attorney General, and *John J. Chester* for appellees in No. 455.

PER CURIAM.

The judgment below is reversed. *Reynolds* v. *Sims,* 377 U. S. 533. The cases are remanded for further proceedings consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds.*

MR. JUSTICE CLARK would reverse on the grounds stated in his opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 587.

MR. JUSTICE STEWART would affirm the judgment because the Ohio system of legislative apportionment is

*Together with No. 455, *Sive et al.* v. *Ellis et al.,* also on appeal from the same court.

clearly a rational one and clearly does not frustrate effective majority rule.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Reynolds* v. *Sims*, 377 U. S. 533, 589.

WEST ET AL. *v.* CARR ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION.

No. 706. Decided June 22, 1964.

Appeal dismissed and certiorari denied.

Reported below: 212 Tenn. 367, 370 S. W. 2d 469.

Harris A. Gilbert for appellants.

George F. McCanless, Attorney General of Tennessee, and *Thomas E. Fox*, Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

GLASS ET AL. *v.* HANCOCK COUNTY ELECTION COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 853. Decided June 22, 1964.

Appeal dismissed and certiorari denied.

Reported below: 156 So. 2d 825.

Upton Sisson for appellants.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

WILLIAMS, TREASURER OF OKLAHOMA, ET AL. *v.* MOSS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 476. Decided June 22, 1964.*

Judgment affirmed on the merits, and cases remanded for further proceedings consistent with views stated in *Reynolds* v. *Sims,* 377 U. S. 533.

Reported below: 220 F. Supp. 149.

Charles Nesbitt, Attorney General of Oklahoma, for appellants in No. 476.

Frank Carter for appellants in No. 534.

Jim A. Rinehart for appellants in No. 546.

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*Together with No. 534, *Oklahoma Farm Bureau et al.* v. *Moss et al.,* and No. 546, *Baldwin et al.* v. *Moss,* both also on appeal from the same court.

Sid White for appellee Moss in No. 476.

Norman E. Reynolds, Jr., pro se, appellee in Nos. 476 and 534.

Delmer L. Stagner and *LeRoy Powers* for Council of Democratic Neighborhood Clubs in Nos. 476 and 534.

PER CURIAM.

The judgment below is affirmed on the merits. *Reynolds* v. *Sims,* 377 U. S. 533. The cases are remanded for further proceedings, with respect to relief, consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds,* should that become necessary.

MR. JUSTICE CLARK would affirm on the merits on the grounds stated in his opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 587.

MR. JUSTICE STEWART would affirm the judgment insofar as it holds that Oklahoma's system of legislative apportionment violates the Equal Protection Clause.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 589.

GERMANO ET AL. *v.* KERNER, GOVERNOR OF ILLINOIS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 636. Decided June 22, 1964.

Judgment reversed and case remanded.

Reported below: 220 F. Supp. 230.

Bernard Kleiman, Lester Asher, John C. Melaniphy and *Charles S. Rhyne* for appellants.

Howard J. Trienens and *Gary L. Cowan* for appellees.

PER CURIAM.

The judgment below is reversed. *Reynolds* v. *Sims,* 377 U. S. 533; *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U. S. 713. The case is remanded for further proceedings consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds.*

MR. JUSTICE CLARK and MR. JUSTICE STEWART would affirm the judgment, because, as the opinions of Judge Campbell and Judge Schnackenberg demonstrate, 220 F. Supp. 230, 235, the Illinois system of legislative apportionment is entirely rational and does not frustrate effective majority rule.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 589.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

MARSHALL ET AL. *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 962. Decided June 22, 1964.

Judgment reversed and case remanded.

Reported below: 227 F. Supp. 989.

Theodore Sachs for appellants.

Robert A. Derengoski, Solicitor General of Michigan, *Stanton S. Faville,* Chief Assistant Attorney General, and *James R. Ramsey* and *Russell A. Searl,* Assistant Attorneys General, for Hare et al.; and *Edmund E. Shepherd* and *R. William Rogers* for Beadle et al., appellees.

PER CURIAM.

The judgment below is reversed. *Reynolds* v. *Sims,* 377 U. S. 533; *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U. S. 713. The case is remanded for further proceedings consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds.*

MR. JUSTICE CLARK and MR. JUSTICE STEWART would affirm the judgment because the Michigan system of legislative apportionment is clearly a rational one and clearly does not frustrate effective majority rule.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 589.

TOWN OF FRANKLIN ET AL. *v.* BUTTERWORTH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

No. 1032. Decided June 22, 1964.

229 F. Supp. 754, affirmed.

John D. Fassett for appellants.

Richard H. Bowerman for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

SENK *v.* PENNSYLVANIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 900, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 412 Pa. 184, 194 A. 2d 221.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of Pennsylvania is vacated and the case is remanded for further proceedings not inconsistent with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

HEARNE ET AL. *v.* SMYLIE, GOVERNOR OF IDAHO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO.

No. 1075. Decided June 22, 1964.

Judgment reversed and case remanded.

Reported below: 225 F. Supp. 645.

Herman J. McDevitt for appellants.

Allan G. Shepard, Attorney General of Idaho, and *M. Allyn Dingel, Jr.,* Assistant Attorney General, for appellees.

PER CURIAM.

The judgment below is reversed. *Baker* v. *Carr,* 369 U. S. 186; *Reynolds* v. *Sims,* 377 U. S. 533. The case is remanded for further proceedings consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds.*

MR. JUSTICE CLARK would reverse on the basis of his dissenting opinion in *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U. S. 713, 741.

MR. JUSTICE STEWART would remand for further proceedings consistent with the views stated in his dissenting opinion in *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U. S. 713, 744.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 589.

PINNEY ET AL. *v.* BUTTERWORTH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

No. 1078. Decided June 22, 1964.

Judgment affirmed and case remanded for further proceedings consistent with views stated in *Reynolds* v. *Sims*, 377 U. S. 533.

Reported below: 229 F. Supp. 754.

H. Meade Alcorn, Jr., James William Moore and *Norman K. Parsells* for appellants.

Richard H. Bowerman for appellees.

PER CURIAM.

The judgment below is affirmed. *Reynolds* v. *Sims*, 377 U. S. 533. The case is remanded for further proceedings, with respect to relief, consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds*.

MR. JUSTICE CLARK would affirm the judgment on the basis of his opinion in *Reynolds* v. *Sims*, 377 U. S. 533, 587.

MR. JUSTICE STEWART would affirm the judgment insofar as it holds that Connecticut's system of legislative apportionment violates the Equal Protection Clause.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Reynolds* v. *Sims*, 377 U. S. 533, 589.

HILL, AUDITOR OF CLARKE COUNTY, IOWA, ET AL. *v.* DAVIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

No. 1079. Decided June 22, 1964.

Judgment affirmed and case remanded for further proceedings consistent with views stated in *Reynolds* v. *Sims,* 377 U. S. 533.

Reported below: 225 F. Supp. 689.

Ward Reynoldson for appellants.

Robert F. Wilson for appellees.

PER CURIAM.

The judgment below is affirmed. *Reynolds* v. *Sims,* 377 U. S. 533. The case is remanded for further proceedings, with respect to relief, consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds,* should that become necessary. Since this appeal presents no question as to the correctness of the District Court's later decision upholding the validity of the temporary reapportionment plan enacted by the Iowa General Assembly in February 1964, we do not consider or pass upon this matter.

MR. JUSTICE CLARK would affirm on the grounds stated in his opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 587.

MR. JUSTICE STEWART would affirm the judgment insofar as it holds that Iowa's system of legislative apportionment violates the Equal Protection Clause.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Reynolds* v. *Sims,* 377 U. S. 533, 589.

LATHAN *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 298, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 12 N. Y. 2d 822, 187 N. E. 2d 359.

Murray A. Gordon for petitioner.

Isidore Dollinger and *Bertram R. Gelfand* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals of the State of New York is vacated and the case is remanded for further proceedings not inconsistent with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

LOPEZ *v.* TEXAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 396, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 366 S. W. 2d 587.

Carlos C. Cadena for petitioner.

Waggoner Carr, Attorney General of Texas, and *James E. Barlow* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Criminal Appeals of Texas is vacated and the case is remanded for further proceedings not inconsistent with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

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OISTER *v.* PENNSYLVANIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

No. 682, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 201 Pa. Super. 251, 191 A. 2d 851.

Joseph Knox Fornance for petitioner.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Superior Court of Pennsylvania is vacated and the case is remanded for further proceedings not inconsistent with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

MUSCHETTE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 729, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 116 U. S. App. D. C. 239, 322 F. 2d 989.

Alfred L. Scanlan for petitioner.

Solicitor General Cox, Assistant Attorney General Miller and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded for further proceedings in conformity with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

DEL HOYO *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 893, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.

Leon B. Polsky and *Edward A. Miller* for petitioner.

Isidore Dollinger and *Irving Anolik* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Appellate Division of the Supreme Court of New York, First Judicial Department, is vacated and the case is remanded for further proceedings not inconsistent with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

PEA *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 930, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 116 U. S. App. D. C. 410, 324 F. 2d 442.

Henry Lincoln Johnson, Jr. for petitioner.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Jerome Nelson* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded for further proceedings in conformity with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

HARRIS *v.* TEXAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 963, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 370 S. W. 2d 886.

Marian S. Rosen for petitioner.

Carl E. F. Dally for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Criminal Appeals of Texas is vacated and the case is remanded for further proceedings not inconsistent with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

CATANZARO *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 994, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 13 N. Y. 2d 842, 192 N. E. 2d 232.

Petitioner *pro se.*

Frank S. Hogan and *H. Richard Uviller* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals of New York is vacated and the case is remanded for further proceedings not inconsistent with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

OWEN ET AL. *v.* ARIZONA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 1078, Misc. Decided June 22, 1964.

Certiorari granted; judgments vacated; and case remanded.

Reported below: 94 Ariz. 404, 385 P. 2d 700; 94 Ariz. 413, 385 P. 2d 706.

Petitioners *pro se.*

Robert W. Pickrell, Attorney General of Arizona, and *Norman E. Green* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgments of the Supreme Court of Arizona are vacated and the case is remanded for further proceedings not inconsistent with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

McNERLIN *v.* DENNO, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1117, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 324 F. 2d 46.

Richard J. Medalie for petitioner.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Ronald J. Offenkrantz,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded for further proceedings in conformity with the opinion of this Court in *Jackson* v. *Denno, ante,* p. 368.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent for the reasons stated in their dissenting opinions in *Jackson* v. *Denno, supra.*

TRALINS *v.* GERSTEIN, STATE ATTORNEY.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 246. Decided June 22, 1964.

Certiorari granted and judgment reversed.
Reported below: 151 So. 2d 19.

Richard Yale Feder and *Howard W. Dixon* for petitioner.

Richard W. Ervin, Attorney General of Florida, *Herbert P. Benn* and *Leonard R. Mellon,* Assistant Attorneys General, and *Glenn C. Mincer* for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted, and the judgment is reversed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would reverse for the reasons stated in the opinion of MR. JUSTICE BLACK in *Jacobellis* v. *Ohio, ante,* p. 196. MR. JUSTICE BRENNAN and MR. JUSTICE GOLDBERG would reverse for the reasons stated in the opinion of MR. JUSTICE BRENNAN in *Jacobellis, ante,* p. 184. MR. JUSTICE STEWART would reverse for the reasons stated in his opinion in *Jacobellis, ante,* p. 197. THE CHIEF JUSTICE, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

GROVE PRESS, INC., *v.* GERSTEIN, STATE ATTORNEY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 718. Decided June 22, 1964.

Certiorari granted and judgment reversed.
Reported below: 156 So. 2d 537.

Edward de Grazia and *Richard Yale Feder* for petitioner.

James W. Kynes, Attorney General of Florida, *Leonard R. Mellon,* Assistant Attorney General, and *Glenn C. Mincer* for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted, and the judgment is reversed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would reverse for the reasons stated in the opinion of MR. JUSTICE BLACK in *Jacobellis* v. *Ohio, ante,* p. 196. MR. JUSTICE BRENNAN and MR. JUSTICE GOLDBERG would reverse for the reasons stated in the opinion of MR. JUSTICE BRENNAN in *Jacobellis, ante,* p. 184. MR. JUSTICE STEWART would reverse for the reasons stated in his opinion in *Jacobellis, ante,* p. 197. THE CHIEF JUSTICE, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

FRIED *v.* NEW YORK.

APPEAL FROM THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 330. Decided June 22, 1964.

Appeal dismissed and certiorari denied.

Reported below: 18 App. Div. 2d 996, 238 N. Y. S. 2d 742.

Herbert Monte Levy for appellant.

Frank S. Hogan and *H. Richard Uviller* for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and the judgment reversed.

MAYER *v.* RUSK, SECRETARY OF STATE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 746. Decided June 22, 1964.

Judgment vacated and case remanded.

Reported below: 224 F. Supp. 929.

David Carliner, Francis Heisler, Oliver Stone and *Jack Wasserman* for appellant.

Solicitor General Cox for appellee.

PER CURIAM.

The judgment is vacated and the case is remanded to the District Court for consideration in light of *Aptheker* v. *Secretary of State, ante,* p. 500.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE would affirm the judgment.

INLAND EMPIRE BUILDERS, INC., ET AL. *v.* WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 849. Decided June 22, 1964.*

Appeals dismissed for want of a substantial federal question.
Reported below: 62 Wash. 2d 619, 384 P. 2d 337.

Seth W. Morrison for appellants in No. 849.

T. M. Royce for appellants in No. 850.

Edward G. Dobrin for appellants in No. 851.

John J. O'Connell, Attorney General of Washington, *John W. Riley* and *Timothy R. Malone,* Special Assistant Attorneys General, and *James A. Furber,* Assistant Attorney General, for appellees.

Solicitor General Cox, Assistant Attorney General Oberdorfer and *I. Henry Kutz* filed a memorandum for the United States.

PER CURIAM.

The motion to dismiss is granted and the appeals are dismissed for want of a substantial federal question.

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*Together with No. 850, *Hebb & Narodick Construction Co., Inc., et al.* v. *Washington et al.,* and No. 851, *Murray et al.* v. *Washington et al.,* both also on appeal from the same court.

BOB JONES UNIVERSITY, INC., *v.* CITY OF GREENVILLE, SOUTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 1024. Decided June 22, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 243 S. C. 351, 133 S. E. 2d 843.

Clarence Steele Bowen for appellant.

Charles S. Rhyne, Brice W. Rhyne and *Alfred J. Tighe, Jr.* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

TEXAS CO. (P. R.) INC. ET AL. *v.* SECRETARY OF THE TREASURY OF PUERTO RICO.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO.

No. 1048. Decided June 22, 1964.

Appeal dismissed and certiorari denied.

James R. Beverley for appellants.

J. B. Fernandez Badillo, Solicitor General of Puerto Rico, and *Irene Curbelo,* Assistant Solicitor General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

McLEOD *v.* OHIO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 14, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case remanded to the Supreme Court of Ohio for consideration in light of *Massiah* v. *United States,* 377 U. S. 201.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons assigned in the dissenting opinion in *Massiah* v. *United States, supra,* at 207.

BLAIR *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 699, Misc. Decided June 22, 1964.

Appeal dismissed and certiorari denied.

Theodore R. Saker for appellant.

Lynn B. Griffith, Jr. for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

HUDSON COUNTY NEWS CO., INC., *v.* SILLS, ATTORNEY GENERAL OF NEW JERSEY, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 1037. Decided June 22, 1964.

Appeal dismissed for want of a substantial federal question. Reported below: 41 N. J. 220, 195 A. 2d 626.

Julius Kass for appellant.

Arthur J. Sills, Attorney General of New Jersey, *Evan William Jahos,* Assistant Attorney General, and *John W. Hayden, Jr.,* Deputy Attorney General, for appellees.

Morris B. Abram for Council for Periodical Distributors Associations, Inc., as *amicus curiae,* in support of appellant.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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SMITH *v.* CROUSE, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 915, Misc. Decided June 22, 1964.

Certiorari granted and judgment reversed.
Reported below: 192 Kan. 171, 386 P. 2d 295.

Petitioner *pro se.*

William M. Ferguson, Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed. *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE HARLAN, dissenting.

In my opinion the question whether *Douglas* v. *California,* 372 U. S. 353, should be given retroactive application is deserving of plenary consideration. Cf. my dissenting opinion in *LaVallee* v. *Durocher,* 377 U. S. 998.

RUARK *v.* COLORADO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO.

No. 1173, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Duke W. Dunbar, Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Colorado for consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE HARLAN, dissenting.

For the reasons stated in my dissenting opinion in *Smith* v. *Crouse, ante,* p. 584, I would set this case for argument.

PEOPLES *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 934, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 324 F. 2d 689.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Julia P. Cooper* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for consideration in light of *Fallen* v. *United States, ante,* p. 139.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent.

FOX ET AL. *v.* NORTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 5. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 254 N. C. 97, 118 S. E. 2d 58.

Jack Greenberg, James M. Nabrit III, Samuel S. Mitchell, George E. Brown, William T. Coleman, Jr., Louis H. Pollak, Charles A. Reich and *Spottswood W. Robinson III* for petitioners.

T. W. Bruton, Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted, the judgment vacated and the case remanded to the Supreme Court of North Carolina for consideration in light of *Robinson* v. *Florida, ante,* p. 153.

MR. JUSTICE DOUGLAS would reverse outright on the basis of the views expressed in his opinion in *Bell* v. *Maryland, ante,* p. 242.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent.

COPELAND *v.* SECRETARY OF STATE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1041, Misc. Decided June 22, 1964.

Judgment vacated and case remanded.

Reported below: 226 F. Supp. 20.

Leonard B. Boudin and *Victor Rabinowitz* for appellant.

Solicitor General Cox for appellee.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The judgment is vacated and the case is remanded to the District Court for consideration in light of *Aptheker* v. *Secretary of State, ante,* p. 500.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE would affirm the judgment.

ETCHIESON *v.* TEXAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 1050, Misc. Decided June 22, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 372 S. W. 2d 690.

Clyde W. Woody for petitioner.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case remanded to the Court of Criminal Appeals of Texas for consideration in light of *Aguilar* v. *Texas, ante,* p. 108.

MR. JUSTICE BLACK, MR. JUSTICE CLARK and MR. JUSTICE STEWART dissent for the reasons assigned in the dissenting opinion in *Aguilar* v. *Texas.*

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1961, 1962, AND 1963

Terms	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
	1961	1962	1963	1961	1962	1963	1961	1962	1963	1961	1962	1963
Number of cases on dockets	13	15	9	1,062	1,182	1,238	1,510	1,627	1,532	2,585	2,824	2,779
Number disposed of during terms	0	*7	2	860	972	1,036	1,297	1,371	1,374	2,157	2,350	2,412
Number remaining on dockets	13	8	7	202	210	202	213	256	158	428	474	367

	TERMS		
	1961	1962	1963
Distribution of cases disposed of during terms:			
Original cases	0	*7	2
Appellate cases on merits	195	282	303
Petitions for certiorari	665	690	733
Miscellaneous docket applications	1,297	1,371	1,374

	TERMS		
	1961	1962	1963
Distribution of cases remaining on dockets:			
Original cases	13	8	7
Appellate cases on merits	118	108	81
Petitions for certiorari	84	102	121
Miscellaneous docket applications	213	256	158

*This figure includes 3 cases finally disposed of by Court action and 4 cases which have been dropped from the docket as there is no matter with respect to them pending before the Court.

June 24, 1964.

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