UNITED STATES REPORTS

VOLUME 399

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1969

JUNE 22 THROUGH JUNE 29, 1970
END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATUM

396 U. S. 835, No. 311, line 4: "113" should be "133."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.

RETIRED

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

JOHN N. MITCHELL, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.
E. ROBERT SEAVER, Clerk.*
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

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*Mr. E. Robert Seaver was appointed Clerk of the Court on June 8, 1970, effective at the commencement of business June 22, 1970 (see 398 U. S. vii, 946), on which date he took his oath.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

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

For the Second Circuit, John M. Harlan, Associate Justice.

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

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

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, Thurgood Marshall, Associate Justice.

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

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

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

June 9, 1970.

(For next previous allotment, see 396 U. S., p. iv.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1969

COLEMAN ET AL. *v.* ALABAMA

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

No. 72. Argued November 18, 1969—Decided June 22, 1970

Petitioners were convicted of assault with intent to murder and the Alabama Court of Appeals affirmed. They argue that (1) the in-court identifications that were made of them were fatally tainted by a prejudicial station-house lineup (which occurred prior to *United States* v. *Wade,* 388 U. S. 218, and *Gilbert* v. *California,* 388 U. S. 263, requiring the exclusion of such tainted in-court identification evidence), and (2) that Alabama's failure to provide them with appointed counsel at the preliminary hearing, a "critical stage" of the prosecution, unconstitutionally denied them the assistance of counsel. The victim testified that, "in the car lights" while "looking straight at him," he saw the petitioner who shot him and saw the other petitioner "face to face." He also stated that he identified the gunman at the station house before the formal lineup began, and identified the other before he spoke the words used by the assailants. The sole purposes of a preliminary hearing under Alabama law are to determine whether there is sufficient evidence to warrant presenting the case to a grand jury, and to fix bail for bailable offenses. The trial court scrupulously followed *Pointer* v. *Texas,* 380 U. S. 400, which prohibits the use of testimony given at a pretrial proceeding where the accused did not have the benefit of cross-examination by and through counsel. *Held:* The convictions are vacated and the case is remanded to determine whether the denial of counsel at the preliminary hearing was harmless error. Pp. 3–20.

44 Ala. App. 429, 211 So. 2d 917, vacated and remanded.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, for the three points enumerated directly below, and by MR. JUSTICE BLACK, for the third point, concluded that:

1. On this record the trial court did not err in finding that the victim's in-court identifications did not stem from a lineup procedure "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Pp. 3–6.

2. The preliminary hearing is a "critical stage" of Alabama's criminal process at which the indigent accused is "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell* v. *Alabama,* 287 U. S. 45, 57. Pp. 7–10.

3. Although nothing that occurred at the preliminary hearing was used at the trial, the record does not reveal whether petitioners were otherwise prejudiced by absence of counsel at the hearing, and the question whether the denial of counsel was harmless error should be answered in the first instance by the Alabama courts. Pp. 10–11.

MR. JUSTICE BLACK concluded that:

1. Petitioners had a right to the assistance of counsel at the preliminary hearing not because it is deemed part of a "fair trial" by judges but because the Sixth Amendment establishes a right to counsel "[i]n all criminal prosecutions" and in Alabama the preliminary hearing is a definite part or stage of a criminal prosecution. Pp. 11–13.

2. The trial court did not err in permitting courtroom identification of petitioners by the victim who had previously identified them at the lineup, as the requirements of the Fifth and Sixth Amendments were satisfied when the prosecution declined at trial to introduce the lineup identifications into evidence. Pp. 13–14.

MR. JUSTICE HARLAN concurs in the conclusion that petitioners' constitutional rights were violated when they were refused counsel at the preliminary hearing. Pp. 19–20.

Charles Tarter, by appointment of the Court, 394 U. S. 1011, argued the cause and filed a brief for petitioners.

David W. Clark, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *MacDonald Gallion,* Attorney General.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered the following opinion.

Petitioners were convicted in an Alabama Circuit Court of assault with intent to murder in the shooting of one Reynolds after he and his wife parked their car on an Alabama highway to change a flat tire. The Alabama Court of Appeals affirmed, 44 Ala. App. 429, 211 So. 2d 917 (1968), and the Alabama Supreme Court denied review, 282 Ala. 725, 211 So. 2d 927 (1968). We granted certiorari, 394 U. S. 916 (1969). We vacate and remand.

Petitioners make two claims in this Court. First, they argue that they were subjected to a station-house lineup in circumstances so unduly prejudicial and conducive to irreparable misidentification as fatally to taint Reynolds' in-court identifications of them at the trial. Second, they argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore unconstitutionally denied them the assistance of counsel.

I[1]

The lineup of which petitioners complain was conducted on October 1, 1966, about two months after the assault and seven months before petitioners' trial. Petitioners concede that since the lineup occurred before *United States* v. *Wade,* 388 U. S. 218, and *Gilbert* v. *California,* 388 U. S. 263, were decided on June 12, 1967, they cannot invoke the holding of those cases requiring the exclusion of in-court identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of coun-

[1] MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join this Part I.

sel. *Stovall* v. *Denno,* 388 U. S. 293, 296–301 (1967). Rather, they argue that in the circumstances here the conduct of the lineup was so unduly prejudicial as fatally to taint Reynolds' in-court identification of them. This is a claim that must be determined on the totality of the surrounding circumstances. *Stovall* v. *Denno, supra,* at 301–302; *Simmons* v. *United States,* 390 U. S. 377 (1968); *Foster* v. *California,* 394 U. S. 440 (1969).

At the trial Reynolds testified that at about 11:30 p. m. on July 24, 1966, he was engaged in changing a tire when three men approached from across the highway. One of them shot him from a short distance away. The three then ran up to within three or four feet. Reynolds arose from his stooped position and held on to his wife, who had left the car to watch him as he worked. One of the men put his hand on Mrs. Reynolds' shoulder. Reynolds testified that this was Coleman. Within a few seconds a car with its lights on approached, and the three men turned and "ran across the road . . . ." As they turned to go, Reynolds was shot a second time. He identified petitioner Stephens as the gunman, stating that he saw him "in the car lights" while "looking straight at him." Reynolds repeated on cross-examination his testimony on direct; he said he saw Coleman "face to face"; "I looked into his face," "got a real good look at him."

At the pretrial hearing on petitioners' motion to suppress identification evidence, Detective Fordham testified that he had spoken briefly to Reynolds at the hospital two days after the assault and about two weeks later, and that on neither occasion was Reynolds able to provide much information about his assailants. At the hospital he gave a vague description—that the attackers were "young, black males, close to the same age and height." Petitioners are both Negro; but Stephens was 18 and 6′2″, and Coleman, 28 and 5′4½″. However,

Detective Fordham also testified that at the time Reynolds gave this description he was in considerable pain, and that consequently the questioning was very brief. The detective further stated that Reynolds did not identify any of his assailants from mug shots, but it does not appear whether pictures of petitioners were among those shown him. Detective Hart testified that a lineup was held on October 1 at the request of the police. He stated that Reynolds identified petitioner Stephens spontaneously before the formal lineup even began. "[T]he six men were brought in by the warden, up on the stage, and as Otis Stephens—he didn't get to his position on the stage, which was number one, when Mr. Reynolds identified him as being one of his assailants." Reynolds gave similar testimony: "As soon as he stepped inside the door—I hadn't seen him previous to then until he stepped inside the door, and I recognized him . . . . Just as soon as he stepped up on the stage, I said, 'That man, there, is the one; he is the one that shot me.' " Reynolds also testified that he identified Coleman at the lineup before Coleman could act on a request Reynolds had made that the lineup participants speak certain words used by the attackers. Reynolds admitted that he did not tell Detective Hart of his identification until later during the lineup, and the detective stated he could not recall whether Reynolds told him of the identification before or after Coleman spoke the words.

It cannot be said on this record that the trial court erred in finding that Reynolds' in-court identification of the petitioners did not stem from an identification procedure at the lineup "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States, supra,* at 384. Indeed, the court could find on the evidence adduced at the suppression hearing that Reynolds' identifications were entirely based upon observations at the

time of the assault and not at all induced by the conduct of the lineup. There is no merit in the three arguments offered by petitioners for a contrary conclusion.

First, Reynolds testified that when the police asked him to go to the city jail he "took [it] for granted" that the police had caught his assailants. But the record is utterly devoid of evidence that anything the police said or did prompted Reynolds' virtually spontaneous identification of petitioners among the lineup participants as the proceeding got under way.

Petitioners next contend that the lineup was unfair because they and their codefendant were the only ones required to say the words used by one of the attackers. There is some conflict in the testimony on this point. Petitioner Stephens testified that petitioners and their codefendant were the only ones who spoke the words. Reynolds testified that not all the men in the lineup spoke them. But Detective Hart stated that all the participants spoke the words. In any case, the court could find on the evidence that Reynolds identified both petitioners before either said anything, and that therefore any failure to require the other participants to say the same words did not aid or influence his identifications.

Finally, petitioner Coleman contends that he was unfairly singled out to wear a hat though all the other participants were bareheaded. One of the attackers had worn a hat. Although the record demonstrates that Coleman did in fact wear a hat at the lineup, nothing in the record shows that he was required to do so. Moreover, it does not appear that Reynolds' identification of Coleman at the lineup was based on the fact that he remembered that Coleman had worn a hat at the time of the assault. On the contrary, the court could conclude from his testimony that Reynolds "asked them to make John Henry Coleman to take his hat off, or move it back," because he wanted to see Coleman's face more clearly.

II [2]

This Court has held that a person accused of crime "requires the guiding hand of counsel at every step in the proceedings against him," *Powell* v. *Alabama,* 287 U. S. 45, 69 (1932), and that that constitutional principle is not limited to the presence of counsel at trial. "It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States* v. *Wade, supra,* at 226. Accordingly, "the principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.,* at 227. Applying this test, the Court has held that "critical stages" include the pretrial type of arraignment where certain rights may be sacrificed or lost, *Hamilton* v. *Alabama,* 368 U. S. 52, 54 (1961), see *White* v. *Maryland,* 373 U. S. 59 (1963), and the pretrial lineup, *United States* v. *Wade, supra; Gilbert* v. *California, supra.* Cf. *Miranda* v. *Arizona,* 384 U. S. 436 (1966), where the Court held that the privilege against compulsory self-incrimination includes a right to counsel at a pretrial custodial interrogation. See also *Massiah* v. *United States,* 377 U. S. 201 (1964).

[2] MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join this Part II.

The preliminary hearing is not a required step in an Alabama prosecution. The prosecutor may seek an indictment directly from the grand jury without a preliminary hearing. *Ex parte Campbell*, 278 Ala. 114, 176 So. 2d 242 (1965). The opinion of the Alabama Court of Appeals in this case instructs us that under Alabama law the sole purposes of a preliminary hearing are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and, if so, to fix bail if the offense is bailable. 44 Ala. App., at 433, 211 So. 2d, at 920. See Ala. Code, Tit. 15, §§ 139, 140, 151.[3] The court continued:

> "At the preliminary hearing . . . the accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case. Also Pointer v. State of Texas [380 U. S. 400 (1965)] bars the admission of testimony given at a pre-trial proceeding where the accused did not have the benefit of cross-examination by and through counsel. Thus, nothing occurring at the preliminary hearing in absence of counsel can substantially prejudice the rights of the accused on trial." 44 Ala. App., at 433, 211 So. 2d, at 921.

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[3] A textbook, Criminal Procedure in Alabama, by M. Clinton McGee (University of Alabama Press 1954), p. 41, states:

"A preliminary hearing or examination is not a trial in its ordinary sense nor is it a final determination of guilt. It is a proceeding whereby an accused is discharged or held to answer, as the facts warrant. It seeks to determine whether there is probable cause for believing that a crime has been committed and whether the accused is probably guilty, in order that he may be informed of the nature of such charge and to allow the state to take the necessary steps to bring him to trial. Such hearing also serves to perpetuate evidence and to keep the necessary witnesses within the control of the state. It also safeguards the accused against groundless and vindictive prosecutions, and avoids for both the accused and the state the expense and inconvenience of a public trial."

This Court is of course bound by this construction of the governing Alabama law, *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684, 688 (1959); *Albertson* v. *Millard,* 345 U. S. 242, 244 (1953). However, from the fact that in cases where the accused has no lawyer at the hearing the Alabama courts prohibit the State's use at trial of anything that occurred at the hearing, it does not follow that the Alabama preliminary hearing is not a "critical stage" of the State's criminal process. The determination whether the hearing is a "critical stage" requiring the provision of counsel depends, as noted, upon an analysis "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." *United States* v. *Wade, supra,* at 227. Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels

the conclusion that the Alabama preliminary hearing is a "critical stage" of the State's criminal process at which the accused is "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell* v. *Alabama, supra*, at 57.

III [4]

There remains, then, the question of the relief to which petitioners are entitled. The trial transcript indicates that the prohibition against use by the State at trial of anything that occurred at the preliminary hearing was scrupulously observed.[5] Cf. *White* v. *Maryland, supra.* But on the record it cannot be said

[4] MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join this Part III.

[5] The trial judge held a hearing two months before the trial on motions on behalf of petitioners to suppress "any evidence or discovery whatsoever obtained . . . on the preliminary hearing . . . and further any statements relating to any identification . . . during any line-up . . . ." The State conceded that the motion should be granted as to any statements of either petitioner taken by the police upon their arrests, and written and oral confessions made by them were therefore not offered at the trial. At an early stage of the hearing on the motions, the trial judge said:

"It has been my consistent ruling, and I don't know of any law to the contrary, that, on the basis of what happened at the preliminary hearing, that if a lawyer was not representing the defendant that anything that may have occurred at that preliminary which might work against the defendant, whether it be anything he said there, assuming he might have taken the stand, anything of that nature, would, on the trial of the case on the merits, be inadmissible.

"I wouldn't anticipate the State offering anything like that, but that has been my ruling on that ever since we changed some of our ways of doing things.

"It wouldn't be material from the standpoint that a man down there, when not represented by counsel on the preliminary, made some statement, said, 'I am guilty.' You know, a lot of times he might say, 'I am guilty.'

"That that would not be admissible if he weren't represented by counsel, and that sort of thing."

whether or not petitioners were otherwise prejudiced by the absence of counsel at the preliminary hearing. That inquiry in the first instance should more properly be made by the Alabama courts. The test to be applied is whether the denial of counsel at the preliminary hearing was harmless error under *Chapman* v. *California,* 386 U. S. 18 (1967). See *United States* v. *Wade, supra,* at 242.

We accordingly vacate the petitioners' convictions and remand the case to the Alabama courts for such proceedings not inconsistent with this opinion as they may deem appropriate to determine whether such denial of counsel was harmless error, see *Gilbert* v. *California, supra,* at 272, and therefore whether the convictions should be reinstated or a new trial ordered.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, concurring.

I wholeheartedly agree with the conclusion in Part II of the prevailing opinion that an accused has a constitutional right to the assistance of counsel at the preliminary hearing which Alabama grants criminal defendants. The purpose of the preliminary hearing in Alabama is to determine whether an offense has been committed and, if so, whether there is probable cause for charging the defendant with that offense. If the magistrate finds that there is probable cause for charging the defendant with the offense, the defendant must, under Alabama law, be either incarcerated or admitted to bail. In the absence of such a finding of probable cause, the defendant must be released from custody. Ala. Code, Tit. 15, §§ 139–140. The preliminary hearing is therefore a definite part or stage of a criminal prosecution in Alabama,

and the plain language of the Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Moreover, every attorney with experience in representing criminal defendants in a State which has a preliminary hearing similar to Alabama's knows—sometimes from sad experience—that adequate representation requires that counsel be present at the preliminary hearing to protect the interests of his client. The practical importance of the preliminary hearing is discussed in the prevailing opinion, and the considerations outlined there seem to me more than sufficient to compel the conclusion that the preliminary hearing is a "critical stage" of the proceedings during which the accused must be afforded the assistance of counsel if he is to have a meaningful defense at trial as guaranteed in the Bill of Rights.

I fear that the prevailing opinion seems at times to proceed on the premise that the constitutional principle ultimately at stake here is not the defendant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments but rather a right to a "fair trial" as conceived by judges. While that phrase is an appealing one, neither the Bill of Rights nor any other part of the Constitution contains it. The pragmatic, government-fearing authors of our Constitution and Bill of Rights did not, and I think wisely did not, use any such vague, indefinite, and elastic language. Instead, they provided the defendant with clear, emphatic guarantees: counsel for his defense, a speedy trial, trial by jury, confrontation with the witnesses against him, and other such unequivocal and definite rights. The explicit commands of the Constitution provide a full description of the kind of "fair trial" the Constitution guarantees, and in my judgment that document leaves no room for judges either to add to or detract from these com-

mands. I can have no part in unauthorized judicial toying with the carefully selected language of our Constitution, which I think is the wisest and best charter of government in existence. It declares a man charged with a crime shall be afforded a lawyer to defend him even though all the judges throughout the entire United States should declare, "It is only when we think fairness requires it that an accused shall have the assistance of counsel for his defense." For one, I still prefer to trust the liberty of the citizen to the plain language of the Constitution rather than to the sense of fairness of particular judges.

I also agree with the prevailing opinion in rejecting petitioners' claim that their in-court identification by the victim of the assault should have been suppressed. This claim relies mainly on *Stovall* v. *Denno,* 388 U. S. 293 (1967), in which the Court held that an in-court identification could be suppressed under the Due Process Clause of the Fourteenth Amendment if it was tainted by an "unnecessarily suggestive" pretrial lineup. I dissented in *Stovall* partly on the ground that the majority's new suppression rule was a classic example of this Court's using the Due Process Clause to write into law its own notions of fairness, decency, and fundamental justice, in total disregard of the language of the Constitution itself. But I also argued in *Stovall* that the right to counsel at a lineup, declared that same day in *United States* v. *Wade,* 388 U. S. 218 (1967), should be held fully retroactive. *Stovall* v. *Denno,* 388 U. S., at 303. Accordingly, I believe that petitioners in this pre-*Wade* case were entitled to court-appointed counsel at the time of the lineup in which they participated and that Alabama's failure to provide such counsel violated petitioners' rights under the Sixth and Fourteenth Amendments. However, for the reasons stated in my separate opinion in *United States* v. *Wade,* 388 U. S. 218, 243 (1967),

I believe the requirements of the Fifth and Sixth Amendments were satisfied when the Alabama prosecutors declined at trial to introduce the pretrial lineup identification into evidence. Accordingly, I concur in the conclusion in Part I of the prevailing opinion that the Alabama court did not err in permitting the courtroom identification of petitioners by the witness who had previously identified them at the lineup.

For the reasons here stated, I agree that petitioners' convictions must be vacated and the case remanded to the Alabama courts for consideration of whether the denial of counsel at the preliminary hearing was harmless error under the Court's decision in *Chapman* v. *California,* 386 U. S. 18 (1967).

MR. JUSTICE DOUGLAS.

While I have joined MR. JUSTICE BRENNAN's opinion, I add a word as to why I think that a strict construction of the Constitution requires the result reached.

The critical words are: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." As MR. JUSTICE BLACK states, a preliminary hearing is "a definite part or stage of a criminal prosecution in Alabama." A "criminal prosecution" certainly does not start only when the trial starts. If the commencement of the trial were the start of the "criminal prosecution" in the constitutional sense, then indigents would likely go to trial without effective representation by counsel. Lawyers for the defense need time to prepare a defense. The prosecution needs time for investigations and procedures to make that investigation timely and telling. As a shorthand expression we have used the words "critical stage" to describe whether the preliminary phase of a criminal trial was part of the "criminal prosecution" as used in

the Sixth Amendment. But it is the Sixth Amendment that controls, not our own ideas as to what an efficient criminal code should provide. It did not take nearly 200 years of doubt to decide whether Alabama's preliminary hearing is a part of the "criminal prosecution" within the meaning of the Sixth Amendment. The question has never been reached prior to this case. We experience here the case-by-case approach that is the only one available under our "case" or "controversy" jurisdiction under Article III of the Constitution.

If we are to adhere to the mandate of the Constitution and not give it merely that meaning which appeals to the personal tastes of those who from time to time sit here, we should read its terms in light of the realities of what "criminal prosecutions" truly mean.

I was impressed with the need for that kind of strict construction on experiences in my various Russian journeys. In that nation detention *incommunicado* is the common practice, and the period of permissible detention now extends for nine months.[1] Where there is custodial interrogation, it is clear that the critical stage of the trial takes place long before the courtroom formali-

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[1] Article 97 of the RSFSR Codes of Criminal Procedure provides:

"Confinement under guard in connection with the investigation of a case may not continue for more than two months. Only by reason of the special complexity of the case may this period be prolonged up to three months from the day of confinement under guard by a procurator of an autonomous republic, territory, region, autonomous region, or national area, or by a military procurator of a military region or fleet, or up to six months by the RSFSR Procurator or the Chief Military Procurator. Further prolongation of a period of confinement under guard may be carried out only in exceptional instances by the USSR Procurator General for a period of not more than an additional three months." Soviet Criminal Law and Procedure: The RSFSR Codes 288 (H. Berman & J. Spindler transl. 1966).

ties commence. That is apparent to one who attends criminal trials in Russia. Those that I viewed never put in issue the question of guilt; guilt was an issue resolved in the inner precincts of a prison under questioning by the police. The courtroom trial concerned only the issue of punishment.

Custodial interrogation is in practice—here and in other nations—so critical that we would give "criminal prosecutions" as used in the Sixth Amendment a strained and narrow meaning if we held that it did not include that phase. My Brother HARLAN in his dissent in *Miranda* v. *Arizona,* 384 U. S. 436, 513, called the Sixth Amendment cases cited by the majority of the Court the "linchpins" of the ruling that an accused under custodial interrogation was entitled to the assistance of counsel.[2] They were properly such, although the main emphasis in the *Miranda* opinion was on the use of custodial interrogation to exact incriminating statements[3] against

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[2] Article 47 of the RSFSR Codes of Criminal Procedure provides in part:

"Defense counsel shall be permitted to participate in a case from the moment the accused is informed of the completion of the preliminary investigation and is presented with all the proceedings of the case to become acquainted with them." Soviet Criminal Law and Procedure: The RSFSR Codes, *supra,* n. 1, at 269.

[3] No nation has a monopoly on the use of this device although the present Greek Government according to the 1969 report of the Commission of Human Rights of the Council of Europe has reached a high level of efficiency in the use of torture:

"*Falanga* or bastinado has been a method of torture known for centuries. It is the beating of the feet with a wooden or metal stick or bar which, if skilfully done, breaks no bones, makes no skin lesions, and leaves no permanent and recognisable marks, but causes intense pain and swelling of the feet. The use of *falanga* has been described in a variety of situations: on a bench or chair or on a car-seat; with or without shoes on. Sometimes water has

the commands of the Fourteenth and Fifth Amendments. Like the preliminary hearing in the present case, custodial interrogation is obviously part of the "criminal prosecution" that the Sixth Amendment honors—if strict construction is our guide.

MR. JUSTICE WHITE, concurring.

I agree with MR. JUSTICE HARLAN that recent cases furnish ample ground for holding the preliminary hearing a critical event in the progress of a criminal case. I therefore join the prevailing opinion, but with some hesitation since requiring the appointment of counsel may result in fewer preliminary hearings in jurisdic-

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been thrown over the feet and sometimes the victim has been made to run around between beatings. Victims have also been gagged.

. . . . . .

"While *falanga* and severe beatings of all parts of the body are the commonest forms of torture or ill-treatment that appear in the evidence before the Sub-Commission, other forms have been described: for example, the application of electric shock, squeezing of the head in a vice, pulling out of hair from the head or pubic region, or kicking of the male genital organs, dripping water on the head, and intense noises to prevent sleep.

"*Falanga* has not only been the commonest form of torture or ill-treatment in the cases in which the Sub-Commission has been able to establish the facts to a substantial degree but also appears with great frequency in the further allegations raised in the proceedings with regard to other named detainees. The principal forms of alleged treatment—frequently several forms combined in one and the same case—are as follows in the two categories:

	Cases examined	*Further allegations*
Falanga	23	53
Electro-shock	4	3
Mock execution or threats to shoot or kill the victim	12	15
Other beating or ill-treatment	26	17"

European Commission of Human Rights, Report on The Greek Case, Vol. 2, pt. 1, pp. 415–416 (1969).

tions where the prosecutor is free to avoid them by taking a case directly to a grand jury. Our ruling may also invite eliminating the preliminary hearing system entirely.

I would expect the application of the harmless-error standard on remand to produce results approximating those contemplated by MR. JUSTICE HARLAN's separately stated views. Whether denying petitioners counsel at the preliminary hearing was harmless beyond a reasonable doubt depends upon an assessment of those factors that made the denial error. But that assessment cannot ignore the fact that petitioners have been tried and found guilty by a jury.

The possibility that counsel would have detected preclusive flaws in the State's probable-cause showing is for all practical purposes mooted by the trial where the State produced evidence satisfying the jury of the petitioners' guilt beyond a reasonable doubt. Also, it would be wholly speculative in this case to assume either (1) that the State's witnesses at the trial testified inconsistently with what their testimony would have been if petitioners had had counsel to cross-examine them at the preliminary hearing, or (2) that counsel, had he been present at the hearing, would have known so much more about the State's case than he actually did when he went to trial that the result of the trial might have been different. So too it seems extremely unlikely that matters related to bail or early psychiatric examination would ever raise reasonable doubts about the integrity of the trial.

There remains the possibility, as MR. JUSTICE HARLAN suggests, that important testimony of witnesses unavailable at the trial could have been preserved had counsel been present to cross-examine opposing witnesses or to examine witnesses for the defense. If such was the case, petitioners would be entitled to a new trial.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

If I felt free to consider this case upon a clean slate I would have voted to affirm these convictions.* But—in light of the lengths to which the right to appointed counsel has been carried in recent decisions of this Court, see *Miranda* v. *Arizona,* 384 U. S. 436 (1966); *United States* v. *Wade,* 388 U. S. 218 (1967); *Gilbert* v. *California,* 388 U. S. 263 (1967); *Mathis* v. *United States,* 391 U. S. 1 (1968); and *Orozco* v. *Texas,* 394 U. S. 324 (1969)—I consider that course is not open to me with due regard for the way in which the adjudicatory process of this Court, as I conceive it, should work. The continuing viability of the cases just cited is not directly before us for decision, and if and when such an occasion arises I would face it in terms of considerations that I have recently expressed elsewhere. See my dissenting opinion in *Baldwin* v. *New York,* decided today, *post,* p. 117, and my opinion concurring in the result in *Welsh* v. *United States,* 398 U. S. 333, 344 (1970).

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*From the standpoint of Fourteenth Amendment due process, which is the way in which I think state cases of this kind should be judged (see, *e. g.,* my concurring opinion in *Gideon* v. *Wainwright,* 372 U. S. 335, 349 (1963)), I could not have said that the denial of appointed counsel at a preliminary hearing, carrying no consequences beyond those involved in the Alabama procedure, is offensive to the concept of "fundamental fairness" embodied in the Due Process Clause. The case would, of course, be different if the State were permitted to introduce at trial evidence collected and presented at the preliminary hearing. *A fortiori,* I would not have thought that the lack of counsel at a police "line-up" is, as held in *United States* v. *Wade,* 388 U. S. 218 (1967), a denial of due process such as to require reversal. Even from the standpoint of the Sixth Amendment, I would have found it difficult to say that the language, "In all criminal *prosecutions,* the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence" (emphasis supplied), was intended to reach such pre-indictment events. Cf. *Sanders* v. *United States,* 373 U. S. 1, 23 (1963).

Accordingly I am constrained to agree with the Court's conclusion that petitioners' constitutional rights were violated when Alabama refused to appoint counsel to represent them at the preliminary hearing. I dissent, however, from the terms of the Court's remand on this issue, as well as from the refusal to accord petitioners the benefit of the *Wade* case in connection with their police "lineup" contentions.

I

It would indeed be strange were this Court, having held a suspect or an accused entitled to counsel at such pretrial stages as "in-custody" police investigation, whether at the station house (*Miranda*) or even in the home (*Orozco*), now to hold that he is left to fend for himself at the first formal confrontation in the courtroom.

While, given the cases referred to, I cannot escape the conclusion that petitioners' constitutional rights must be held to have been violated by denying them appointed counsel at the preliminary hearing, I consider the scope of the Court's remand too broad and amorphous. I do not think that reversal of these convictions, for lack of counsel at the preliminary hearing, should follow unless petitioners are able to show on remand that they have been prejudiced in their defense at trial, in that favorable testimony that might otherwise have been preserved was irretrievably lost by virtue of not having counsel to help present an affirmative case at the preliminary hearing. In this regard, of course, as with any other erroneously excluded testimony, petitioners would have to show that its weight at trial would have been such as to constitute its "exclusion" reversible error, as well as demonstrate the actual likelihood that such testimony could have been presented and preserved at the preliminary hearing. In my opinion mere speculation that defense

counsel might have been able to do better at trial had he been present at the preliminary hearing should not suffice to vitiate a conviction. The Court's remand under the *Chapman* harmless-error rule seems to me to leave the way open for that sort of speculation.

II

Despite my continuing disagreement with *United States* v. *Wade, supra,* I must dissent from the refusal to accord petitioners the benefit of the *Wade* holding, neither petitioner having been afforded counsel at the police "lineup" identification. The majority's action results from the holding in *Stovall* v. *Denno,* 388 U. S. 293 (1967), making *Wade* applicable only to lineups occurring after the date of that decision, the present lineup having taken place well before. For reasons explained in my dissent in *Desist* v. *United States,* 394 U. S. 244, 256 (1969), I can no longer follow the "retroactivity" doctrine announced in *Stovall* in cases before us on direct review. That being the situation here, I would judge the case in light of *Wade.*

The *Wade* rule requires the exclusion of any in-court identification preceded by a pretrial lineup where the accused was not represented by counsel, unless the in-court identification is found to be derived from a source "independent" of the tainted pretrial viewing. Such a determination must, in the first instance, be made by the trial court. I would therefore send the case back on this score too.

MR. CHIEF JUSTICE BURGER, dissenting.

I agree that as a matter of *sound policy* counsel should be made available to all persons subjected to a preliminary hearing and that this should be provided either by statute or by the rulemaking process. However, I cannot accept the notion that the Constitution commands

it because it is a "criminal prosecution." [1] Although MR. JUSTICE STEWART, whose opinion I join, and MR. JUSTICE HARLAN and MR. JUSTICE WHITE have each noted some of the difficulties, both on constitutional and practical grounds, with today's holding, I separately set forth additional reasons for my dissent.[2]

Certainly, as MR. JUSTICE HARLAN and MR. JUSTICE WHITE suggest, not a word in the Constitution itself either requires or contemplates the result reached; unlike them, however, I do not acquiesce in prior holdings that purportedly, but nonetheless erroneously, are based on the Constitution. That approach simply is an acknowledgment that the Court having previously amended the Sixth Amendment now feels bound by its action. While I do not rely solely on 183 years of contrary constitutional interpretation, it is indeed an odd business that it has taken this Court nearly two centuries to "discover" a constitutional mandate to have counsel at a preliminary hearing. Here there is not even the excuse that conditions have changed; the preliminary hearing is an ancient institution.

With deference, then, I am bound to reject categorically MR. JUSTICE HARLAN's and MR. JUSTICE WHITE's thesis that what the Court said lately controls over the Constitution. While our holdings are entitled to deference I will not join in employing recent cases rather than the Constitution, to bootstrap ourselves into a result, even though I agree with the objective of having counsel at preliminary hearings. By placing a premium on "recent cases" rather than the language of the Constitution, the Court makes it dangerously simple for

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[1] The pertinent language is: "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence."

[2] I concur in the conclusion that due process was not violated by the identification procedures employed here.

future Courts, using the technique of interpretation, to operate as a "continuing Constitutional convention."

I wish to make clear that my disagreement with the prevailing opinion is directed primarily at its reasoning process, rather than with the broad social and legal desirability of the result reached. I would not decide that the Constitution commands this result simply because I think it is a desirable one. Indeed, there have been many studies, including that of the American Bar Association's Criminal Justice Project, that acknowledged the wisdom of providing counsel at the preliminary hearing. ABA Project on Standards for Criminal Justice, Providing Defense Services § 5.1 (Approved Draft 1968). But this should be provided either by statute or by the rulemaking process since the Constitution does not require it. MR. JUSTICE WHITE, while joining the prevailing opinion with some reservations, belies the essence of the matter when he states that "recent cases furnish ample ground for holding the preliminary hearing a *critical event* in the progress of a criminal case." (Emphasis added.)

If the Constitution provided that counsel be furnished for every "critical event in the progress of a criminal case," that would be another story, but it does not. In contrast to the variety of verbal combinations employed by the majority to justify today's disposition, the Sixth Amendment states with laudable precision that: "In all *criminal prosecutions,* the accused shall . . . have the Assistance of Counsel." (Emphasis added.) The only relevant determination is whether a preliminary hearing is a "criminal prosecution," *not* whether it is a "*critical event* in the progress of a criminal case." By inventing its own verbal formula the prevailing opinion simply seeks to reshape the Constitution in accordance with predilections of what is deemed desirable. Constitutional interpretation is not an easy matter, but we

should be especially cautious about substituting our own notions for those of the Framers. I heed MR. JUSTICE BLACK's recent admonition on "the difference . . . between our Constitution as *written* by the Founders and an unwritten constitution to be formulated by judges according to their ideas of fairness on a case-by-case basis." *North Carolina* v. *Pearce,* 395 U. S. 711, 744 (1969) (separate opinion of BLACK, J.) (emphasis in original).

In the federal courts, and as provided by statute in most States, the three steps that follow arrest are (1) the preliminary hearing under Fed. Rule Crim. Proc. 5 (c); (2) the grand jury inquiry; and (3) the arraignment under Fed. Rule Crim. Proc. 10. We know, of course, that if the hearing officer at the preliminary hearing concludes to hold the person for possible grand jury action counsel is not permitted to attend the latter proceedings. If the grand jury returns an indictment, the accused must then enter a plea at arraignment, and at this hearing counsel is required under *Hamilton* v. *Alabama,* 368 U. S. 52 (1961).

In Alabama, as in the federal system, the preliminary hearing has been an inquiry into whether the arrested person should be discharged or whether, on the contrary, there is probable cause to submit evidence to a grand jury or other charging authority for further consideration. No verdict can flow from the hearing magistrate's determination, and a discharge, unlike an acquittal, is no bar to a later indictment. Thus it is not a trial in any sense in which lawyers and judges use that term. Moreover, the hearing magistrate cannot *indict;* he can pass only on the narrow question of whether further inquiry is warranted. Recognizing, however, that the preliminary hearing is not an unimportant step in "the progress of a criminal case," this Court has already held that disclosures of an uncounseled person at the hearing may not be used against him if he is later tried. *White* v.

Maryland, 373 U. S. 59 (1963). See also *Pointer* v. *Texas,* 380 U. S. 400 (1965).

Under today's holding we thus have something of an anomaly under the new "discovery" of the Court that counsel is *constitutionally* required at the preliminary hearing since counsel cannot attend a subsequent grand jury inquiry, even though witnesses, including the person eventually charged, may be interrogated in secret session. If the current mode of constitutional analysis subscribed to by this Court in recent cases requires that counsel be present at preliminary hearings, how can this be reconciled with the fact that the Constitution itself does not permit the assistance of counsel at the decidedly more "critical" grand jury inquiry?

Finally, as pointed out, the Court has already protected an accused from absence of counsel at the preliminary hearing by providing that statements of an uncounseled person are inadmissible at trial. The prevailing opinion fails to explain why that salutary—indeed drastic—remedy is no longer sufficient protection for the preliminary hearing stage, unless what the Court is doing—surreptitiously—is to convert the preliminary hearing into a discovery device. But the need for even that step is largely dissipated by the proposed amendments for pretrial discovery in criminal cases. See Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Proposed Amendments to the Federal Rules of Criminal Procedure for United States District Courts (preliminary draft, Jan. 1970).

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, dissenting.

On a July night in 1966 Casey Reynolds and his wife stopped their car on Green Springs Highway in Birmingham, Alabama, in order to change a flat tire. They were soon accosted by three men whose evident purpose was

armed robbery and rape. The assailants shot Reynolds twice before they were frightened away by the lights of a passing automobile. Some two months later the petitioners were arrested, and later identified by Reynolds as two of the three men who had assaulted him and his wife.

A few days later the petitioners were granted a preliminary hearing before a county judge. At this hearing the petitioners were neither required nor permitted to enter any plea. The sole purpose of such a hearing in Alabama is to determine whether there is sufficient evidence against the accused to warrant presenting the case to a grand jury, and, if so, to fix bail if the offense is bailable.[1] At the conclusion of the hearing the petitioners were bound over to the grand jury, and their bond was set at $10,000. No record or transcript of any kind was made of the hearing.

Less than a month later the grand jury returned an indictment against the petitioners, charging them with assault to commit murder. Promptly after their indictment, a lawyer was appointed to represent them. At their arraignment two weeks later, where they were represented by their appointed counsel, they entered a plea of not guilty. Cf. *Hamilton* v. *Alabama,* 368 U. S. 52. Some months later they were brought to trial, again represented by appointed counsel. Cf. *Gideon* v. *Wainwright,* 372 U. S. 335. The jury found them guilty as charged, and they were sentenced to the penitentiary.

If at the trial the prosecution had used any incriminating statements made by the petitioners at the preliminary hearing, the convictions before us would quite properly have to be set aside. *White* v. *Maryland,* 373 U. S. 59. But that did not happen in this case. Or if the prosecution had used the statement of any other wit-

[1] Ala. Code, Tit. 15, §§ 133–140 (1958).

ness at the preliminary hearing against the petitioners at their trial, we would likewise quite properly have to set aside these convictions. *Pointer* v. *Texas,* 380 U. S. 400. But that did not happen in this case either. For, as the prevailing opinion today perforce concedes, "the prohibition against use by the State at trial of anything that occurred at the preliminary hearing was scrupulously observed."

Nevertheless, the Court sets aside the convictions because, it says, counsel should have been provided for the petitioners at the preliminary hearing. None of the cases relied upon in that opinion points to any such result. Even the *Miranda* decision does not require counsel to be present at "pretrial custodial interrogation." That case simply held that the constitutional guarantee against compulsory self-incrimination prohibits the introduction at the *trial* of statements made by the defendant during custodial interrogation if the *Miranda* "guidelines" were not followed. 384 U. S. 436. See also *United States* v. *Wade,* 388 U. S. 218; *Gilbert* v. *California,* 388 U. S. 263. And I repeat that in this case no evidence of anything said or done at the preliminary hearing was introduced at the petitioners' trial.

But the prevailing opinion holds today that the Constitution required Alabama to provide a lawyer for the petitioners at their preliminary hearing, not so much, it seems, to assure a fair trial as to assure a fair preliminary hearing. A lawyer at the preliminary hearing, the opinion says, might have led the magistrate to "refuse to bind the accused over." Or a lawyer might have made "effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail."

If *those* are the reasons a lawyer must be provided, then the most elementary logic requires that a new preliminary hearing must now be held, with counsel

made available to the petitioners. In order to provide such relief, it would, of course, be necessary not only to set aside these convictions, but also to set aside the grand jury indictments, and the magistrate's orders fixing bail and binding over the petitioners. Since the petitioners have now been found by a jury in a constitutional trial [2] to be guilty beyond a reasonable doubt, the prevailing opinion understandably boggles at these logical consequences of the reasoning therein. It refrains, in short, from now turning back the clock by ordering a new preliminary hearing to determine all over again whether there is sufficient evidence against the accused to present their case to a grand jury. Instead, the Court sets aside these convictions and remands the case for determination "whether the convictions should be reinstated or a new trial ordered," and this action seems to me even more quixotic.

The petitioners have simply not alleged that anything that happened at the preliminary hearing turned out in this case to be critical to the fairness of their *trial.* They have not alleged that they were affirmatively prejudiced at the trial by anything that occurred at the preliminary hearing. They have not pointed to any affirmative advantage they would have enjoyed at the trial if they had had a lawyer at their preliminary hearing.

No record or transcript of any kind was made of the preliminary hearing. Therefore, if the burden on remand is on the petitioners to show that they were prejudiced, it is clear that that burden cannot be met, and the remand is a futile gesture. If, on the other hand, the burden is on the State to disprove beyond a reasonable doubt any and all speculative advantages that the petitioners might conceivably have enjoyed if counsel had been present at their preliminary hearing, then

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[2] I agree with the result reached in Part I of the prevailing opinion.

obviously that burden cannot be met either, and the Court should simply reverse these convictions. All I can say is that if the Alabama courts can figure out what they are supposed to do with this case now that it has been remanded to them, their perceptiveness will far exceed mine.

The record before us makes clear that no evidence of what occurred at the preliminary hearing was used against the petitioners at their now completed trial. I would hold, therefore, that the absence of counsel at the preliminary hearing deprived the petitioners of no constitutional rights. Accordingly, I would affirm these convictions.

VALE *v.* LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 727. Argued March 4–5, 1970—Decided June 22, 1970

Police officers, possessing warrants for appellant's arrest, were watching the house where he resided. They observed what they suspected was an exchange of narcotics between a known addict and appellant outside the house, after appellant had gone into the house and brought something out to the addict. They arrested appellant at the front steps and announced that they would search the house. A search of the then-unoccupied house disclosed narcotics in a bedroom. The Louisiana Supreme Court, affirming appellant's conviction for possessing heroin, held that the search did not violate the Fourth Amendment, as it occurred "in the immediate vicinity of the arrest" and was "substantially contemporaneous therewith." Consideration by this Court of the question of jurisdiction was postponed to the hearing of the case on the merits. *Held:* The warrantless search of appellant's house violated the Fourth Amendment as made applicable to the States by the Fourteenth Amendment. Pp. 33–35.

(a) Even if *Chimel* v. *California,* 395 U. S. 752, holding that the warrantless search of a house can be justified as incident to a lawful arrest only if confined to the area within the arrestee's reach, were given retroactive effect (a question not decided here), there is no precedent of this Court to sustain the validity of this search. P. 33.

(b) If a search of a house is to be upheld as incident to an arrest, the arrest must take place *inside* the house. Pp. 33–34.

(c) A warrantless search of a dwelling is constitutionally valid only in "a few specifically established and well-delineated exceptions," none of which the State has shown here; and the search cannot be justified solely because narcotics, which are easily destroyed, are involved. Pp. 34–35.

Appeal dismissed and certiorari granted; 252 La. 1056, 215 So. 2d 811, reversed and remanded.

Eberhard P. Deutsch, by appointment of the Court, 396 U. S. 883, argued the cause for appellant. With him on the brief was *René H. Himel, Jr.*

Louise Korns argued the cause for appellee. With her on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Jim Garrison.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellant, Donald Vale, was convicted in a Louisiana court on a charge of possessing heroin and was sentenced as a multiple offender to 15 years' imprisonment at hard labor. The Louisiana Supreme Court affirmed the conviction, rejecting the claim that evidence introduced at the trial was the product of an unlawful search and seizure. 252 La. 1056, 215 So. 2d 811. We granted Vale's motion to proceed *in forma pauperis,* postponed consideration of the question of jurisdiction to the hearing of the case on the merits, and limited review to the search-and-seizure question. 396 U. S. 813.*

The evidence adduced at the pretrial hearing on a motion to suppress showed that on April 24, 1967, officers possessing two warrants for Vale's arrest and having information that he was residing at a specified address proceeded there in an unmarked car and set up a surveillance of the house. The evidence of what then took

*In his Notice of Appeal, Vale asserted that the Louisiana Supreme Court in affirming the conviction had relied upon a state statute, Article 225 of the Louisiana Code of Criminal Procedure (1967), which provides in pertinent part:

"A peace officer making an arrest shall take from the person arrested all weapons and incriminating articles which he may have about his person."

Although the state court referred to this statute in the course of its opinion, we do not understand its decision to be grounded on the statute. We therefore dismiss the appeal and treat the papers as a petition for certiorari, which is hereby granted. 28 U. S. C. § 2103.

place was summarized by the Louisiana Supreme Court as follows:

> "After approximately 15 minutes the officers observed a green 1958 Chevrolet drive up and sound the horn and after backing into a parking place, again blew the horn. At this juncture Donald Vale, who was well known to Officer Brady having arrested him twice in the previous month, was seen coming out of the house and walk up to the passenger side of the Chevrolet where he had a close brief conversation with the driver; and after looking up and down the street returned inside of the house. Within a few minutes he reappeared on the porch, and again cautiously looked up and down the street before proceeding to the passenger side of the Chevrolet, leaning through the window. From this the officers were convinced a narcotics sale had taken place. They returned to their car and immediately drove toward Donald Vale, and as they reached within approximately three cars lengths from the accused, (Donald Vale) he looked up and, obviously recognizing the officers, turned around, walking quickly toward the house. At the same time the driver of the Chevrolet started to make his get away when the car was blocked by the police vehicle. The three officers promptly alighted from the car, whereupon Officers Soule and Laumann called to Donald Vale to stop as he reached the front steps of the house, telling him he was under arrest. Officer Brady at the same time, seeing the driver of the Chevrolet, Arizzio Saucier, whom the officers knew to be a narcotic addict, place something hurriedly in his mouth, immediately placed him under arrest and joined his co-officers. Because of the trans-

> action they had just observed they, informed Donald Vale they were going to search the house, and thereupon advised him of his constitutional rights. After they all entered the front room, Officer Laumann made a cursory inspection of the house to ascertain if anyone else was present and within about three minutes Mrs. Vale and James Vale, mother and brother of Donald Vale, returned home carrying groceries and were informed of the arrest and impending search." 252 La., at 1067–1068, 215 So. 2d, at 815. (Footnote omitted.)

The search of a rear bedroom revealed a quantity of narcotics.

The Louisiana Supreme Court held that the search of the house did not violate the Fourth Amendment because it occurred "in the immediate vicinity of the arrest" of Donald Vale and was "substantially contemporaneous therewith . . . ." 252 La., at 1070, 215 So. 2d, at 816. We cannot agree. Last Term in *Chimel* v. *California,* 395 U. S. 752, we held that when the search of a dwelling is sought to be justified as incident to a lawful arrest, it must constitutionally be confined to the area within the arrestee's reach at the time of his arrest—"the area from within which he might gain possession of a weapon or destructible evidence." 395 U. S., at 763. But even if *Chimel* is not accorded retroactive effect—a question on which we do not now express an opinion—no precedent of this Court can sustain the constitutional validity of the search in the case before us.

A search may be incident to an arrest " 'only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.' " *Shipley* v. *California,* 395 U. S. 818, 819; *Stoner* v. *California,* 376 U. S. 483, 486. If a search of a house is to be upheld

as incident to an arrest, that arrest must take place *inside* the house, cf. *Agnello* v. *United States,* 269 U. S. 20, 32, not somewhere outside—whether two blocks away, *James* v. *Louisiana,* 382 U. S. 36, twenty feet away, *Shipley* v. *California, supra,* or on the sidewalk near the front steps. "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant." *Agnello* v. *United States, supra,* at 33. That basic rule "has never been questioned in this Court." *Stoner* v. *California, supra,* at 487 n. 5.

The Louisiana Supreme Court thought the search independently supportable because it involved narcotics, which are easily removed, hidden, or destroyed. It would be unreasonable, the Louisiana court concluded, "to require the officers under the facts of the case to first secure a search warrant before searching the premises, as time is of the essence inasmuch as the officers never know whether there is anyone on the premises to be searched who could very easily destroy the evidence." 252 La., at 1070, 215 So. 2d, at 816. Such a rationale could not apply to the present case, since by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises. But entirely apart from that point, our past decisions make clear that only in "a few specifically established and well-delineated" situations, *Katz* v. *United States,* 389 U. S. 347, 357, may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it. The burden rests on the State to show the existence of such an exceptional situation. *Chimel* v. *California, supra,* at 762; *United States* v. *Jeffers,* 342 U. S. 48, 51; *McDonald* v. *United States,* 335 U. S. 451, 456. And the record before us discloses none.

There is no suggestion that anyone consented to the search. Cf. *Zap* v. *United States,* 328 U. S. 624, 628. The officers were not responding to an emergency. *United States* v. *Jeffers, supra,* at 52; *McDonald* v. *United States, supra,* at 454. They were not in hot pursuit of a fleeing felon. *Warden* v. *Hayden,* 387 U. S. 294, 298–299; *Chapman* v. *United States,* 365 U. S. 610, 615; *Johnson* v. *United States,* 333 U. S. 10, 15. The goods ultimately seized were not in the process of destruction. *Schmerber* v. *California,* 384 U. S. 757, 770–771; *United States* v. *Jeffers, supra; McDonald* v. *United States, supra,* at 455. Nor were they about to be removed from the jurisdiction. *Chapman* v. *United States, supra; Johnson* v. *United States, supra; United States* v. *Jeffers, supra.*

The officers were able to procure two warrants for Vale's arrest. They also had information that he was residing at the address where they found him. There is thus no reason, so far as anything before us appears, to suppose that it was impracticable for them to obtain a search warrant as well. Cf. *McDonald* v. *United States, supra,* at 454–455; *Trupiano* v. *United States,* 334 U. S. 699, 705–706; *Johnson* v. *United States, supra; Taylor* v. *United States,* 286 U. S. 1, 6; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 358; *Carroll* v. *United States,* 267 U. S. 132, 156; cf. *Ker* v. *California,* 374 U. S. 23, 42 (opinion of Clark, J.). We decline to hold that an arrest on the street can provide its own "exigent circumstance" so as to justify a warrantless search of the arrestee's house.

The Louisiana courts committed constitutional error in admitting into evidence the fruits of the illegal search. *Shipley* v. *California, supra,* at 819; *James* v. *Louisiana, supra,* at 37; *Ker* v. *California, supra,* at 30–34; *Mapp* v. *Ohio,* 367 U. S. 643. Accordingly, the judgment is

reversed and the case is remanded to the Louisiana Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, dissenting.

The Fourth Amendment to the United States Constitution prohibits only "unreasonable searches."* A warrant has never been thought to be an absolute requirement for a constitutionally proper search. Searches, whether with or without a warrant, are to be judged by whether they are reasonable, and, as I said, speaking for the Court in *Preston* v. *United States,* 376 U. S. 364, 366–367 (1964), common sense dictates that reasonableness varies with the circumstances of the search. See, *e. g., Henry* v. *United States,* 361 U. S. 98 (1959); *Brinegar* v. *United States,* 338 U. S. 160 (1949). The Louisiana Supreme Court held not only that the police action here was reasonable but also that failure to conduct an immediate search would have been unreasonable. 252 La. 1056, 1070, 215 So. 2d 811, 816. With that view I am in complete agreement, for the following reasons.

The police, having warrants for Vale's arrest, were watching his mother's house from a short distance away. Not long after they began their vigil a car arrived,

*The Fourth Amendment says:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

sounded its horn, and backed into a parking space near the house. The driver did not get out, but instead honked the car horn again. Vale, who had been arrested twice the month before and against whom an indictment for a narcotics offense was then pending, came out of his mother's house and talked to the driver of the car. At the conclusion of the conversation Vale looked both ways, up and down the street, and then went back inside the house. When he reappeared he stopped before going to the car and stood, as one of the officers testified, "[l]ooking back and forth like to see who might be coming or who was in the neighborhood." He then walked to the car and leaned in.

From this behavior the officers were convinced that a narcotics transaction was taking place at that very moment. They drove down the street toward Vale and the parked car. When they came within a few car lengths of the two men Vale saw them and began to walk quickly back toward the house. At the same time the driver of the car attempted to pull away. The police brought both parties to the transaction to a stop. They then saw that the driver of the car was one Saucier, a known narcotics addict. He hurriedly placed something in his mouth, and apparently swallowed it. The police placed both Vale and Saucier under arrest.

At this point the police had probable cause to believe that Vale was engaged in a narcotics transfer, and that a supply of narcotics would be found in the house, to which Vale had returned after his first conversation, from which he had emerged furtively bearing what the police could readily deduce was a supply of narcotics, and toward which he hurried after seeing the police. But the police did not know then who else might be in the house. Vale's arrest took place near the house, and anyone observing from inside would surely have been alerted to destroy the stocks of contraband which

the police believed Vale had left there. The police had already seen Saucier, the narcotics addict, apparently swallow what Vale had given him. Believing that some evidence had already been destroyed and that other evidence might well be, the police were faced with the choice of risking the immediate destruction of evidence or entering the house and conducting a search. I cannot say that their decision to search was unreasonable. Delay in order to obtain a warrant would have given an accomplice just the time he needed.

That the arresting officers did, in fact, believe that others might be in the house is attested to by their actions upon entering the door left open by Vale. The police at once checked the small house to determine if anyone else was present. Just as they discovered the house was empty, however, Vale's mother and brother arrived. Now what had been a suspicion became a certainty: Vale's relatives were in possession and knew of his arrest. To have abandoned the search at this point, and left the house with Vale, would not have been the action of reasonable police officers. As MR. JUSTICE WHITE said, dissenting in *Chimel* v. *California,* 395 U. S. 752, 775 (1969):

> "For the police to search the house while the evidence they had probable cause to search out and seize was still there cannot be considered unreasonable."

In my view, whether a search incident to a lawful arrest is reasonable should still be determined by the facts and circumstances of each case. *Ker* v. *California,* 374 U. S. 23, 34–36 (1963); *United States* v. *Rabinowitz,* 339 U. S. 56, 63–64 (1950). For the reasons given above I am convinced that the search here was reasonable, even though Vale had not yet crossed the threshold of the house toward which he was headed.

Moreover, the circumstances here were sufficiently exceptional to justify a search, even if the search was not strictly "incidental" to an arrest. The Court recognizes that searches to prevent the destruction or removal of evidence have long been held reasonable by this Court. *Preston* v. *United States, supra; McDonald* v. *United States,* 335 U. S. 451, 455 (1948); *Carroll* v. *United States,* 267 U. S. 132 (1925). Whether the "exceptional circumstances" justifying such a search exist or not is a question that may be, as it is here, quite distinct from whether or not the search was incident to a valid arrest. See *United States* v. *Jeffers,* 342 U. S. 48, 51 (1951); *Johnson* v. *United States,* 333 U. S. 10 (1948). It is thus unnecessary to determine whether the search was valid as incident to the arrest under either *Chimel* v. *California, supra,* or under the pre-*Chimel* standard as interpreted in *Shipley* v. *California,* 395 U. S. 818 (1969). It is only necessary to find that, given Vale's arrest in a spot readily visible to anyone in the house and the probable existence of narcotics inside, it was reasonable for the police to conduct an immediate search of the premises.

The Court, however, finds the search here unreasonable. First, the Court suggests that the contraband was not "in the process of destruction." None of the cases cited by the Court supports the proposition that "exceptional circumstances" exist only when the process of destruction has already begun. On the contrary we implied that those circumstances did exist when "evidence or contraband was *threatened* with removal or destruction." *Johnson* v. *United States, supra,* at 15 (emphasis added). See also *Chapman* v. *United States,* 365 U. S. 610, 615 (1961); *Hernandez* v. *United States,* 353 F. 2d 624 (C. A. 9th Cir. 1965), cert. denied, 384 U. S. 1008 (1966).

Second, the Court seems to argue that the search was unreasonable because the police officers had time to obtain a warrant. I agree that the opportunity to obtain a warrant is one of the factors to be weighed in determining reasonableness. *Trupiano* v. *United States*, 334 U. S. 699 (1948); *United States* v. *Rabinowitz*, *supra*, at 66 (BLACK, J., dissenting). But the record conclusively shows that there was no such opportunity here. As I noted above, once the officers had observed Vale's conduct in front of the house they had probable cause to believe that a felony had been committed and that immediate action was necessary. At no time after the events in front of Mrs. Vale's house would it have been prudent for the officers to leave the house in order to secure a warrant.

The Court asserts, however, that because the police obtained two warrants for Vale's arrest there is "no reason . . . to suppose that it was impracticable for them to obtain a search warrant as well." The difficulty is that the two arrest warrants on which the Court seems to rely so heavily were not issued because of any present misconduct of Vale's; they were issued because the bond had been increased for an earlier narcotics charge then pending against Vale. When the police came to arrest Vale, they knew only that his bond had been increased. There is nothing in the record to indicate that, absent the increased bond, there would have been probable cause for an arrest, much less a search. Probable cause for the search arose for the first time when the police observed the activity of Vale and Saucier in and around the house.

I do not suggest that all arrests necessarily provide the basis for a search of the arrestee's house. In this case there is far more than a mere street arrest. The police also observed Vale's use of the house as a base of operations for his commercial business, his attempt to

return hurriedly to the house on seeing the officers, and the apparent destruction of evidence by the man with whom Vale was dealing. Furthermore the police arrival and Vale's arrest were plainly visible to anyone within the house, and the police had every reason to believe that someone in the house was likely to destroy the contraband if the search were postponed.

This case raises most graphically the question how does a policeman protect evidence necessary to the State if he must leave the premises to get a warrant, allowing the evidence he seeks to be destroyed. The Court's answer to that question makes unnecessarily difficult the conviction of those who prey upon society.

CHAMBERS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT

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

No. 830. Argued April 27, 1970—Decided June 22, 1970

Petitioner was one of four men arrested after the auto in which they were riding was stopped by police shortly after an armed robbery of a service station. The arrests resulted from information supplied by the service station attendant and bystanders. The car was driven to a police station, where a search disclosed two revolvers, one loaded with dumdum bullets, and cards bearing the name of an attendant at another service station who had been robbed at gunpoint a week earlier. In a warrant-authorized search of petitioner's home the next day police found and seized ammunition, including dumdum bullets similar to those found in one of the guns in the car. At his first trial, which ended in a mistrial, petitioner was represented by a Legal Aid Society attorney. Another Legal Aid Society attorney, who represented him at the second trial, did not confer with petitioner until a few minutes before that trial began. The materials taken from the car and the bullets seized from petitioner's home were introduced in evidence and petitioner was convicted of robbery of both service stations. Petitioner did not take a direct appeal, but sought, unsuccessfully, a writ of habeas corpus in the Pennsylvania courts and in the federal courts, challenging the admissibility of the materials taken from the car and the ammunition seized in his home, and claiming that he was denied the effective assistance of counsel. The Court of Appeals dealt with the claim that the attorney's lack of preparation resulted in the failure to exclude the guns and ammunition by finding harmless error in the admission of the bullets and ruling that the materials seized from the car were admissible in evidence, and concluded that the claim of prejudice from substitution of counsel was without substantial basis. *Held:*

1. The warrantless search of the automobile was valid and the materials seized therefrom were properly introduced in evidence. Pp. 46–52.

(a) The search, made at the police station some time after the arrest, cannot be justified as incident to the arrest. Pp. 46–47.

(b) Just as there was probable cause to arrest the occupants of the car, there was probable cause to search the car for guns and stolen money. Pp. 47–48.

(c) If there is probable cause, an automobile, because of its mobility, may be searched without a warrant in circumstances that would not justify a warrantless search of a house or office. *Carroll* v. *United States,* 267 U. S. 132. Pp. 48–51.

(d) Given probable cause, there is no difference under the Fourth Amendment between (1) seizing and holding a car before presenting the issue of probable cause to a magistrate, and (2) carrying out an immediate warrantless search. Pp. 51–52.

2. The findings of the District Court and the Court of Appeals that, if there was error in admitting in evidence the ammunition seized from petitioner's house, it was harmless error beyond a reasonable doubt, are affirmed on the basis of the Court's review of the record. Pp. 52–53.

3. Based on a careful examination of the state court record, the Court of Appeals' judgment denying a hearing as to the adequacy of representation by counsel, is not disturbed. Pp. 53–54.

408 F. 2d 1186, affirmed.

Vincent J. Grogan, by appointment of the Court, 396 U. S. 983, argued the cause and filed a brief for petitioner.

Carol Mary Los argued the cause for respondent, *pro hac vice.* With her on the brief was *Robert W. Duggan.*

Louis J. Lefkowitz, Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Amy Juviler* and *Brenda Soloff,* Assistant Attorneys General, filed a brief for the State of New York as *amicus curiae.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The principal question in this case concerns the admissibility of evidence seized from an automobile, in which petitioner was riding at the time of his arrest, after the automobile was taken to a police station and was there thoroughly searched without a warrant. The Court of Appeals for the Third Circuit found no violation of petitioner's Fourth Amendment rights. We affirm.

I

During the night of May 20, 1963, a Gulf service station in North Braddock, Pennsylvania, was robbed by two men, each of whom carried and displayed a gun. The robbers took the currency from the cash register; the service station attendant, one Stephen Kovacich, was directed to place the coins in his right-hand glove, which was then taken by the robbers. Two teen-agers, who had earlier noticed a blue compact station wagon circling the block in the vicinity of the Gulf station, then saw the station wagon speed away from a parking lot close to the Gulf station. About the same time, they learned that the Gulf station had been robbed. They reported to police, who arrived immediately, that four men were in the station wagon and one was wearing a green sweater. Kovacich told the police that one of the men who robbed him was wearing a green sweater and the other was wearing a trench coat. A description of the car and the two robbers was broadcast over the police radio. Within an hour, a light blue compact station wagon answering the description and carrying four men was stopped by the police about two miles from the Gulf station. Petitioner was one of the men in the station wagon. He was wearing a green sweater and there was a trench coat in the car. The occupants were arrested and the car was driven to the police station. In the course of a thorough search of the car at the station, the police found concealed in a compartment under the dashboard two .38-caliber revolvers (one loaded with dumdum bullets), a right-hand glove containing small change, and certain cards bearing the name of Raymond Havicon, the attendant at a Boron service station in McKeesport, Pennsylvania, who had been robbed at gunpoint on May 13, 1963. In the course of a warrant-authorized search of petitioner's home the day after petitioner's arrest, police found and

seized certain .38-caliber ammunition, including some dumdum bullets similar to those found in one of the guns taken from the station wagon.

Petitioner was indicted for both robberies.[1] His first trial ended in a mistrial but he was convicted of both robberies at the second trial. Both Kovacich and Havicon identified petitioner as one of the robbers.[2] The materials taken from the station wagon were introduced into evidence, Kovacich identifying his glove and Havicon the cards taken in the May 13 robbery. The bullets seized at petitioner's house were also introduced over objections of petitioner's counsel.[3] Petitioner was sentenced to a term of four to eight years' imprisonment for the May 13 robbery and to a term of two to seven years' imprisonment for the May 20 robbery, the sentences to run consecutively.[4] Petitioner did not take a direct appeal from these convictions. In 1965, petitioner sought a writ of habeas corpus in the state court, which denied the writ after a brief evidentiary hearing; the denial of

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[1] Petitioner was indicted separately for each robbery. One of the other three men was similarly indicted and the other two were indicted only for the Gulf robbery. All indictments and all defendants were tried together. In a second trial following a mistrial, the jury found all defendants guilty as charged.

[2] Kovacich identified petitioner at a pretrial stage of the proceedings, and so testified, but could not identify him at the trial. Havicon identified petitioner both before trial and at trial.

[3] The bullets were apparently excluded at the first trial. The grounds for the exclusion do not clearly appear from the record now before us.

[4] The four-to-eight-year sentence was to be served concurrently with another sentence, for an unrelated armed robbery offense, imposed earlier but vacated subsequent to imposition of sentence in this case. The two-to-seven-year term was to be consecutive to the other sentences. It appears that the offenses here at issue caused revocation of petitioner's parole in connection with a prior conviction. Apparently petitioner has now begun to serve the first of the two sentences imposed for the convictions here challenged.

the writ was affirmed on appeal in the Pennsylvania appellate courts. Habeas corpus proceedings were then commenced in the United States District Court for the Western District of Pennsylvania. An order to show cause was issued. Based on the State's response and the state court record, the petition for habeas corpus was denied without a hearing. The Court of Appeals for the Third Circuit affirmed, 408 F. 2d 1186, and we granted certiorari, 396 U. S. 900 (1969).[5]

II

We pass quickly the claim that the search of the automobile was the fruit of an unlawful arrest. Both the courts below thought the arresting officers had probable cause to make the arrest. We agree. Having talked to the teen-age observers and to the victim Kovacich, the police had ample cause to stop a light blue compact station wagon carrying four men and to arrest the occupants, one of whom was wearing a green sweater

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[5] Since *Mapp* v. *Ohio,* 367 U. S. 643 (1961), the federal courts have regularly entertained and ruled on petitions for habeas corpus filed by state prisoners alleging that unconstitutionally seized evidence was admitted at their trials. See, *e. g., Mancusi* v. *DeForte,* 392 U. S. 364 (1968); *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Warden* v. *Hayden,* 387 U. S. 294 (1967). As for federal prisoners, a divided Court held that relief under 28 U. S. C. § 2255 was available to vindicate Fourth Amendment rights. *Kaufman* v. *United States,* 394 U. S. 217 (1969). Right-to-counsel claims of course have regularly been pressed and entertained in federal habeas corpus proceedings.

It is relevant to note here that petitioner Chambers at trial made no objection to the introduction of the items seized from the car; however his Fourth Amendment claims with respect to the auto search were raised and passed on by the Pennsylvania courts in the state habeas corpus proceeding. His objection to the search of his house was raised at his trial and rejected both on the merits and because he had not filed a motion to suppress; similar treatment was given the point in the state collateral proceedings, which took

and one of whom had a trench coat with him in the car.[6]

Even so, the search that produced the incriminating evidence was made at the police station some time after the arrest and cannot be justified as a search incident to an arrest: "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston* v. *United States,* 376 U. S. 364, 367 (1964). *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216 (1968), is to the same effect; the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house.

There are, however, alternative grounds arguably justifying the search of the car in this case. In *Preston, supra,* the arrest was for vagrancy; it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto. In *Dyke, supra,* the Court expressly rejected the suggestion that there was probable cause to search the car, 391 U. S., at 221–222. Here the situation is different, for the police had probable cause to believe that the robbers, carrying guns and the fruits of the crime, had fled the scene in a light blue compact station wagon which would be carrying four men, one wearing a green sweater and another wearing a trench coat. As the state courts correctly held, there was probable cause to arrest the occupants of the station wagon that the officers stopped; just as obviously was

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place before the same judge who had tried the criminal case. The counsel claim was not presented at trial but was raised and rejected in the state collateral proceedings.

[6] In any event, as we point out below, the validity of an arrest is not necessarily determinative of the right to search a car if there is probable cause to make the search. Here, as will be true in many cases, the circumstances justifying the arrest are also those furnishing probable cause for the search.

there probable cause to search the car for guns and stolen money.

In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office. In *Carroll* v. *United States,* 267 U. S. 132 (1925), the issue was the admissibility in evidence of contraband liquor seized in a warrantless search of a car on the highway. After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. The Court expressed its holding as follows:

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.
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> "Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. . . . [T]hose lawfully within the country, entitled to use

> the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. . . .
>
> . . . . .
>
> "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." 267 U. S., at 153–154, 155–156.

The Court also noted that the search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest:

> "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." 267 U. S., at 158–159.

Finding that there was probable cause for the search and seizure at issue before it, the Court affirmed the convictions.

Carroll was followed and applied in *Husty* v. *United States,* 282 U. S. 694 (1931), and *Scher* v. *United States,* 305 U. S. 251 (1938). It was reaffirmed and followed in *Brinegar* v. *United States,* 338 U. S. 160 (1949). In 1964, the opinion in *Preston, supra,* cited both *Brinegar* and *Carroll* with approval, 376 U. S., at 366–367. In *Cooper* v. *California,* 386 U. S. 58 (1967),[7]

[7] *Cooper* involved the warrantless search of a car held for forfeiture under state law. Evidence seized from the car in that search was held admissible. In the case before us no claim is made that state law authorized that the station wagon be held as

the Court read *Preston* as dealing primarily with a search incident to arrest and cited that case for the proposition that the mobility of a car may make the search of a car without a warrant reasonable "although the result might be the opposite in a search of a home, a store, or other fixed piece of property." 386 U. S., at 59. The Court's opinion in *Dyke,* 391 U. S., at 221, recognized that "[a]utomobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office," citing *Brinegar* and *Carroll, supra.* However, because there was insufficient reason to search the car involved in the *Dyke* case, the Court did not reach the question of whether those cases "extend to a warrantless search, based upon probable cause, of an automobile which, having been stopped originally on a highway, is parked outside a courthouse." 391 U. S., at 222.[8]

Neither *Carroll, supra,* nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that

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evidence or as an instrumentality of the crime; nor was the station wagon an abandoned or stolen vehicle. The question here is whether probable cause justifies a warrantless search in the circumstances presented.

[8] Nothing said last term in *Chimel* v. *California,* 395 U. S. 752 (1969), purported to modify or affect the rationale of *Carroll.* As the Court noted:

"Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' *Carroll* v. *United States,* 267 U. S. 132, 153; see *Brinegar* v. *United States,* 338 U. S. 160." 395 U. S., at 764 n. 9.

furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in *Carroll* and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.[9]

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll, supra,* holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.

Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety

[9] Following the car until a warrant can be obtained seems an impractical alternative since, among other things, the car may be taken out of the jurisdiction. Tracing the car and searching it hours or days later would of course permit instruments or fruits of crime to be removed from the car before the search.

of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.[10] The same consequences may not follow where there is unforeseeable cause to search a house. Compare *Vale* v. *Louisiana, ante,* p. 30. But as *Carroll, supra,* held, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.

III

Neither of petitioner's remaining contentions warrants reversal of the judgment of the Court of Appeals. One of them challenges the admissibility at trial of the .38-caliber ammunition seized in the course of a search of petitioner's house. The circumstances relevant to this

[10] It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.

issue are somewhat confused, involving as they do questions of probable cause, a lost search warrant, and the Pennsylvania procedure for challenging the admissibility of evidence seized. Both the District Court and the Court of Appeals, however, after careful examination of the record, found that if there was error in admitting the ammunition, the error was harmless beyond a reasonable doubt. Having ourselves studied this record, we are not prepared to differ with the two courts below. See *Harrington* v. *California,* 395 U. S. 250 (1969).

The final claim is that petitioner was not afforded the effective assistance of counsel. The facts pertinent to this claim are these: The Legal Aid Society of Allegheny County was appointed to represent petitioner prior to his first trial. A representative of the society conferred with petitioner, and a member of its staff, Mr. Middleman, appeared for petitioner at the first trial. There is no claim that petitioner was not then adequately represented by fully prepared counsel. The difficulty arises out of the second trial. Apparently no one from the Legal Aid Society again conferred with petitioner until a few minutes before the second trial began. The attorney who then appeared to represent petitioner was not Mr. Middleman but Mr. Tamburo, another Legal Aid Society attorney. No charge is made that Mr. Tamburo was incompetent or inexperienced; rather the claim is that his appearance for petitioner was so belated that he could not have furnished effective legal assistance at the second trial. Without granting an evidentiary hearing, the District Court rejected petitioner's claim. The Court of Appeals dealt with the matter in an extensive opinion. After carefully examining the state court record, which it had before it, the court found ample grounds for holding that the appearance of a different attorney at the second trial had not resulted in prejudice to petitioner. The claim that Mr. Tamburo

was unprepared centered around his allegedly inadequate efforts to have the guns and ammunition excluded from evidence. But the Court of Appeals found harmless any error in the admission of the bullets and ruled that the guns and other materials seized from the car were admissible evidence. Hence the claim of prejudice from the substitution of counsel was without substantial basis.[11] In this posture of the case we are not inclined to disturb the judgment of the Court of Appeals as to what the state record shows with respect to the adequacy of counsel. Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel. The Court of Appeals reached the right result in denying a hearing in this case.

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, concurring.

I adhere to the view that the admission at trial of evidence acquired in alleged violation of Fourth Amend-

[11] It is pertinent to note that each of the four defendants was represented by separate counsel. The attorney for Lawson, who was the car owner and who was the only defendant to take the stand, appears to have been the lead counsel. As far as the record before us reveals, no counsel made any objection at the trial to the admission of the items taken from the car. Petitioner's counsel objected to the introduction of the bullets seized from petitioner's house.

ment standards is not of itself sufficient ground for a collateral attack upon an otherwise valid criminal conviction, state or federal. See *Harris* v. *Nelson,* 394 U. S. 286, 307 (dissenting opinion); *Kaufman* v. *United States,* 394 U. S. 217, 242 (dissenting opinion). But until the Court adopts that view, I regard myself as obligated to consider the merits of the Fourth and Fourteenth Amendment claims in a case of this kind. Upon that premise I join the opinion and judgment of the Court.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I find myself in disagreement with the Court's disposition of this case in two respects.

I

I cannot join the Court's casual treatment of the issue that has been presented by both parties as the major issue in this case: petitioner's claim that he received ineffective assistance of counsel at his trial. As the Court acknowledges, petitioner met Mr. Tamburo, his trial counsel, for the first time en route to the courtroom on the morning of trial. Although a different Legal Aid Society attorney had represented petitioner at his first trial, apparently neither he nor anyone else from the society had conferred with petitioner in the interval between trials. Because the District Court did not hold an evidentiary hearing on the habeas petition, there is no indication in the record of the extent to which Mr. Tamburo may have consulted petitioner's previous attorney, the attorneys for the other defendants, or the files of the Legal Aid Society. What the record does disclose on this claim is essentially a combination of two factors: the entry of counsel into the case immediately

before trial, and his handling of the issues that arose during the trial.[1]

As respondent must concede, counsel's last-minute entry into the case precluded his compliance with the state rule requiring that motions to suppress evidence be made before trial, even assuming that he had sufficient acquaintance with the case to know what arguments were worth making. Furthermore, the record suggests that he may have had virtually no such acquaintance.

In the first place, he made no objection to the admission in evidence of the objects found during the search of the car at the station house after the arrest of its occupants, although that search was of questionable validity under Fourth Amendment standards, see *infra*.

Second, when the prosecution offered in evidence the bullets found in the search of petitioner's home, which had been excluded on defense objection at the first trial, Mr. Tamburo objected to their admission, but in a manner that suggested that he was a stranger to the facts of the case. While he indicated that he did know of the earlier exclusion, he apparently did not know on what ground the bullets had been excluded, and based his

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[1] Respondent concedes in this Court that "no other facts are available to determine the amount and the quality of the preparation for trial pursued by Mr. Tamburo or the amount of evidentiary material known by and available to him in determining what, if any, evidentiary objections were mandated or what, if any, defenses were available to petitioner." Brief for Respondent 13. The Court of Appeals stated: "We do not know what preparation, if any, counsel was able to accomplish prior to the date of the trial as he did not testify in the state habeas corpus proceeding and there was no evidentiary hearing in the district court. From the lower court opinion, as will appear later, we are led to believe that counsel was not wholly familiar with all aspects of the case before trial." 408 F. 2d 1186, 1191.

objection only on their asserted irrelevance.[2] Later in the trial he renewed his objection on the basis of the inadequacy of the warrant, stating, "I didn't know a thing about the search Warrant until this morning." App. 130.[3]

Third, when prosecution witness Havicon made an in-court identification of petitioner as the man who had

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[2] Mr. Tamburo stated to the trial court:

"Your Honor, at the first trial, the District Attorney attempted to introduce into evidence some .38 calibre bullets that were found at the Chambers' home after his arrest. . . . At that trial, it was objected to and the objection was sustained, and I would also like to object to it now, I don't think it is good for the Jury to hear it. I don't feel there is any relevancy or connection between the fact there were .38 calibre bullets at his home and the fact that a .38 calibre gun was found, not on the person of Chambers, but in the group." App. 82.

This was the only instance in which Mr. Tamburo expressed any knowledge of what had transpired at the first trial, and it does not appear whether he learned of the exclusion from his brief talk with petitioner en route to the courtroom or from sources within the Legal Aid Society. The record does not disclose the reason for the exclusion of the bullets at the first trial.

[3] This colloquy followed the renewed objection:

"THE COURT: Well, of course, you have known about this from the other trial three weeks ago.

"MR. TAMBURO: I wasn't the attorney at the other trial.

"THE COURT: But, you knew about it?

"MR. TAMBURO: I didn't know a thing about the search Warrant until this morning.

"THE COURT: You knew about the evidence about to be introduced, you told me about it.

"MR. TAMBURO: It wasn't admitted.

"THE COURT: That doesn't mean I have to exclude it now." *Id.*, at 130.

The court proceeded to overrule the objection on the ground that it had not been made in a pretrial motion, adding that "I think there is reasonable ground for making a search here, even without a Warrant." *Id.*, at 130–131.

threatened him with a gun during one of the robberies, Mr. Tamburo asked questions in cross-examination that suggested that he had not had time to settle upon a trial strategy or even to consider whether petitioner would take the stand. Mr. Tamburo asked whether, at a pretrial lineup, a detective had not told Havicon that petitioner "was the man with the gun." After Havicon's negative answer, this colloquy ensued:

> "THE COURT: I take it you will be able to disprove that, will you?
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> "MR. TAMBURO: What?
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> "THE COURT: You shouldn't ask that question unless you are prepared to disprove that, contradict him.
>
> "MR. TAMBURO: I have the defendant's testimony.
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> "THE COURT: Disprove it in any way at all.
>
> "MR. MEANS [the prosecutor]: I don't understand how the defendant would know what the detectives told him.
>
> "THE COURT: He said he is going to disprove it by the defendant, that's all right, go ahead." App. 34.

The next witness was a police officer who had been present at the lineup, and who testified that no one had told Havicon whom to pick out. Petitioner's counsel did not cross-examine, and petitioner never took the stand.

On this state of the record the Court of Appeals ruled that, although the late appointment of counsel necessitated close scrutiny into the effectiveness of his representation, petitioner "was not prejudiced by the late appointment of counsel" because neither of the Fourth Amendment claims belatedly raised justified reversal of

the conviction. 408 F. 2d 1186, 1196. I agree that the strength of the search and seizure claims is an element to be considered in the assessment of whether counsel was adequately prepared to make an effective defense, but I cannot agree that the relevance of those claims in this regard disappears upon a conclusion by an appellate court that they do not invalidate the conviction.

This Court recognized long ago that the duty to provide counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Powell* v. *Alabama,* 287 U. S. 45, 71 (1932); *Hawk* v. *Olson,* 326 U. S. 271, 278 (1945). While "the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial," the Court has recognized that

> "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery* v. *Alabama,* 308 U. S. 444, 446 (1940).

Where counsel has no acquaintance with the facts of the case and no opportunity to plan a defense, the result is that the defendant is effectively denied his constitutional right to assistance of counsel.

It seems to me that what this record reveals about counsel's handling of the search and seizure claims and about the tenor of his cross-examination of the government witness Havicon, when coupled with his late entry into the case, called for more exploration by the District Court before petitioner's ineffective assistance of counsel claim could be dismissed. Such an exploration should

have been directed to ascertaining whether the circumstances under which Mr. Tamburo was required to undertake petitioner's defense at the second trial were such as to send him into the courtroom with so little knowledge of the case as to render him incapable of affording his client adequate representation. The event of that exploration would turn, not on a mere assessment of particular missteps or omissions of counsel, whether or not caused by negligence, cf. *McMann* v. *Richardson,* 397 U. S. 759 (1970), but on the District Court's evaluation of the total picture, with the objective of determining whether petitioner was deprived of rudimentary legal assistance. See *Williams* v. *Beto,* 354 F. 2d 698 (C. A. 5th Cir. 1965). And, of course, such an exploration would not be confined to the three episodes that, in my opinion, triggered the necessity for a hearing.

It is not an answer to petitioner's claim for a reviewing court simply to conclude that he has failed after the fact to show that, with adequate assistance, he would have prevailed at trial. *Glasser* v. *United States,* 315 U. S. 60, 75–76 (1942); cf. *White* v. *Maryland,* 373 U. S. 59 (1963); *Reynolds* v. *Cochran,* 365 U. S. 525, 530–533 (1961). Further inquiry might show, of course, that counsel's opportunity for preparation was adequate to protect petitioner's interests,[4] but petitioner did, in my view, raise a sufficient doubt on that score to be entitled to an evidentiary hearing.[5]

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[4] In *Avery,* this Court concluded on the basis of a hearing: "That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted." 308 U. S., at 452.

[5] The absence of any request by counsel for a continuance of the trial should not, in my opinion, serve to vitiate petitioner's claim at this juncture.

II

In sustaining the search of the automobile I believe the Court ignores the framework of our past decisions circumscribing the scope of permissible search without a warrant. The Court has long read the Fourth Amendment's proscription of "unreasonable" searches as imposing a general principle that a search without a warrant is not justified by the mere knowledge by the searching officers of facts showing probable cause. The "general requirement that a search warrant be obtained" is basic to the Amendment's protection of privacy, and " 'the burden is on those seeking [an] exemption . . . to show the need for it.' " *E. g., Chimel* v. *California,* 395 U. S. 752, 762 (1969); *Katz* v. *United States,* 389 U. S. 347, 356–358 (1967); *Warden* v. *Hayden,* 387 U. S. 294, 299 (1967); *Preston* v. *United States,* 376 U. S. 364, 367 (1964); *United States* v. *Jeffers,* 342 U. S. 48, 51 (1951); *McDonald* v. *United States,* 335 U. S. 451, 455–456 (1948); *Agnello* v. *United States,* 269 U. S. 20, 33 (1925).

Fidelity to this established principle requires that, where exceptions are made to accommodate the exigencies of particular situations, those exceptions be no broader than necessitated by the circumstances presented. For example, the Court has recognized that an arrest creates an emergency situation justifying a warrantless search of the arrestee's person and of "the area from within which he might gain possession of a weapon or destructible evidence"; however, because the exigency giving rise to this exception extends only that far, the search may go no further. *Chimel* v. *California,* 395 U. S., at 763; *Trupiano* v. *United States,* 334 U. S. 699, 705, 708 (1948). Similarly we held in *Terry* v. *Ohio,* 392 U. S. 1 (1968), that a warrantless search in a "stop and frisk" situation must "be strictly circum-

scribed by the exigencies which justify its initiation." *Id.*, at 26. Any intrusion beyond what is necessary for the personal safety of the officer or others nearby is forbidden.

Where officers have probable cause to search a vehicle on a public way, a further limited exception to the warrant requirement is reasonable because "the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* v. *United States*, 267 U. S. 132, 153 (1925). Because the officers might be deprived of valuable evidence if required to obtain a warrant before effecting any search or seizure, I agree with the Court that they should be permitted to take the steps necessary to preserve evidence and to make a search possible.[6] Cf. ALI, Model Code of Pre-Arraignment Procedure § 6.03 (Tent. Draft No. 3, 1970). The Court holds that those steps include making a warrantless search of the entire vehicle on the highway—a conclusion reached by the Court in *Carroll* without discussion—and indeed appears to go further and to condone the removal of the car to the police station for a warrantless search there at the convenience of the police.[7] I cannot agree that this result is con-

[6] Where a suspect is lawfully arrested in the automobile, the officers may, of course, perform a search within the limits prescribed by *Chimel* as an incident to the lawful arrest. However, as the Court recognizes, the search here exceeded those limits. Nor was the search here within the limits imposed by pre-*Chimel* law for searches incident to arrest; therefore, the retroactivity of *Chimel* is not drawn into question in this case. See *Preston* v. *United States*, 376 U. S. 364 (1964).

[7] The Court disregards the fact that *Carroll*, and each of this Court's decisions upholding a warrantless vehicle search on its authority, involved a search for contraband. *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Scher* v. *United States*, 305 U. S. 251 (1938); *Husty* v. *United States*, 282 U. S. 694 (1931); see *United States* v. *Di Re*, 332 U. S. 581, 584–586 (1948). Although subsequent dicta have omitted this limitation, see *Dyke* v. *Taylor Imple-*

sistent with our insistence in other areas that departures from the warrant requirement strictly conform to the exigency presented.

The Court concedes that the police could prevent removal of the evidence by temporarily seizing the car for the time necessary to obtain a warrant. It does not dispute that such a course would fully protect the interests of effective law enforcement; rather it states that whether temporary seizure is a "lesser" intrusion than warrantless search "is itself a debatable question and the answer may depend on a variety of circumstances." *Ante,* at 51–52.[8] I believe it clear that a warrantless search involves the greater sacrifice of Fourth Amendment values.

The Fourth Amendment proscribes, to be sure, unreasonable "seizures" as well as "searches." However, in the circumstances in which this problem is likely to occur, the lesser intrusion will almost always be the simple seizure of the car for the period—perhaps a day—necessary to enable the officers to obtain a search warrant. In the first place, as this case shows, the very facts establishing probable cause to search will often

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ment Mfg. Co., 391 U. S. 216, 221 (1968); *United States* v. *Ventresca,* 380 U. S. 102, 107 n. 2 (1965); *United States* v. *Rabinowitz,* 339 U. S. 56, 61 (1950), *id.,* at 73 (Frankfurter, J., dissenting), the *Carroll* decision has not until today been held to authorize a general search of a vehicle for evidence of crime, without a warrant, in every case where probable cause exists.

[8] The Court, unable to decide whether search or temporary seizure is the "lesser" intrusion, in this case authorizes both. The Court concludes that it was reasonable for the police to take the car to the station, where they searched it once to no avail. The searching officers then entered the station, interrogated petitioner and the car's owner, and returned later for another search of the car—this one successful. At all times the car and its contents were secure against removal or destruction. Nevertheless, the Court approves the searches without even an inquiry into the officers' ability promptly to take their case before a magistrate.

also justify arrest of the occupants of the vehicle. Since the occupants themselves are to be taken into custody, they will suffer minimal further inconvenience from the temporary immobilization of their vehicle. Even where no arrests are made, persons who wish to avoid a search—either to protect their privacy or to conceal incriminating evidence—will almost certainly prefer a brief loss of the use of the vehicle in exchange for the opportunity to have a magistrate pass upon the justification for the search. To be sure, one can conceive of instances in which the occupant, having nothing to hide and lacking concern for the privacy of the automobile, would be more deeply offended by a temporary immobilization of his vehicle than by a prompt search of it. However, such a person always remains free to consent to an immediate search, thus avoiding any delay. Where consent is not forthcoming, the occupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure. *Terry* v. *Ohio, supra.* The Court's endorsement of a warrantless invasion of that privacy where another course would suffice is simply inconsistent with our repeated stress on the Fourth Amendment's mandate of " 'adherence to judicial processes.' " *E. g., Katz* v. *United States,* 389 U. S., at 357.[9]

Indeed, I believe this conclusion is implicit in the opinion of the unanimous Court in *Preston* v. *United*

[9] Circumstances might arise in which it would be impracticable to immobilize the car for the time required to obtain a warrant—for example, where a single police officer must take arrested suspects to the station, and has no way of protecting the suspects' car during his absence. In such situations it might be wholly reasonable to perform an on-the-spot search based on probable cause. However, where nothing in the situation makes impracticable the obtaining of a warrant, I cannot join the Court in shunting aside that vital Fourth Amendment safeguard.

States, 376 U. S. 364 (1964). The Court there purported to decide whether a factual situation virtually identical to the one now before us was "such as to fall within *any* of the exceptions to the constitutional rule that a search warrant must be had before a search may be made." *Id.,* at 367 (emphasis added). The Court concluded that no exception was available, stating that "since the men were under arrest at the police station and the car was in police custody at a garage, [there was no] danger that the car would be moved out of the locality or jurisdiction." *Id.,* at 368. The Court's reliance on the police custody of the car as its reason for holding "that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment," *ibid.,* can only have been based on the premise that the more reasonable course was for the police to retain custody of the car for the short time necessary to obtain a warrant. The Court expressly did not rely, as suggested today, on the fact that an arrest for vagrancy provided "no cause to believe that evidence of crime was concealed in the auto." *Ante,* at 47; see 376 U. S., at 368; *Wood* v. *Crouse,* 417 F. 2d 394, 397–398 (C. A. 10th Cir. 1969). The Court now discards the approach taken in *Preston,* and creates a special rule for automobile searches that is seriously at odds with generally applied Fourth Amendment principles.

III

The Court accepts the conclusion of the two courts below that the introduction of the bullets found in petitioner's home, if error, was harmless. Although, as explained above, I do not agree that this destroys the relevance of the issue to the ineffectiveness of counsel claim, I agree that the record supports the lower courts' conclusion that this item of evidence, taken alone, was harmless beyond a reasonable doubt.

BALDWIN *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 188. Argued December 9, 1969—Decided June 22, 1970

Appellant was charged with a misdemeanor in the New York City Criminal Court. Under § 40 of the New York City Criminal Court Act all trials in that court are without a jury. Appellant's motion for a jury trial was denied, he was convicted, and given the maximum sentence of a year's imprisonment. The highest state court affirmed, rejecting appellant's contention that § 40 was unconstitutional. *Held:* The judgment is reversed. Pp. 67–76.

24 N. Y. 2d 207, 247 N. E. 2d 260, reversed.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, concluded that defendants accused of serious crimes must, under the Sixth Amendment, as made applicable to the States by the Fourteenth Amendment, be afforded the right to trial by jury, *Duncan* v. *Louisiana,* 391 U. S. 145, and though "petty crimes" may be tried without a jury, no offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized. Pp. 68–74.

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, concluded that the constitutional guarantee of the right to trial by jury applies to "all crimes" and not just to those crimes deemed to be "serious." Pp. 74–76.

William E. Hellerstein argued the cause for appellant. With him on the brief were *Leon B. Polsky* and *Alice Daniel.*

Michael R. Juviler argued the cause for appellee. With him on the brief were *Frank S. Hogan, Lewis R. Friedman,* and *David Otis Fuller, Jr.*

Louis J. Lefkowitz, Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Maria L. Marcus,* Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE announced the judgment of the Court and delivered an opinion in which MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join.

Appellant was arrested and charged with "jostling"—a Class A misdemeanor in New York, punishable by a maximum term of imprisonment of one year.[1] He was brought to trial in the New York City Criminal Court. Section 40 of the New York City Criminal Court Act declares that all trials in that court shall be without a jury.[2] Appellant's pretrial motion for jury trial was accordingly denied. He was convicted and sentenced to imprisonment for the maximum term. The New York

[1] "Jostling" is one of the ways in which legislatures have attempted to deal with pickpocketing. See Denzer & McQuillan, Practice Commentary, N. Y. Penal Law, following § 165.25; Note, Pickpocketing: A Survey of the Crime and Its Control, 104 U. Pa. L. Rev. 408, 419 (1955). The New York law provides:

"A person is guilty of jostling when, in a public place, he intentionally and unnecessarily:

"1. Places his hand in the proximity of a person's pocket or handbag; or

"2. Jostles or crowds another person at a time when a third person's hand is in the proximity of such person's pocket or handbag." N. Y. Penal Law § 165.25.

Appellant was convicted on the testimony of the arresting officer. The officer stated that he had observed appellant, working in concert with another man, remove a loose package from an unidentified woman's pocketbook after the other man had made a "body contact" with her on a crowded escalator. He arrested both men, searched appellant, and found a single $10 bill. No other testimony or evidence was introduced on either side. The trial judge thought the police officer "a very forthright and credible witness" and found appellant guilty. He was subsequently sentenced to one year in the penitentiary. See App. 1–17, 21.

[2] "All trials in the court shall be without a jury. All trials in the court shall be held before a single judge; provided, however, that where the defendant has been charged with a misdemeanor . . . [he] shall be advised that he has the right to a trial in a part of the court held by a panel of three of the judges thereof . . . ." N. Y. C. Crim. Ct. Act § 40 (Supp. 1969).

Court of Appeals affirmed the conviction, rejecting appellant's argument that § 40 was unconstitutional insofar as it denied him an opportunity for jury trial.[3] We noted probable jurisdiction.[4] We reverse.

In *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), we held that the Sixth Amendment, as applied to the States through the Fourteenth, requires that defendants accused of serious crimes be afforded the right to trial by jury. We also reaffirmed the long-established view that so-called "petty offenses" may be tried without a jury.[5] Thus the task before us in this case is the essential if not wholly satisfactory one, see *Duncan,* at 161, of determining the line between "petty" and "serious" for purposes of the Sixth Amendment right to jury trial.

Prior cases in this Court narrow our inquiry and furnish us with the standard to be used in resolving this issue. In deciding whether an offense is "petty," we have sought objective criteria reflecting the seriousness with which society regards the offense, *District of Columbia* v. *Clawans,* 300 U. S. 617, 628 (1937), and we have found the most relevant such criteria in the severity of the maximum authorized penalty. *Frank* v. *United States,* 395 U. S. 147, 148 (1969); *Duncan* v. *Louisiana, supra,* at 159–161; *District of Columbia* v. *Clawans, supra,* at 628. Applying these guidelines, we have held

[3] 24 N. Y. 2d 207, 247 N. E. 2d 260 (1969).

[4] 395 U. S. 932 (1969).

[5] *Duncan* v. *Louisiana,* 391 U. S. 145, 159 (1968); see *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966); *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937); *District of Columbia* v. *Colts,* 282 U. S. 63 (1930); *Schick* v. *United States,* 195 U. S. 65 (1904); *Natal* v. *Louisiana,* 139 U. S. 621 (1891); *Callan* v. *Wilson,* 127 U. S. 540 (1888); Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926). But see Kaye, Petty Offenders Have No Peers!, 26 U. Chi. L. Rev. 245 (1959).

that a possible six-month penalty is short enough to permit classification of the offense as "petty," *Dyke* v. *Taylor Implement Co.*, 391 U. S. 216, 220 (1968); *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), but that a two-year maximum is sufficiently "serious" to require an opportunity for jury trial, *Duncan* v. *Louisiana, supra.* The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized.[6]

New York has urged us to draw the line between "petty" and "serious" to coincide with the line between misdemeanor and felony. As in most States, the maximum sentence of imprisonment for a misdemeanor in New York is one year, for a felony considerably longer.[7] It is also true that the collateral consequences attaching to a felony conviction are more severe than those attaching to a conviction for a misdemeanor.[8] And, like other

[6] Decisions of this Court have looked to both the nature of the offense itself, *District of Columbia* v. *Colts*, 282 U. S. 63 (1930), as well as the maximum potential sentence, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), in determining whether a particular offense was so serious as to require a jury trial. In this case, we decide only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of "petty." None of our decisions involving this issue have ever held such an offense "petty." See cases cited n. 5, *supra.*

[7] N. Y. Penal Law, §§ 10.00, 70.15 (1967).

[8] Both the convicted felon and the convicted misdemeanant may be prevented under New York law from engaging in a wide variety of occupations. In addition, the convicted felon is deprived of certain civil rights, including the right to vote and to hold public office. The relevant statutes are set out in Brief for Appellant C–1 to C–6; Brief for Appellee A8–A12.

States, New York distinguishes between misdemeanors and felonies in determining such things as whether confinement shall be in county or regional jails, rather than state prison,[9] and whether prosecution may proceed by information or complaint, rather than by grand jury indictment.[10] But while these considerations reflect what may readily be admitted—that a felony conviction is more serious than a misdemeanor conviction—they in no way detract from appellant's contention that some misdemeanors are also "serious" offenses. Indeed we long ago declared that the Sixth Amendment right to jury trial "is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen." *Callan* v. *Wilson,* 127 U. S. 540, 549 (1888).[11]

A better guide "[i]n determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial" is disclosed by "the existing laws and practices in the Nation." *Duncan* v. *Louisiana, supra,* at 161. In the federal system, as we noted in *Duncan,* petty offenses

[9] See statutes cited n. 7, *supra;* N. Y. Penal Law § 70.20 (1967).

[10] N. Y. Const., Art. I, § 6; N. Y. Code Crim. Proc. §§ 22, 222 (1958); N. Y. C. Crim. Ct. Act §§ 31, 41 (1963); see, *e. g., People* v. *Bellinger,* 269 N. Y. 265, 199 N. E. 213 (1935); *People* v. *Van Dusen,* 56 Misc. 2d 107, 287 N. Y. S. 2d 741 (1967).

[11] Even New York distinguishes among misdemeanors in terms of the seriousness of the offense. Following a recent revision of the penal law, Class A misdemeanors were made punishable by up to one year's imprisonment, Class B misdemeanors up to three months' imprisonment, and "violations" up to 15 days. As Judge Burke noted in his dissenting opinion below, "an argument can be made with some force that the Legislature has identified petty offenses as those included in the 'violations' category and in the category of class B misdemeanors." 24 N. Y. 2d 207, 225, 247 N. E. 2d 260, 270 (1969).

have been defined as those punishable by no more than six months in prison and a $500 fine.[12] And, with a few exceptions, crimes triable without a jury in the American States since the late 18th century were also generally punishable by no more than a six-month prison term.[13] Indeed, when *Duncan* was decided two Terms ago, we could discover only three instances in which a State denied jury trial for a crime punishable by imprisonment for longer than six months: the Louisiana scheme at issue in *Duncan*, a New Jersey statute punishing disorderly conduct, and the New York City statute at issue in this case.[14] These three instances have since been reduced to one. In response to the decision in *Duncan*, Louisiana has lowered the penalty for certain misdemeanors to six months, and has provided for a jury trial where the penalty still exceeds six months.[15] New Jersey has amended its disorderly persons statute by reducing the maximum penalty to six months' imprisonment and a $500 fine.[16] Even New York State would have provided appellant with a six-man-jury trial for this offense if he had been tried outside the City of New York.[17] In the entire Nation, New York City alone

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[12] 18 U. S. C. § 1.

[13] Frankfurter & Corcoran, n. 5, *supra*.

[14] *Duncan* v. *Louisiana*, 391 U. S. 145, 161 n. 33 (1968).

[15] La. Crim. Proc. Code Ann., Art. 779 (Supp. 1969); see Comment, Jury Trial in Louisiana—Implications of Duncan, 29 La. L. Rev. 118, 127 (1968).

[16] N. J. Rev. Stat. § 2A:169–4 (Supp. 1969).

[17] Compare N. Y. C. Crim. Ct. Act § 40 (Supp. 1969), with N. Y. Uniform Dist. Ct. Act § 2011 (1963); N. Y. Uniform City Ct. Act § 2011 (Supp. 1969). Because of our disposition of this case on appellant's jury-trial claim, we find it unnecessary to consider his argument that New York has violated the Equal Protection Clause by denying him a jury trial, while granting a six-man-jury trial to defendants charged with the identical offense elsewhere in the State. See *Salsburg* v. *Maryland*, 346 U. S. 545 (1954); *Missouri* v. *Lewis*, 101 U. S. 22 (1880). See generally Horowitz & Neitring, Equal

denies an accused the right to interpose between himself and a possible prison term of over six months, the commonsense judgment of a jury of his peers.[18]

It is true that in a number of these States the jury provided consists of less than the 12-man, unanimous-verdict jury available in federal cases.[19] But the primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him.[20] Except for the criminal courts of New York City, every other court in the Nation proceeds under jury trial provisions that reflect this "fundamental decision about the exercise of official power," *Duncan* v. *Louisiana, supra,* at 156, when what is at stake is the deprivation of individual liberty for a period exceeding six months. This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between

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Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State, 15 U. C. L. A. L. Rev. 787–804 (1968).

[18] The various state statutory provisions are set out in the briefs filed in this case. A survey is also included in American Bar Assn. Project on Standards for Criminal Justice, Advisory Committee on the Criminal Trial, Trial by Jury 20–23 (Approved Draft 1968) (recommending that the possibility of six months' imprisonment and a fine of $500, "should be the upper limit upon the definition of 'petty offenses' ").

[19] In a related decision of this date we hold that trial by a six-man jury satisfies the Sixth Amendment requirement of jury trial. *Williams* v. *Florida, post,* p. 78.

[20] Thus a trial before a panel of three judges, which appellant might have requested in lieu of trial before a single judge, see n. 2, *supra,* can hardly serve as a substitute for a jury trial.

offenses that are and that are not regarded as "serious" for purposes of trial by jury.[21]

Of necessity, the task of drawing a line "requires attaching different consequences to events which, when they lie near the line, actually differ very little." *Duncan* v. *Louisiana, supra,* at 161. One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications. We cannot, however, conclude that these administrative conveniences, in light of the practices that now exist in every one of the 50 States as well as in the federal courts, can sim-

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[21] We find little relevance in the fact that Congress has defined misdemeanors punishable by imprisonment up to one year as "minor offenses" for purposes of vesting trial jurisdiction in the United States magistrates rather than commissioners, 18 U. S. C. § 3401 (f) (1964 ed., Supp. IV), or for purposes of authorizing eavesdropping under state court orders, 18 U. S. C. § 2516 (2) (1964 ed., Supp. IV), or for purposes of determining the eligibility for jury service of formerly convicted persons, 28 U. S. C. § 1865 (b) (5) (1964 ed., Supp. IV). Such statutes involve entirely different considerations from those involved in deciding when the important right to jury trial shall attach to a criminal proceeding. Nothing in any of the above Acts suggests that Congress meant to alter its long-standing judgment that "[n]otwithstanding any Act of Congress to the contrary . . . [a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense." 18 U. S. C. § 1.

ilarly justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment.[22] The conviction is

Reversed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

[For dissenting opinion of MR. JUSTICE HARLAN, see *post,* p. 117.]

[For dissenting opinion of MR. JUSTICE STEWART, see *post,* p. 143.]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring in the judgment.

I agree that the appellant here was entitled to a trial by jury in a New York City court for an offense punishable by one year's imprisonment. I also agree that his right to a trial by jury was governed by the Sixth Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. I disagree, however, with the view that a defendant's right to a jury trial under the Sixth Amendment is determined by whether the offense charged is a "petty" or "serious" one. The Constitution guarantees a right of trial by jury in two separate places but in neither does it hint of any difference between "petty" offenses and "serious" offenses. Article III, § 2, cl. 3, provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and Amendment VI provides that "[i]n all criminal prosecutions, the accused shall

[22] Experience in other States, notably California where jury trials are available for all criminal offenses including traffic violations, Cal. Pen. Code § 689 (1956), suggests that the administrative burden is likely to be slight, with a very high waiver rate of jury trials. See H. Kalven & H. Zeisel, The American Jury 18–19 and n. 12 (1966).

enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." Thus the Constitution itself guarantees a jury trial "[i]n all criminal prosecutions" and for "all crimes." Many years ago this Court, without the necessity of an amendment pursuant to Article V, decided that "all crimes" did not mean "all crimes," but meant only "all serious crimes." [1] Today three members of the Court would judicially amend that judicial amendment and substitute the phrase "all crimes in which punishment for more than six months is authorized." This definition of "serious" would be enacted even though those members themselves recognize that imprisonment for less than six months may still have serious consequences. This decision is reached by weighing the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial and magically concluding that the scale tips at six months' imprisonment. Such constitutional adjudication, whether framed in terms of "fundamental fairness," "balancing," or "shocking the conscience," amounts in every case to little more than judicial mutilation of our written Constitution. Those who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary. They decided that the value of a jury trial far outweighed its costs for "all crimes" and "[i]n all criminal prosecutions." Until that language is changed by the constitutionally prescribed method of amendment, I cannot agree that this Court can reassess the balance and substitute its own judgment for that embodied in the Constitution. Since there can be no doubt in this case that Baldwin was charged with and convicted of a "crime" in any relevant sense

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[1] See *Callan* v. *Wilson*, 127 U. S. 540 (1888); *District of Columbia* v. *Colts*, 282 U. S. 63 (1930); *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937); cf. *Schick* v. *United States*, 195 U. S. 65 (1904).

of that word—I agree that his conviction must be reversed because he was convicted without the benefit of a jury trial.[2]

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from today's holding that something in the Sixth and Fourteenth Amendments commands New York City to provide trial by jury for an offense punishable by a confinement of more than six months but less than one year. MR. JUSTICE BLACK has noted correctly that the Constitution guarantees a jury trial "[i]n all criminal prosecutions" (Amendment VI) and for "all Crimes" (Art. III, § 2, cl. 3), but these provisions were not written as a command to the States; they were written at a time when the Federal Government exercised only a limited authority to provide for federal offenses "very grave and few in number."[1] The limited number of serious acts that were made criminal offenses were against federal authority, and were proscribed in a period when administration of the criminal law was regarded as largely the province of the States. The Founding

[2] My view does not require a conclusion that every act which may lead to "minuscule" sanctions by the Government is a "crime" which can only be punished after a jury trial. See *Frank* v. *United States*, 395 U. S. 147, 159–160 (1969) (dissenting opinion). There may be instances in which certain conduct is punished by fines or other sanctions in circumstances that would not make that conduct criminal. Not all official sanctions are imposed in criminal proceedings, but when, as in this case, the sanction bears all the indicia of a criminal punishment, a jury trial cannot be denied by labeling the punishment "petty."

[1] See Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 975–976 (1926), where the authors observe: "Until very recently the occasion for considering the dispensability of trial by jury in the enforcement of the criminal law has hardly presented itself to Congress, except as to the Territories and the District of Columbia, because, on the whole, federal offenses were at once very grave and few in number." (Footnote omitted.)

Fathers therefore cast the constitutional provisions we deal with here as limitations on federal power, not the power of States. State administration of criminal justice included a wide range of petty offenses, and as to many of the minor cases, the States often did not require trial by jury.[2] This state of affairs had not changed appreciably when the Fourteenth Amendment was approved by Congress in 1866 and was ratified by the States in 1868. In these circumstances, the jury trial guarantees of the Constitution properly have been read as extending only to "serious" crimes. I find, however, nothing in the "serious" crime coverage of the Sixth or Fourteenth Amendment that would require this Court to invalidate the particular New York City trial scheme at issue here.

I find it somewhat disconcerting that with the constant urging to adjust ourselves to being a "pluralistic society"—and I accept this in its broad sense—we find constant pressure to conform to some uniform pattern on the theory that the Constitution commands it. I see no reason why an infinitely complex entity such as New York City should be barred from deciding that misdemeanants can be punished with up to 365 days' confinement without a jury trial while in less urban areas another body politic would fix a six-month maximum for offenses tried without a jury. That the "near-uniform judgment of the Nation" is otherwise than the judgment in some of its parts affords no basis for me to read into the Constitution something not found there. What may be a serious offense in one setting—*e. g.*, stealing a horse in Cody, Wyoming, where a horse may be an indispensable part of living—may be considered less serious in another area, and the procedures for finding guilt and fixing punishment in the two locales may rationally differ from each other.

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[2] See *id.*, at 934–965; *District of Columbia* v. *Clawans*, 300 U. S. 617, 626 (1937).

WILLIAMS *v.* FLORIDA

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

No. 927. Argued March 4, 1970—Decided June 22, 1970

Florida has a rule of criminal procedure requiring a defendant who intends to rely on an alibi to disclose to the prosecution the names of his alibi witnesses; the prosecution must in turn disclose to the defense the names of witnesses to rebut the alibi. Failure to comply can result in exclusion of alibi evidence at trial (except for the defendant's own testimony) or, in the case of the State, exclusion of the rebuttal evidence. Petitioner, who was charged with robbery, complied with the rule after failing to be relieved of its requirements. His pretrial motion to impanel a 12-man jury, instead of the six-man jury Florida law provides for noncapital cases, was denied. At trial the State used a deposition of petitioner's alibi witness to impeach the witness. Petitioner was convicted and the appellate court affirmed. Petitioner claims that his Fifth Amendment rights were violated, on the ground that the notice-of-alibi rule required him to furnish the State with information useful in convicting him, and that his Sixth Amendment right was violated on the ground that the six-man jury deprived him of the right to "trial by jury" under the Sixth Amendment. *Held:*

1. Florida's notice-of-alibi rule does not violate the Fifth Amendment as made applicable to the States by the Fourteenth Amendment. Pp. 80–86.

(a) This discovery rule is designed to enhance the search for truth in criminal trials by giving both the accused and the State opportunity to investigate certain facts crucial to the issue of guilt or innocence and comports with requirements for due process and a fair trial. Pp. 81–82.

(b) The rule at most accelerated the timing of petitioner's disclosure of an alibi defense and thus did not violate the privilege against compelled self-incrimination. Pp. 82–86.

2. The constitutional guarantee of a trial by jury does not require that jury membership be fixed at 12, a historically accidental figure. Although accepted at common law, the Framers did not explicitly intend to forever codify as a constitutional requirement a feature not essential to the Sixth Amendment's purpose of inter-

posing between the defendant and the prosecution the commonsense judgment of his peers. Pp. 86–103.

224 So. 2d 406, affirmed.

Richard Kanner argued the cause and filed briefs for petitioner.

Jesse J. McCrary, Jr., Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief were *Earl Faircloth,* Attorney General, and *Ronald W. Sabo,* Assistant Attorney General.

Jack Greenberg and *Michael Meltsner* filed a brief for Virgil Jenkins as *amicus curiae* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

Prior to his trial for robbery in the State of Florida, petitioner filed a "Motion for a Protective Order," seeking to be excused from the requirements of Rule 1.200 of the Florida Rules of Criminal Procedure. That rule requires a defendant, on written demand of the prosecuting attorney, to give notice in advance of trial if the defendant intends to claim an alibi, and to furnish the prosecuting attorney with information as to the place where he claims to have been and with the names and addresses of the alibi witnesses he intends to use.[1] In his motion petitioner openly declared his intent to claim an alibi, but objected to the further disclosure requirements on the ground that the rule "compels the Defendant in a criminal case to be a witness against himself" in violation of his Fifth and Fourteenth Amendment rights.[2] The motion was denied. Petitioner also filed a pretrial motion to impanel a 12-man jury instead of the six-

[1] The full text of the rule is set out in the appendix to this opinion, *infra,* at 104. Subsequent references to an appendix are to the separately bound appendix filed with the briefs in this case [hereinafter "App."].

[2] See App. 5.

man jury provided by Florida law in all but capital cases.[3] That motion too was denied. Petitioner was convicted as charged and was sentenced to life imprisonment.[4] The District Court of Appeal affirmed, rejecting petitioner's claims that his Fifth and Sixth Amendment rights had been violated. We granted certiorari.[5] 396 U. S. 955 (1969).

I

Florida's notice-of-alibi rule is in essence a requirement that a defendant submit to a limited form of pretrial discovery by the State whenever he intends to rely at trial on the defense of alibi. In exchange for the defendant's disclosure of the witnesses he proposes to use to establish that defense, the State in turn is required to notify the defendant of any witnesses it proposes to offer in rebuttal to that defense. Both sides are under a continuing duty promptly to disclose the names and addresses of additional witnesses bearing on the alibi as they become available. The threatened sanction for failure to comply is the exclusion at trial of the defendant's alibi evidence—except for his own testimony—or, in the case of the State, the exclusion of the State's evidence offered in rebuttal of the alibi.[6]

In this case, following the denial of his Motion for a Protective Order, petitioner complied with the alibi

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[3] Fla. Stat. § 913.10 (1) (1967):

"Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases."

[4] See App. 82.

[5] The Supreme Court of Florida had earlier held that it was without jurisdiction to entertain petitioner's direct appeal from the trial court. See *id.*, at 92. Under Florida law, the District Court of Appeal became the highest court from which a decision could be had. See Fla. Const., Art. V, § 4 (2); Fla. App. Rule 2.1a (5)(a); *Ansin* v. *Thurston,* 101 So. 2d 808, 810 (1958).

[6] "For good cause shown" the court may waive the requirements of the rule. Fla. Rule Crim. Proc. 1.200.

rule and gave the State the name and address of one Mary Scotty. Mrs. Scotty was summoned to the office of the State Attorney on the morning of the trial, where she gave pretrial testimony. At the trial itself, Mrs. Scotty, petitioner, and petitioner's wife all testified that the three of them had been in Mrs. Scotty's apartment during the time of the robbery. On two occasions during cross-examination of Mrs. Scotty, the prosecuting attorney confronted her with her earlier deposition in which she had given dates and times that in some respects did not correspond with the dates and times given at trial. Mrs. Scotty adhered to her trial story, insisting that she had been mistaken in her earlier testimony.[7] The State also offered in rebuttal the testimony of one of the officers investigating the robbery who claimed that Mrs. Scotty had asked him for directions on the afternoon in question during the time when she claimed to have been in her apartment with petitioner and his wife.[8]

We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of "due process" or a "fair trial." Florida law provides for liberal discovery by the defendant against the State,[9] and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927,[10]

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[7] See App. 58–60.

[8] *Id.*, at 65–66.

[9] See Fla. Rule Crim. Proc. 1.220. These discovery provisions were invoked by petitioner in the instant case. See App. 3, 4, 8.

[10] See Epstein, Advance Notice of Alibi, 55 J. Crim. L. C. & P. S. 29, 32 (1964).

are now in existence in a substantial number of States.[11] The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.[12] We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Petitioner's major contention is that he was "compelled . . . to be a witness against himself" contrary to the commands of the Fifth and Fourteenth Amendments because the notice-of-alibi rule required him to give the State the name and address of Mrs. Scotty in advance of trial and thus to furnish the State with information useful in convicting him. No pretrial statement of petitioner was introduced at trial; but armed with Mrs. Scotty's name and address and the knowledge

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[11] In addition to Florida, at least 15 States appear to have alibi-notice requirements of one sort or another. See Ariz. Rule Crim. Proc. 192 B (1956); Ind. Ann. Stat. §§ 9–1631 to 9–1633 (1956); Iowa Code § 777.18 (1966); Kan. Stat. Ann. § 62–1341 (1964); Mich. Comp. Laws §§ 768.20, 768.21 (1948); Minn. Stat. § 630.14 (1967); N. J. Rule 3:5–9 (1958); N. Y. Code Crim. Proc. § 295–*l* (1958); Ohio Rev. Code Ann. § 2945.58 (1954); Okla. Stat., Tit. 22, § 585 (1969); Pa. Rule Crim. Proc. 312 (1970); S. D. Comp. Laws §§ 23–37–5, 23–37–6 (1967); Utah Code Ann. § 77–22–17 (1953); Vt. Stat. Ann., Tit. 13, §§ 6561, 6562 (1959); Wis. Stat. § 955.07 (1961). See generally 6 J. Wigmore, Evidence § 1855*b* (3d ed. 1940).

We do not, of course, decide that each of these alibi-notice provisions is necessarily valid in all respects; that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State.

[12] See, *e. g.*, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L. Q. 279, 292.

that she was to be petitioner's alibi witness, the State was able to take her deposition in advance of trial and to find rebuttal testimony. Also, requiring him to reveal the elements of his defense is claimed to have interfered with his right to wait until after the State had presented its case to decide how to defend against it. We conclude, however, as has apparently every other court that has considered the issue,[13] that the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses.[14]

The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to

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[13] *E. g., State* v. *Stump,* 254 Iowa 1181, 119 N. W. 2d 210, cert. denied, 375 U. S. 853 (1963); *State* v. *Baldwin,* 47 N. J. 379, 221 A. 2d 199, cert. denied, 385 U. S. 980 (1966); *People* v. *Rakiec,* 260 App. Div. 452, 457–458, 23 N. Y. S. 2d 607, 612–613 (1940); *Commonwealth* v. *Vecchiolli,* 208 Pa. Super. 483, 224 A. 2d 96 (1966); see *Jones* v. *Superior Court,* 58 Cal. 2d 56, 372 P. 2d 919 (1962); Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif. L. Rev. 89 (1965); Traynor, Ground Lost and Found in Criminal Discovery, 39 N. Y. U. L. Rev. 228 (1964); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif. L. Rev. 135 (1963); 76 Harv. L. Rev. 838 (1963).

[14] We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore. Cf. Brief for *Amicus Curiae* 17–26. It is enough that no such penalty was exacted here.

incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However "testimonial" or "incriminating" the alibi defense proves to be, it cannot be considered "compelled" within the meaning of the Fifth and Fourteenth Amendments.

Very similar constraints operate on the defendant when the State requires pretrial notice of alibi and the naming of alibi witnesses. Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice.[15] That choice must

[15] Petitioner's apparent suggestion to the contrary is simply not borne out by the facts of this case. The mere requirement that petitioner disclose in advance his intent to rely on an alibi in no way "fixed" his defense as of that point in time. The suggestion that the State, by referring to petitioner's proposed alibi in opening or closing statements might have "compelled" him to follow through with the defense in order to avoid an unfavorable inference is a hypothetical totally without support in this record. The first reference to the alibi came from petitioner's own attorney in his opening remarks; the State's response did not come until after the defense had finished direct examination of Mrs. Scotty. Petitioner appears to raise this issue as a possible defect in alibi-notice requirements in general, without seriously suggesting that his choice of defense at trial in this case would have been different but for his prior compliance with the rule. Indeed, in his Motion for a Protective Order, petitioner freely disclosed his intent to rely on an alibi; his only objection was to the further requirement that he disclose the nature of the alibi and the name of the witness. On these facts, then, we simply are not confronted with the question

be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.

In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

Petitioner concedes that absent the notice-of-alibi rule the Constitution would raise no bar to the court's granting the State a continuance at trial on the ground of surprise as soon as the alibi witness is called.[16] Nor

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of whether a defendant can be compelled in advance of trial to select a defense from which he can no longer deviate. We do not mean to suggest, though, that such a procedure must necessarily raise serious constitutional problems. See *State ex rel. Simos* v. *Burke*, 41 Wis. 2d 129, 137, 163 N. W. 2d 177, 181 (1968) ("[i]f we are discussing the right of a defendant to defer until the moment of his testifying the election between alternative and inconsistent alibis, we have left the concept of the trial as a search for truth far behind").

[16] See Reply Brief for Petitioner 2 and n. 1.

would there be self-incrimination problems if, during that continuance, the State was permitted to do precisely what it did here prior to trial: take the deposition of the witness and find rebuttal evidence. But if so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, then surely the same result may be accomplished through pretrial discovery, as it was here, avoiding the necessity of a disrupted trial.[17] We decline to hold that the privilege against compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense.

II

In *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), we held that the Fourteenth Amendment guarantees a right to trial by jury in all criminal cases that—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. Petitioner's trial for robbery on July 3, 1968, clearly falls within the scope of that holding. See *Baldwin* v. *New York, ante,* p. 66; *DeStefano* v. *Woods,* 392 U. S. 631 (1968). The question in this case then is whether the constitutional guarantee of a trial by "jury" necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six. We hold that the 12-man panel is not a necessary ingredient of "trial by jury," and that respondent's refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth.

We had occasion in *Duncan* v. *Louisiana, supra,* to review briefly the oft-told history of the development

[17] It might also be argued that the "testimonial" disclosures protected by the Fifth Amendment include only statements relating to the historical facts of the crime, not statements relating solely to what a defendant proposes to do at trial.

of trial by jury in criminal cases.[18] That history revealed a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement. That same history, however, affords little insight into the considerations that gradually led the size of that body to be generally fixed at 12.[19] Some have suggested that the number 12 was fixed upon simply because that was the number of the presentment jury from the hundred, from which the petit jury developed.[20]

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[18] See *Duncan* v. *Louisiana,* 391 U. S. 145, 151–154 (1968).

[19] In tracing the development of the jury from the time when the jury performed a different, "inquisitory" function, James B. Thayer notes the following:

"In early times the inquisition had no fixed number. In the Frankish empire we are told of 66, 41, 20, 17, 13, 11, 8, 7, 53, 15, and a great variety of other numbers. So also among the Normans it varied much, and 'twelve has not even the place of the prevailing *grundzahl;*' the documents show all sorts of numbers—4, 5, 6, 12, 13–18, 21, 27, 30, and so on. It seems to have been the recognitions under Henry II. that established twelve as the usual number; even then the number was not uniform." The Jury and Its Development, 5 Harv. L. Rev. 295 (1892) (citations omitted).

See J. Thayer, A Preliminary Treatise on Evidence at the Common Law 85 (1898).

Similarly, Professor Scott writes:

"At the beginning of the thirteenth century twelve was indeed the usual but not the invariable number. But by the middle of the fourteenth century the requirement of twelve had probably become definitely fixed. Indeed this number finally came to be regarded with something like superstitious reverence." A. Scott, Fundamentals of Procedure in Actions at Law 75–76 (1922) (footnotes omitted).

[20] 1 W. Holdsworth, A History of English Law 325 (1927); Wells, The Origin of the Petty Jury, 27 L. Q. Rev. 347, 357 (1911). The latter author traces the development of the 12-man petit jury through the following four stages. The first stage saw the development of the presentment jury, made up generally of 12 persons from the hundred, whose function was simply to charge the ac-

Other, less circular but more fanciful reasons for the number 12 have been given, "but they were all brought forward after the number was fixed," [21] and rest on little more than mystical or superstitious insights into the significance of "12." Lord Coke's explanation that the "*number of twelve* is much respected *in holy writ*, as 12 *apostles*, 12 *stones*, 12 *tribes, etc.*," [22] is typical.[23] In

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cused with a crime; the test of his guilt or innocence was by some other means, such as trial by ordeal, battle, or wager of law. In the second stage, the presentment jury began to be asked for its verdict on the guilt or innocence of the person it had accused, and hence began to function as both a petit and a grand jury. In the third stage, "combination juries" were formed to render the verdict in order to broaden the base of representation beyond the local hundred, or borough, to include the county. These juries were formed by adding one or more presentment juries from one or more hundreds, as well as certain officials such as coroners or knights. "These combination juries numbered from twenty-four to eighty-four jurors, and the number became embarrassingly large and unwieldy, and the sense of the personal responsibility of each juror was in danger of being lost." *Id.*, at 356. The obvious fourth step was the creation of a special jury "formed by selecting one or more jurors from each of several of the presentment juries of the hundreds, until the number twelve is reached . . . probably because that was the number of the presentment jury from the hundred. Therefore, just as the presentment jury represented the voice of the hundred in making the accusation, so the jury of 'the country', with the same number, represented the whole county in deciding whether the accused was guilty or not." *Id.*, at 357.

Neither of these authors hazards a guess as to why the presentment jury itself numbered 12.

[21] *Id.*, at 357.

[22] 1 E. Coke, Institutes of the Laws of England *155a (1st Amer. ed. 1812).

[23] Thus John Proffatt in his treatise on jury trials notes that the reasons why the number of the petit jury is 12, are "quaintly given" in Duncombe's Trials per Pais, as follows:

"[T]his number is no less esteemed by our own law than by holy writ. If the twelve apostles on their twelve thrones must

short, while sometime in the 14th century the size of the jury at common law came to be fixed generally at 12,[24] that particular feature of the jury system appears to have been a historical accident, unrelated to the great

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try us in our eternal state, good reason hath the law to appoint the number twelve to try us in our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve." Trial by Jury 112 n. 4 (1877), quoting G. Duncombe, 1 Trials per Pais 92–93 (8th ed. 1766).

Attempts have also been made to trace the number 12 to early origins on the European Continent, particularly in Scandinavia. See F. Busch, 1 Law and Tactics in Jury Trials § 24 (1959). See generally W. Forsyth, History of Trial by Jury 4 (1852); T. Repp, Trial by Jury (1832). But even as to the continental practice, no better reasons are discovered for the number 12. Thus Proffatt, in discussing the ancient Scandinavian tribunals, comments:

"Twelve was not only the common number throughout Europe, but was the favorite number in every branch of the polity and jurisprudence of the Gothic nations.

"The singular unanimity in the selection of the number twelve to compose certain judicial bodies, is a remarkable fact in the history of many nations. Many have sought to account for this general custom, and some have based it on religious grounds. One of the ancient kings of Wales, Morgan of Gla-Morgan, to whom is accredited the adoption of the trial by jury in A. D. 725, calls it the 'Apostolic Law.' 'For,' said he, 'as Christ and his twelve apostles were finally to judge the world, so human tribunals should be composed of the king and twelve wise men.'" Proffatt, Trial by Jury 11 n. 2 (1877) (citations omitted).

See also 1 L. Pike, A History of Crime in England 122 (1873).

In this connection it is interesting to note the following oath, required of the early 12-man jury:

"Hear this, ye Justices! that I will speak the truth of that which ye shall ask of me on the part of the king, and I will do faithfully to the best of my endeavour. So help me God, and these holy Apostles." W. Forsyth, Trial by Jury 197 (1852).

See Proffatt, *supra,* at 42.

[24] See *supra,* n. 19.

purposes which gave rise to the jury in the first place.[25] The question before us is whether this accidental feature of the jury has been immutably codified into our Constitution.

This Court's earlier decisions have assumed an affirmative answer to this question. The leading case so construing the Sixth Amendment is *Thompson* v. *Utah,* 170 U. S. 343 (1898). There the defendant had been tried and convicted by a 12-man jury for a crime committed in the Territory of Utah. A new trial was granted, but by that time Utah had been admitted as a State. The defendant's new trial proceeded under Utah's Constitution, providing for a jury of only eight members. This Court reversed the resulting conviction, holding that Utah's constitutional provision was an *ex post facto* law as applied to the defendant. In reaching its conclusion, the Court announced that the Sixth Amendment was applicable to the defendant's trial when Utah was a Territory, and that the jury referred to in the Amendment was a jury "constituted, as it was at common law, of twelve persons, neither more nor less." 170 U. S., at 349. Arguably unnecessary for the result,[26]

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[25] P. Devlin, Trial by Jury 8 (1956); F. Heller, The Sixth Amendment 64 (1951); W. Willoughby, Principles of Judicial Administration 503 (1929); Tamm, The Five-Man Civil Jury: A Proposed Constitutional Amendment, 51 Geo. L. J. 120, 128–130 (1962); Wiehl, The Six Man Jury, 4 Gonzaga L. Rev. 35, 38–39 (1968); see Thayer, *supra,* n. 19, at 89–90; White, Origin and Development of Trial by Jury, 29 Tenn. L. Rev. 8, 15–16, 17 (1959).

[26] At the time of the crime and at the first trial the statutes of the Territory of Utah—wholly apart from the Sixth Amendment—ensured Thompson a 12-man jury. See 170 U. S., at 345. The Court found the *ex post facto* question easy to resolve, once it was assumed that Utah's subsequent constitutional provision deprived Thompson of a right previously guaranteed him by the United States Constitution; the possibility that the same result might

this announcement was supported simply by referring to the Magna Carta,[27] and by quoting passages from treatises which noted—what has already been seen—that at common law the jury did indeed consist of 12. Noticeably absent was any discussion of the essential step in the argument: namely, that every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a "jury."[28] Subsequent decisions have reaffirmed the

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have been reached solely on the basis of the rights formerly accorded Thompson under the territorial statute was hinted at, but was not explicitly considered.

[27] Whether or not the Magna Carta's reference to a judgment by one's peers was a reference to a "jury"—a fact that historians now dispute, see, *e. g.*, 1 F. Pollock & F. Maitland, The History of English Law Before the Time of Edward I, p. 173 n. 3 (2d ed. 1909); Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 922 n. 14 (1926) (criticizing *Thompson* v. *Utah*'s reliance on the document "long after scholars had exposed this ancient error")—it seems clear that the Great Charter is not authority for fixing the number of the jury at 12. See W. McKechnie, Magna Carta 134–138, 375–382 (1958); Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 672 (1918).

As the text indicates, the question is not whether the 12-man jury is traced to 1215 or to 1789, but whether that particular feature must be accepted as a *sine qua non* of the jury trial guaranteed by the Constitution. See Heller, *supra,* n. 25, at 64.

[28] The *Thompson* opinion also reasoned that if a jury can be reduced from 12 to eight, then there was nothing to prevent its similarly being reduced to four or two or even zero, thus dispensing with the jury altogether. See 170 U. S., at 353. That bit of "logic," resurrected today in Mr. Justice Harlan's concurring opinion, *post,* at 126, suffers somewhat as soon as one recognizes that he can get off the "slippery slope" before he reaches the bottom. We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.

announcement in *Thompson,* often in dictum [29] and usually by relying—where there was any discussion of the issue at all—solely on the fact that the common-law jury consisted of 12.[30] See *Patton* v. *United States,* 281 U. S. 276, 288 (1930); [31] *Rassmussen* v. *United States,* 197 U. S. 516, 519 (1905); *Maxwell* v. *Dow,* 176 U. S. 581, 586 (1900).

While "the intent of the Framers" is often an elusive quarry, the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Con-

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[29] A ruling that the Sixth Amendment refers to a common-law jury was essential to the holding in *Rassmussen* v. *United States,* 197 U. S. 516 (1905), where the Court held invalid a conviction by a six-man jury in Alaska. The ruling was accepted at the Government's concession without discussion or citation; the major focus of the case was on the question whether the Sixth Amendment was applicable to the territory in question at all. See 197 U. S., at 519.

[30] Similarly, cases interpreting the jury trial provisions of the Seventh Amendment generally leap from the fact that the jury possessed a certain feature at common law to the conclusion that that feature must have been preserved by the Amendment's simple reference to trial by "jury." *E. g., Capital Traction Co.* v. *Hof,* 174 U. S. 1, 13–14 (1899); *American Publishing Co.* v. *Fisher,* 166 U. S. 464, 468 (1897). While much of our discussion in this case may be thought to bear equally on the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional references to the "common law" that occur in the Seventh Amendment might support a different interpretation. See *infra,* at 97 and n. 44.

[31] The *Patton* opinion furnishes an interesting illustration of the Court's willingness to re-examine earlier assertions about the nature of "jury trial" in almost every respect except the 12-man-jury requirement. *Patton* reaffirmed the 12-man requirement with a simple citation to *Thompson* v. *Utah,* while at the same time discarding as "dictum" the equally dogmatic assertion in *Thompson* that the requirement could not be waived. See 281 U. S., at 293.

stitution. Provisions for jury trial were first placed in the Constitution in Article III's provision that "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." [32] The "very scanty history [of this provision] in the records of the Constitutional Convention" [33] sheds little light either way on the intended correlation between Article III's "jury" and the features of the jury at common law.[34] Indeed, pending and after the adoption of the Constitution, fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a "jury of the vicinage." [35] That concern, as well as the concern

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[32] U. S. Const., Art. III, § 2, cl. 3.

[33] Frankfurter & Corcoran, *supra,* n. 27, at 969.

[34] The only attention given the jury trial provisions involved such questions as whether the right should also be extended to civil cases, see Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 292–294 (1966), whether the wording should embrace the "trial of all crimes" or the "trial of all criminal offenses," see Frankfurter & Corcoran, *supra,* n. 27, at 969, and how to provide for the trial of crimes not committed in any State, *id.,* at 969 n. 244. See 2 M. Farrand, Records of the Federal Convention 144, 173, 187, 433, 438, 576, 587–588, 601, 628 (1911). See also 4 *id.,* at 121 (1937) (indexing all references to Art. III, § 2, cl. 3 in Farrand's records).

[35] See Heller, *supra,* n. 25, at 31–33, 93; Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 105 (1923). Technically, "vicinage" means neighborhood, and "vicinage of the jury" meant jury of the neighborhood or, in medieval England, jury of the county. See 4 W. Blackstone, Commentaries *350–351. While Article III provided for venue, it did not impose the explicit juror-residence requirement associated with the concept of "vicinage." See *Maryland* v. *Brown,* 295 F. Supp. 63, 80 (1969). In the Virginia Convention, Madison conceded that the omission was deliberate and defended it as follows:

"It was objected yesterday, that there was no provision for a jury from the vicinage. If it could have been done with safety, it would

to preserve the right to jury in civil as well as criminal cases, furnished part of the impetus for introducing amendments to the Constitution that ultimately resulted in the jury trial provisions of the Sixth and Seventh Amendments. As introduced by James Madison in the House, the Amendment relating to jury trial in criminal cases would have provided that:

> "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . ." [36]

The Amendment passed the House in substantially this form, but after more than a week of debate in the Senate it returned to the House considerably altered.[37] While records of the actual debates that occurred in

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not have been opposed. It might so happen that a trial would be impracticable in the county. Suppose a rebellion in a whole district, would it not be impossible to get a jury? The trial by jury is held as sacred in England as in America. There are deviations of it in England: yet greater deviations have happened here since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from, yet in some cases it is necessary. It must be therefore left to the discretion of the legislature to modify it according to circumstances. This is a complete and satisfactory answer." 3 M. Farrand, Records of the Federal Convention 332 (1911).

[36] 1 Annals of Cong. 435 (1789).

[37] The Senate Journal indicates that every clause in the House version of the proposed Amendment was deleted except the clause relating to grand jury indictment. Senate Journal, Sept. 4, 1789, 1st Cong., 1st Sess., 71. A subsequent motion to restore the words providing for trial "by an impartial jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites" failed of adoption. Senate Journal, Sept. 9, 1789, 1st Cong., 1st Sess., 77.

the Senate are not available,[38] a letter from Madison to Edmund Pendleton on September 14, 1789, indicates that one of the Senate's major objections was to the "vicinage" requirement in the House version.[39] A conference committee was appointed. As reported in a second letter by Madison on September 23, 1789, the Senate remained opposed to the vicinage requirement, partly because in its view the then-pending judiciary bill—which was debated at the same time as the Amendments—adequately preserved the common-law vicinage feature, making it unnecessary to freeze that requirement into the Constitution. "The Senate," wrote Madison:

> "are . . . inflexible in opposing a definition of the *locality* of Juries. The vicinage they contend is either too vague or too strict a term; too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the county. It was proposed to insert after the word Juries, 'with the accustomed requisites,' leaving the definition to be construed according to the judgment of professional

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[38] The principal source of information on the proceedings of the Senate in the First Congress is the Journal of Senator Maclay of Pennsylvania, who unfortunately was ill during the Senate debate on the amendments. See Journal of William Maclay 144–151 (1927); Heller, *supra,* n. 25, at 31–32.

[39] Madison writes:

"The Senate have sent back the plan of amendments with some alterations, which strike, in my opinion, at the most salutary articles. In many of the States, juries, even in criminal cases, are taken from the State at large; in others, from districts of considerable extent; in very few from the County alone. Hence a dislike to the restraint with respect to *vicinage,* which has produced a negative on that clause. . . . Several others have had a similar fate." Letter from James Madison to Edmund Pendleton, Sept. 14, 1789, in 1 Letters and Other Writings of James Madison 491 (1865).

> men. Even this could not be obtained. . . . The Senate suppose, also, that the provision for vicinage in the Judiciary bill will sufficiently quiet the fears which called for an amendment on this point." [40]

The version that finally emerged from the Committee was the version that ultimately became the Sixth Amendment, ensuring an accused:

> "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."

Gone were the provisions spelling out such common-law features of the jury as "unanimity," or "the accustomed requisites." And the "vicinage" requirement itself had been replaced by wording that reflected a compromise between broad and narrow definitions of that term, and that left Congress the power to determine the actual size of the "vicinage" by its creation of judicial districts.[41]

Three significant features may be observed in this sketch of the background of the Constitution's jury trial provisions. First, even though the vicinage requirement was as much a feature of the common-law jury as was the 12-man requirement,[42] the mere reference to "trial by jury" in Article III was not interpreted to include that feature. Indeed, as the subsequent debates over the Amendments indicate, disagreement arose over whether the feature should be included at all in its common-law sense, resulting in the compromise described above. Second, provisions that would have explicitly

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[40] Letter from James Madison to Edmund Pendleton, Sept. 23, 1789, in *id.*, at 492–493. See generally Heller, *supra,* n. 25, at 28–34; Warren, *supra,* n. 35, at 118–132.

[41] See Heller, *supra,* n. 25, at 93.

[42] Proffatt, *supra,* n. 23, at 119; 1 G. Curtis, History of the Origin, Formation, and Adoption of the Constitution of the United States 23 (1863).

tied the "jury" concept to the "accustomed requisites" of the time were eliminated. Such action is concededly open to the explanation that the "accustomed requisites" were thought to be already included in the concept of a "jury." But that explanation is no more plausible than the contrary one: that the deletion had some substantive effect. Indeed, given the clear expectation that a substantive change would be effected by the inclusion or deletion of an explicit "vicinage" requirement, the latter explanation is, if anything, the more plausible. Finally, contemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect. Thus, the Judiciary bill, signed by the President on the same day that the House and Senate finally agreed on the form of the Amendments to be submitted to the States, provided in certain cases for the narrower "vicinage" requirements that the House had wanted to include in the Amendments.[43] And the Seventh Amendment, providing for jury trial in civil cases, explicitly added that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[44]

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[43] The Act provided in § 29:

"That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence." Act of Sept. 24, 1789, § 29, 1 Stat. 88.

[44] Similarly, the First Continental Congress resolved in October 1774:

"That the respective colonies are entitled *to the common law of England,* and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, *according to the course of that law.*" 1 Journals of the Continental Congress 69 (C. Ford ed. 1904) (emphasis added). And the Northwest Ordi-

We do not pretend to be able to divine precisely what the word "jury" imported to the Framers, the First Congress, or the States in 1789. It may well be that the usual expectation was that the jury would consist of 12,[45] and that hence, the most likely con-

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nance of 1787 declared that the inhabitants of that Territory should "always be entitled to the benefits of the writs of *habeas corpus,* and of the trial by jury . . . and of judicial proceedings *according to the course of the common law.*" Ordinance of 1787, Art. II, 1 U. S. C. XXXVIII (emphasis added). See *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 5–8 (1899) (concluding from these sources that the explicit reference to the "common law" in the Seventh Amendment, referred to the rules of the common law of England, not the rules as modified by local or state practice).

[45] One scholar, however, in investigating the reception of the English common law by the early American colonies, notes that the process:

"was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles." Reinsch, The English Common Law in the Early American Colonies, in 1 Select Essays in Anglo-American Legal History 367, 415 (1907).

With respect to the jury trial in particular, while most of the colonies adopted the institution in its English form at an early date, more than one appears to have accepted the institution at various stages only with "various modifications." See *id.,* at 412. Thus Connecticut permitted majority decision in case of continued failure to agree, *id.,* at 386, Virginia expressed regret at being unable to retain the "vicinage" requirement of the English jury, *id.,* at 405, Pennsylvania permitted majority verdicts and employed juries of six or seven, *id.,* at 398, and the Carolinas discontinued the unanimity requirement, 5 F. Thorpe, Federal and State Constitutions 2781 (1909) (Art. 69, "Fundamental Constitutions of Carolina"). See also Heller, *supra,* n. 25, at 13–21.

The States that had adopted Constitutions by the time of the Philadelphia Convention in 1787 appear for the most part to have either explicitly provided that the jury would consist of 12, see Va. Const. of 1776, § 8, in 7 F. Thorpe, Federal and State Constitutions

clusion to be drawn is simply that little thought was actually given to the specific question we face today. But there is absolutely no indication in "the intent of the Framers" of an explicit decision to equate the constitutional and common-law characteristics of the jury. Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the

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3813 (1909), or to have subsequently interpreted their jury trial provisions to include that requirement. In at least one instance involving conviction by eight jurors, a subsequent South Carolina decision interpreting the provision for trial by "jury," refused to declare the 12-man requirement an essential feature of that institution, immune from change by the legislature. See *State* v. *Starling*, 15 Rich. 120, 134 (S. C. Ct. of Errors 1867). The conviction was affirmed without deciding the question, since the State had by that time adopted a Constitution specifically empowering the legislature to determine the number of jurors in certain inferior courts. South Carolina remains today one of apparently five States, including Florida, that provide for juries of less than 12 in felony cases where imprisonment for more than one year may be imposed. See La. Const., Art. 7, § 41; La. Crim. Proc. Code Ann., Art. 779 (Supp. 1969); S. C. Const., Art. 1, §§ 18, 25; Art. 5, § 22; S. C. Code Ann. §§ 15–618, 15–612 (1962); Tex. Const., Art. 1, §§ 10, 15; Art. 5, § 17; Tex. Code Crim. Proc., Arts. 4.07, 37.02 (1966); Tex. Pen. Code, Art. 1148 (1961); Utah Const., Art. 1, §§ 10, 12; Utah Code Ann. § 78–46–5 (1953).

In addition, it appears that at least nine States presently provide for less than 12-man juries in trials of certain offenses carrying maximum penalties of one year's imprisonment. See Brief for Appellee A13–A15, *Baldwin* v. *New York*, *ante*, p. 66 (collecting statutory provisions). See also 17 Mass. L. Q. No. 4, p. 12 (1932) (noting States that have interpreted the "right of trial by jury" to permit trial by less than 12 in certain cases). For a "poll of state practice," see MR. JUSTICE HARLAN's concurring opinion, *post*, at 122, 136–137, and App.

purposes of the jury trial. Measured by this standard, the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment.

The purpose of the jury trial, as we noted in *Duncan,* is to prevent oppression by the Government. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana, supra,* at 156. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained.[46] And, certainly the reliability of the jury

[46] We intimate no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial. While much of the above historical discussion applies as well to the unanimity as to the 12-man requirement, the former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof. See *Hibdon* v. *United States,* 204 F. 2d 834, 838 (C. A. 6th Cir. 1953); Tamm, *supra,* n. 25, at 139. But cf. Comment, Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt, 21 U. Chi. L. Rev. 438, 441–443

as a factfinder hardly seems likely to be a function of its size.

It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more "chances" of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal.[47] What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries.[48] In short, neither currently available evidence nor theory[49] suggests that the 12-man

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(1954). See generally American Bar Association Project on Standards for Criminal Justice, Trial by Jury 42–45 (Approved Draft 1968).

[47] It is true, of course, that the "hung jury" might be thought to result in a minimal advantage for the defendant, who remains unconvicted and who enjoys the prospect that the prosecution will eventually be dropped if subsequent juries also "hang." Thus a 100-man jury would undoubtedly be more favorable for defendants than a 12-man jury. But when the comparison is between 12 and six, the odds of continually "hanging" the jury seem slight, and the numerical difference in the number needed to convict seems unlikely to inure perceptibly to the advantage of either side.

[48] See Wiehl, *supra,* n. 25, at 40–41; Tamm, *supra,* n. 25, at 134–136; Cronin, Six-Member Juries in District Courts, 2 Boston B. J. No. 4, p. 27 (1958); Six-Member Juries Tried in Massachusetts District Court, 42 J. Am. Jud. Soc. 136 (1958). See also New Jersey Experiments with Six-Man Jury, 9 Bull. of the Section of Jud. Admin. of the ABA (May 1966); Phillips, A Jury of Six in All Cases, 30 Conn. B. J. 354 (1956).

[49] Studies of the operative factors contributing to small group deliberation and decisionmaking suggest that jurors in the minority on the first ballot are likely to be influenced by the proportional size of the majority aligned against them. See H. Kalven & H. Zeisel, The American Jury 462–463, 488–489 (1966); C. Hawkins, Interaction and Coalition Realignments in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations 13, 146, 156, Aug. 17,

jury is necessarily more advantageous to the defendant than a jury composed of fewer members.

Similarly, while in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, see, *e. g., Carter* v. *Jury Commission,* 396 U. S. 320, 329–330 (1970), the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.

We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance "except to mystics." *Duncan* v. *Louisiana, supra,* at 182 (HARLAN, J., dissenting). To read the Sixth Amendment as

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1960 (unpublished thesis on file at Library of Congress); cf. Asch, Effects of Group Pressure Upon the Modification and Distortion of Judgments, in Readings in Social Psychology 2 (G. Swanson, T. Newcomb & E. Hartley et al., eds., 1952). See generally Note, On Instructing Deadlocked Juries, 78 Yale L. J. 100, 108 and n. 30 (and authorities cited), 110–111 (1968). Thus if a defendant needs initially to persuade four jurors that the State has not met its burden of proof in order to escape ultimate conviction by a 12-man jury, he arguably escapes by initially persuading half that number in a six-man jury; random reduction, within limits, of the absolute number of the jury would not affect the outcome. See also C. Joiner, Civil Justice and the Jury 31, 83 (1962) (concluding that the deliberative process should be the same in either the six- or 12-man jury).

forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions. We do not mean to intimate that legislatures can never have good reasons for concluding that the 12-man jury is preferable to the smaller jury, or that such conclusions—reflected in the provisions of most States and in our federal system [50]—are in any sense unwise. Legislatures may well have their own views about the relative value of the larger and smaller juries, and may conclude that, wholly apart from the jury's primary function, it is desirable to spread the collective responsibility for the determination of guilt among the larger group. In capital cases, for example, it appears that no State provides for less than 12 jurors—a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty. Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury. Consistent with this holding, we conclude that petitioner's Sixth Amendment rights, as applied to the States through the Fourteenth Amendment, were not violated by Florida's decision to provide a six-man rather than a 12-man jury. The judgment of the Florida District Court of Appeal is

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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[50] See Fed. Rule Crim. Proc. 23 (b) ("[j]uries shall be of 12").

APPENDIX TO OPINION OF THE COURT

Fla. Rule Crim. Proc. 1.200:

"Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a

defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule."

MR. CHIEF JUSTICE BURGER, concurring.

I join fully in MR. JUSTICE WHITE's opinion for the Court. I see an added benefit to the notice-of-alibi rule in that it will serve important functions by way of disposing of cases without trial in appropriate circumstances—a matter of considerable importance when courts, prosecution offices, and legal aid and defender agencies are vastly overworked. The prosecutor upon receiving notice will, of course, investigate prospective alibi witnesses. If he finds them reliable and unimpeachable he will doubtless re-examine his entire case and this process would very likely lead to dismissal of the charges. In turn he might be obliged to determine why false charges were instituted and where the breakdown occurred in the examination of evidence that led to a charge.

On the other hand, inquiry into a claimed alibi defense may reveal it to be contrived and fabricated and the

witnesses accordingly subject to impeachment or other attack. In this situation defense counsel would be obliged to re-examine his case and, if he found his client has proposed the use of false testimony, either seek to withdraw from the case or try to persuade his client to enter a plea of guilty, possibly by plea discussions which could lead to disposition on a lesser charge.

In either case the ends of justice will have been served and the processes expedited. These are the likely consequences of an enlarged and truly reciprocal pretrial disclosure of evidence and the move away from the "sporting contest" idea of criminal justice.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring in part and dissenting in part.

The Court today holds that a State can, consistently with the Sixth Amendment to the United States Constitution, try a defendant in a criminal case with a jury of six members. I agree with that decision for substantially the same reasons given by the Court. My Brother HARLAN, however, charges that the Court's decision on this point is evidence that the "incorporation doctrine," through which the specific provisions of the Bill of Rights are made fully applicable to the States under the same standards applied in federal courts [1] will somehow result in a "dilution" of the protections required by those provisions. He asserts that this Court's desire to relieve the States from the rigorous requirements of the Bill of Rights is bound to cause re-examination and modification of prior decisions interpreting those provisions as applied in federal courts in order simultaneously to apply the provisions equally to the State and Federal Governments and to avoid undue restrictions on the States. This assertion finds no support in today's decision or any

[1] See cases cited in *In re Winship*, 397 U. S. 358, 382 n. 11 (1970) (BLACK, J., dissenting).

other decision of this Court. We have emphatically "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.' " *Malloy* v. *Hogan,* 378 U. S. 1, 10–11 (1964). Today's decision is in no way attributable to any desire to dilute the Sixth Amendment in order more easily to apply it to the States, but follows solely as a necessary consequence of our duty to re-examine prior decisions to reach the correct constitutional meaning in each case. The broad implications in early cases indicating that only a body of 12 members could satisfy the Sixth Amendment requirement arose in situations where the issue was not squarely presented and were based, in my opinion, on an improper interpretation of that amendment. Had the question presented here arisen in a federal court before our decision in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), this Court would still, in my view, have reached the result announced today. In my opinion the danger of diluting the Bill of Rights protections lies not in the "incorporation doctrine," but in the "shock the conscience" test on which my Brother HARLAN would rely instead—a test which depends, not on the language of the Constitution, but solely on the views of a majority of the Court as to what is "fair" and "decent."

The Court also holds that a State can require a defendant in a criminal case to disclose in advance of trial the nature of his alibi defense and give the names and addresses of witnesses he will call to support that defense. This requirement, the majority says, does not violate the Fifth Amendment prohibition against compelling a criminal defendant to be a witness against himself. Although this case itself involves only a notice-of-alibi provision, it is clear that the decision means that a State can require a defendant to disclose in advance of trial any

and all information he might possibly use to defend himself at trial. This decision, in my view, is a radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself.

I

The core of the majority's decision is an assumption that compelling a defendant to give notice of an alibi defense before a trial is no different from requiring a defendant, after the State has produced the evidence against him at trial, to plead alibi before the jury retires to consider the case. This assumption is clearly revealed by the statement that "the pressures that bear on [a defendant's] pre-trial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts." *Ante,* at 85. That statement is plainly and simply wrong as a matter of fact and law, and the Court's holding based on that statement is a complete misunderstanding of the protections provided for criminal defendants by the Fifth Amendment and other provisions of the Bill of Rights.[2]

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[2] As I have frequently stated, in my opinion the Fourteenth Amendment was in part adopted in order to make the provisions of the Bill of Rights fully applicable to the States. See, *e. g., Adamson* v. *California,* 332 U. S. 46, 68 (1947) (dissenting opinion). This Court has now held almost all these provisions do apply to the States as well as the Federal Government, including the Fifth Amendment provision involved in this case. See *Malloy* v. *Hogan,* 378 U. S. 1 (1964); cases cited in *In re Winship,* 397 U. S. 358, 382 n. 11 (1970) (BLACK, J., dissenting). When this Court is called upon to consider the meaning of a particular provision of the Bill of Rights—whether in a case arising from a state court or a

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When a defendant is required to indicate whether he might plead alibi in advance of trial, he faces a vastly different decision from that faced by one who can wait until the State has presented the case against him before making up his mind. Before trial the defendant knows only what the State's case *might* be. Before trial there is no such thing as the "strength of the State's case"; there is only a range of possible cases. At that time there is no certainty as to what kind of case the State will ultimately be able to prove at trial. Therefore any appraisal of the desirability of pleading alibi will be beset with guesswork and gambling far greater than that accompanying the decision at the trial itself. Any lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about.

The Florida system, as interpreted by the majority, plays upon this inherent uncertainty in predicting the possible strength of the State's case in order effectively to coerce defendants into disclosing an alibi defense that may never be actually used. Under the Florida rule, a defendant who might plead alibi must, at least 10 days before the date of trial, tell the prosecuting attorney that he might claim an alibi or else the defendant faces the real threat that he may be completely barred

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federal one—it is necessary to look to the specific language of the provision and the intent of the Framers when the Bill of Rights itself was adopted. This approach is necessary, not because the Framers intended the Bill of Rights to apply to the States when it was proposed in 1789, but because the application of those provisions to the States by the Fourteenth Amendment requires that the original intent be the governing consideration in state as well as federal cases.

from presenting witnesses in support of his alibi. According to the Court, however, if he gives the required notice and later changes his mind "[n]othing in such a rule requires [him] to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice." *Ante,* at 84. Thus in most situations defendants with any possible thought of pleading alibi are in effect compelled to disclose their intentions in order to preserve the possibility of later raising the defense at trial. Necessarily few defendants and their lawyers will be willing to risk the loss of that possibility by not disclosing the alibi. Clearly the pressures on defendants to plead an alibi created by this procedure are not only quite different from the pressures operating at the trial itself, but are in fact significantly greater. Contrary to the majority's assertion, the pretrial decision cannot be analyzed as simply a matter of "timing," influenced by the same factors operating at the trial itself.

The Court apparently also assumes that a defendant who has given the required notice can abandon his alibi without hurting himself. Such an assumption is implicit in and necessary for the majority's argument that the pretrial decision is no different from that at the trial itself. I, however, cannot so lightly assume that pretrial notice will have no adverse effects on a defendant who later decides to forgo such a defense. Necessarily the defendant will have given the prosecutor the names of persons who may have some knowledge about the defendant himself or his activities. Necessarily the prosecutor will have every incentive to question these persons fully, and in doing so he may discover new leads or evidence. Undoubtedly there will be situations in which the State will seek to use such information—information it would probably never have obtained but for the defendant's coerced cooperation.

B

It is unnecessary for me, however, to engage in any such intellectual gymnastics concerning the practical effects of the notice-of-alibi procedure, because the Fifth Amendment itself clearly provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." If words are to be given their plain and obvious meaning, that provision, in my opinion, states that a criminal defendant cannot be required to give evidence, testimony, or any other assistance to the State to aid it in convicting him of crime. Cf. *Schmerber* v. *California,* 384 U. S. 757, 773 (1966) (BLACK, J., dissenting). The Florida notice-of-alibi rule in my opinion is a patent violation of that constitutional provision because it requires a defendant to disclose information to the State so that the State can use that information to destroy him. It seems to me at least slightly incredible to suggest that this procedure may have some beneficial effects for defendants. There is no need to encourage defendants to take actions they think will help them. The fear of conviction and the substantial cost or inconvenience resulting from criminal prosecutions are more than sufficient incentives to make defendants want to help themselves. If a defendant thinks that making disclosure of an alibi before trial is in his best interests, he will obviously do so. And the only time the State needs the compulsion provided by this procedure is when the defendant has decided that such disclosure is likely to hurt his case.

It is no answer to this argument to suggest that the Fifth Amendment as so interpreted would give the defendant an unfair element of surprise, turning a trial into a "poker game" or "sporting contest," for that tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights. The Framers

were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials. A defendant, they said, is entitled to notice of the charges against him, trial by jury, the right to counsel for his defense, the right to confront and cross-examine witnesses, the right to call witnesses in his own behalf, and the right not to be a witness against himself. All of these rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State. The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: "Prove it!"

The Bill of Rights thus sets out the type of constitutionally required system that the State must follow in order to convict individuals of crime. That system requires that the State itself must bear the entire burden without any assistance from the defendant. This requirement is clearly indicated in the Fifth Amendment itself, but it is equally apparent when all the specific provisions of the Bill of Rights relating to criminal prosecutions are considered together. And when a question concerning the constitutionality of some aspect of criminal procedure arises, this Court must consider all those provisions and interpret them together. The Fifth Amendment prohibition against compelling a defendant

to be a witness against himself is not an isolated, distinct provision. It is part of a system of constitutionally required procedures, and its true meaning can be seen only in light of all those provisions. "Strict construction" of the words of the Constitution does not mean that the Court can look only to one phrase, clause, or sentence in the Constitution and expect to find the right answer. Each provision has clear and definite meaning, and various provisions considered together may have an equally clear and definite meaning. It is only through sensitive attention to the specific words, the context in which they are used, and the history surrounding the adoption of those provisions that the true meaning of the Constitution can be discerned.

This constitutional right to remain absolutely silent cannot be avoided by superficially attractive analogies to any so-called "compulsion" inherent in the trial itself that may lead a defendant to put on evidence in his own defense. Obviously the Constitution contemplates that a defendant can be "compelled" to stand trial, and obviously there will be times when the trial process itself will require the defendant to do something in order to try to avoid a conviction. But nothing in the Constitution permits the State to add to the natural consequences of a trial and compel the defendant in advance of trial to participate in any way in the State's attempt to condemn him.

A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required

by the Bill of Rights were well worth any loss in "efficiency" that resulted. Their decision constitutes the final word on the subject, absent some constitutional amendment. That decision should not be set aside as the Court does today.

II

On the surface this case involves only a notice-of-alibi provision, but in effect the decision opens the way for a profound change in one of the most important traditional safeguards of a criminal defendant. The rationale of today's decision is in no way limited to alibi defenses, or any other type or classification of evidence. The theory advanced goes at least so far as to permit the State to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics he plans to use at that trial. In each case the justification will be that the rule affects only the "timing" of the disclosure, and not the substantive decision itself. This inevitability is clearly revealed by the citation to *Jones* v. *Superior Court,* 58 Cal. 2d 56, 372 P. 2d 919 (1962), *ante,* at 83 n. 13. In that case, the theory of which the Court today adopts in its entirety, a defendant in a rape case disclosed that he would rely in part on a defense of impotency. The prosecutor successfully obtained an order compelling the defendant to reveal the names and addresses of any doctors he consulted and the medical reports of any examinations relating to the claimed incapacity. That order was upheld by the highest court in California. There was no "rule" or statute to support such a decision, only the California Supreme Court's sense of fairness, justice, and judicial efficiency. The majority there found no barrier to the judicial creation of pretrial discovery by the State against the defendant, least of all a barrier raised by any constitutional prohibition on compelling the defendant to be a witness against himself.

The dangerous implications of the *Jones* rationale adopted today are not, however, limited to the disclosure of evidence that the defendant has already decided he will use at trial. In *State* v. *Grove,* 65 Wash. 2d 525, 398 P. 2d 170 (1965), the Washington Supreme Court, relying on *Jones,* held that a defendant in a murder trial could be compelled to produce a letter he had written his wife about the alleged crime, even though he had no thought at all of using that evidence in his own behalf. These cases are sufficient evidence of the inch-by-inch, case-by-case process by which the rationale of today's decision can be used to transform radically our system of criminal justice into a process requiring the defendant to assist the State in convicting him, or be punished for failing to do so.

There is a hint in the State's brief in this case—as well as, I fear, in the Court's opinion—of the ever-recurring suggestion that the test of constitutionality is the test of "fairness," "decency," or in short the Court's own views of what is "best." Occasionally this test emerges in disguise as an intellectually satisfying "distinction" or "analogy" designed to cover up a decision based on the wisdom of a proposed procedure rather than its conformity with the commands of the Constitution. Such a course, in my view, is involved in this case. This decision is one more step away from the written Constitution and a radical departure from the system of criminal justice that has prevailed in this country. Compelling a defendant in a criminal case to be a witness against himself in any way, including the use of the system of pretrial discovery approved today, was unknown in English law, except for the unlamented proceedings in the Star Chamber courts—the type of proceedings the Fifth Amendment was designed to prevent. For practically the first 150 years of this Nation's history no State considered adopting such procedures compelling

a criminal defendant to help convict himself, although history does not indicate that our ancestors were any less intelligent or solicitous of having a fair and efficient system of criminal justice than we are. History does indicate that persons well familiar with the dangers of arbitrary and oppressive use of the criminal process were determined to limit such dangers for the protection of each and every inhabitant of this country. They were well aware that any individual might some day be subjected to criminal prosecution, and it was in order to protect the freedom of *each* of us that they restricted the Government's ability to punish or imprison *any* of us. Yet in spite of the history of oppression that produced the Bill of Rights and the strong reluctance of our governments to compel a criminal defendant to assist in his own conviction, the Court today reaches out to embrace and sanctify at the first opportunity a most dangerous departure from the Constitution and the traditional safeguards afforded persons accused of crime. I cannot accept such a result and must express my most emphatic disagreement and dissent.

MR. JUSTICE MARSHALL, dissenting in part.

I join Part I of the Court's opinion. However, since I believe that the Fourteenth Amendment guaranteed Williams a jury of 12 to pass upon the question of his guilt or innocence before he could be sent to prison for the rest of his life, I dissent from the affirmance of his conviction.

I adhere to the holding of *Duncan* v. *Louisiana,* 391 U. S. 145, 149 (1968), that "[b]ecause . . . trial by jury in criminal cases is fundamental to the American scheme of justice . . . the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." And I agree with

the Court that the *same* "trial by jury" is guaranteed to state defendants by the Fourteenth Amendment as to federal defendants by the Sixth. "Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice' . . . the same constitutional standards apply against both the State and Federal Governments." *Benton* v. *Maryland,* 395 U. S. 784, 795 (1969).

At the same time, I adhere to the decision of the Court in *Thompson* v. *Utah,* 170 U. S. 343, 349 (1898), that the jury guaranteed by the Sixth Amendment consists "of twelve persons, neither more nor less." As I see it, the Court has not made out a convincing case that the Sixth Amendment should be read differently than it was in *Thompson* even if the matter were now before us *de novo*—much less that an unbroken line of precedent going back over 70 years should be overruled. The arguments made by MR. JUSTICE HARLAN in Part IB of his opinion persuade me that *Thompson* was right when decided and still states sound doctrine. I am equally convinced that the requirement of 12 should be applied to the States.

MR. JUSTICE HARLAN, dissenting in No. 188, *ante,* p. 66, and concurring in the result in No. 927.

In *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), the Court held, over my dissent, joined by MR. JUSTICE STEWART, that a state criminal defendant is entitled to a jury trial in any case which, if brought in a federal court, would require a jury under the Sixth Amendment. Today the Court concludes, in No. 188, *Baldwin* v. *New York,* that New York cannot constitutionally provide that misdemeanors carrying sentences up to one year shall be tried in New York City without a jury.[1] At

[1] Outside of New York City, such cases are triable before six-member juries.

the same time the Court holds in No. 927, *Williams* v. *Florida,* that Florida's six-member-jury statute satisfies the Sixth Amendment as carried to the States by the *Duncan* holding.[2] The necessary consequence of this decision is that 12-member juries are not *constitutionally* required in *federal* criminal trials either.

The historical argument by which the Court undertakes to justify its view that the Sixth Amendment does not require 12-member juries is, in my opinion, much too thin to mask the true thrust of this decision. The decision evinces, I think, a recognition that the "incorporationist" view of the Due Process Clause of the Fourteenth Amendment, which underlay *Duncan* and is now carried forward into *Baldwin,* must be tempered to allow the States more elbow room in ordering their own criminal systems. With that much I agree. But to accomplish this by diluting constitutional protections within the federal system itself is something to which I cannot possibly subscribe. Tempering the rigor of *Duncan* should be done forthrightly, by facing up to the fact that at least in this area the "incorporation" doctrine does not fit well with our federal structure, and by the same token that *Duncan* was wrongly decided.

I would sustain both the Florida and New York statutes on the constitutional premises discussed in my dissenting opinion in *Duncan,* 391 U. S., at 161 *et seq.* In taking that course in *Baldwin,* I cannot, in a matter that goes to the very pulse of sound constitutional adjudication, consider myself constricted by *stare decisis.*[3]

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[2] Florida provides for a jury of 12 in capital cases and a six-member jury "to try all other criminal cases." Fla. Stat. § 913.10 (1) (1967).

[3] As Mr. Justice Frankfurter said, speaking for the Court:

"[*S*]*tare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence

Accordingly, I dissent in No. 188 and, as to the jury issue, concur in the result in No. 927. Given *Malloy* v. *Hogan,* 378 U. S. 1 (1964), I join that part of the Court's opinion in No. 927 relating to the Florida "alibi" procedure.

I

As a predicate for my conclusions, it is useful to map the circuitous route that has been taken in order to reach the results. In both cases, more patently in *Williams* than in *Baldwin,* the history of jury trial practice in both the state and federal systems has been indiscriminately jumbled together as opposed to the point of departure having been taken from the language in which the *federal* guarantee is expressed and the historical precedent that brings it to life. The consequence of this inverted approach to interpreting the Sixth Amendment results, fortuitously,[4] in *Baldwin* in a Sixth Amendment rule that would be reached under the correct approach, given the "incorporationist" philosophy of *Duncan,* but, unhappily, imposes it on the one jurisdiction in the country that has seen fit to do otherwise; and in *Williams* results in a Sixth Amendment rule that could only be reached by standing the constitutional dialectic on its head.

A

To the extent that the prevailing opinion premises its conclusions in the *Baldwin* case on federal precedent and the common-law practice, I agree that the federal right to

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to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock,* 309 U. S. 106, 119 (1940).

[4] While all States except New York provide for jury trials for crimes carrying sentences of six months or more, there is a good deal of diversity as to the number of jurors and the stage at which the right to jury trial attaches.

jury trial attaches where an offense is punishable by as much as six months' imprisonment. I think this follows both from the breadth of the language of the Sixth Amendment, which provides for a jury in "all criminal prosecutions," and the evidence of historical practice. In this regard I believe that contemporary usage in the States is of little, if any, significance.[5] For if exceptions are to be created out of the all-embracing language of the Sixth Amendment they should only be those that are anchored in history.

It is to the distinction between "petty" and "serious" offenses, rooted in the common law, that this Court has looked to ascertain the metes and bounds of the federal right guaranteed by the Sixth Amendment. See *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937); *Schick* v. *United States,* 195 U. S. 65 (1904); *Callan* v. *Wilson,* 127 U. S. 540, 552 (1888). Since the conventional, if not immutable practice at common law appears to have been to provide juries for offenses punishable by fines of more than £100 or sentences to hard labor of more than six months in prison, see Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926),[6] I think it

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[5] After concluding, relying on this Court's prior decisions, that the jury trial required by the Sixth Amendment applies only to "serious" as opposed to "petty" offenses, the opinion defines those terms by perfunctory reference to history and a survey of prevailing state rules. See No. 188, *ante,* at 71–72.

[6] "The range and severity of punishment in summary trials has been defined by limiting jurisdiction to the imposition of fines up to a hundred pounds and sentences with hard labor up to six months." *Id.,* at 934. The practice in the Colonies was not uniform but it is apparent that the line was drawn at six months in most instances. See *District of Columbia* v. *Clawans, supra,* at 626 nn. 2, 3.

appropriate to draw the line at six months in federal cases,[7] although, for reasons to follow, I would not encumber the States by this requirement.[8]

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[7] While this Court has said that the most significant index to the seriousness of an offense is the degree of penalty that attaches, see *Frank* v. *United States,* 395 U. S. 147, 148 (1969); *District of Columbia* v. *Clawans, supra,* it should be recalled that this is not alone determinative and that the "apportioned punishment was both a consequence of the minor quality of the misconduct and an index of the community's moral judgment upon it." Frankfurter & Corcoran, *supra,* at 980. In *Clawans* the Court held the severity of punishment was not determinative when the offense by its own nature is not considered grave. 300 U. S., at 625; see also *Callan* v. *Wilson, supra,* at 556; *Schick* v. *United States, supra,* where this Court noted that the "nature" of the offense and the severity of punishment are two distinct considerations. Cf. the House debate in 1930 over a bill to provide for a trial before federal magistrates for crimes of a petty nature, 72 Cong. Rec. 9991–9994; see also H. R. Rep. No. 1699, 71st Cong., 2d Sess. (1930) (minority views); Comments, American Bar Association Project on Standards for Criminal Justice, Trial by Jury 21 (Approved Draft 1968); Comment, The Petty Offense Category and Trial by Jury, 40 Yale L. J. 1303 (1931). I would reserve the question as to whether a jury would be required in a federal case for a particular offense not punishable by more than six months in prison.

[8] Nor do I think it offends the Equal Protection Clause for New York not to provide juries to hear offenses punishable by six months in New York City but to have such a provision for trials elsewhere in the State. In *Salsburg* v. *Maryland,* 346 U. S. 545 (1954), and *Missouri* v. *Lewis,* 101 U. S. 22 (1880), this Court upheld the right of a State to adapt procedures to the differing requirements of territorial subdivisions. In *Salsburg* the Court quoted and reaffirmed the principles set forth in *Missouri:* "'[T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the

B

In *Williams* the Court strangely does an about-face. Rather than bind the States by the hitherto undeviating and unquestioned federal practice of 12-member juries, the Court holds, based on a poll of state practice, that a six-man jury satisfies the guarantee of a trial by jury in a federal criminal system and consequently carries over to the States. This is a constitutional *renvoi.* With all respect, I consider that before today it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by a jury of six, or less, as is left open by the Court's opinion in *Williams,* or by less than a unanimous verdict, a question also reserved in today's decision.

1. The Court, in stripping off the livery of history from the jury trial, relies on a two-step analysis. With arduous effort the Court first liberates itself from the "intent of the Framers" and "the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Ante,* at 92–93. Unburdened by

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Constitution of the United States to prevent its doing so.'" 346 U. S., at 551.

The Court in *Missouri* v. *Lewis* also stated: "Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies." 101 U. S., at 32. See also *Ohio* v. *Akron Park District,* 281 U. S. 74, 81 (1930); *Ocampo* v. *United States,* 234 U. S. 91, 98–99 (1914).

The disproportionate number of misdemeanor cases that now clog New York City courts, see Part III, *infra,* creates a difference of a magnitude that more than justifies the differences in treatment between city and non-city defendants.

the yoke of history the Court then concludes that the policy protected by the jury guarantee does not require its perpetuation in common-law form.

Neither argument is, in my view, an acceptable reason for disregarding history and numerous pronouncements of this Court that have made "the easy assumption" that the Sixth Amendment's jury was one composed of 12 individuals. Even assuming ambiguity as to the intent of the Framers,[9] it is common sense and not merely the

[9] The Court's conclusions from the historical materials, by its own admission, can hardly be characterized as solid. The entire argument seems to flow from the fact that the Senate Committee substituted the present language of the Sixth Amendment for the more specific House version that incorporated the unanimity requirement and expressly tied the jury to "other accustomed requisites." But the meaning of this change is wholly speculative, for, apart from the "vicinage" requirement, there is no concrete evidence cited by the Court to show that the Senate opposed the more likely features of the Madison version adopted by the House. In the context of an amendment notable for its sparseness of language, a more likely explanation of the Senate's action is that it was streamlining the Madison version on the assumption that the most prominent features of the jury would be preserved as a matter of course. This interpretation of the events is supported by the fact that the only specifically objectionable feature of the common-law jury—the vicinage requirement—was pre-empted by language providing for a trial by a jury of the district, thus leaving the remaining attributes undefined in face of the distinct expectation that those charged with interpretation would look to the common law. Nor is this explanation rendered less forceful by the fact, noted by the Court, that "reception" of the common-law jury did not unfailingly mean 12 in early colonial times. As the Court itself acknowledges, the States that had constitutions in 1787 provided for juries of 12. The Court's other arguments—(1) that simple reference to a jury in Article III was not necessarily thought to mean to the Framers a common-law jury in light of the need felt to add the Amendments and Madison's more elaborate proposal for the Sixth Amendment; and, (2) that the allusion to "common law" in the Seventh Amendment suggests that it is not the backdrop for the Sixth Amendment jury—are too remote to require rejoinder.

blessing of the Framers that explains this Court's frequent reminders that: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Smith* v. *Alabama,* 124 U. S. 465, 478 (1888). This proposition was again put forward by Mr. Justice Gray speaking for the Court in *United States* v. *Wong Kim Ark,* 169 U. S. 649 (1898), where the Court was called upon to define the term "citizen" as used in the Constitution. "The Constitution nowhere defines the meaning of these words [the Citizenship Clause]. . . . In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." 169 U. S., at 654. History continues to be a wellspring of constitutional interpretation. Indeed, history was even invoked by the Court in such decisions as *Townsend* v. *Sain,* 372 U. S. 293 (1963), and *Fay* v. *Noia,* 372 U. S. 391 (1963), where it purported to interpret the constitutional provision for habeas corpus according to the "historic conception of the writ" and took note that the guarantee was one rooted in common law and should be so interpreted.[10] Cf. *United States* v. *Brown,* 381 U. S. 437, 458 (1965). In accordance with these precepts, sound constitutional interpretation requires, in my view, fixing the federal jury as it was known to the common law.

It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined in a given instance by a blend

[10] While I disagreed with the Court on these occasions, my differences with the majority went to the conclusions that could properly be drawn from the common-law history of the writ and the precedents in this Court, not to the jurisprudential approach that took history as a point of departure.

of historical understanding and the adaptation of purpose to contemporary circumstances. Cf. *Katz* v. *United States,* 389 U. S. 347 (1967); *Estes* v. *Texas,* 381 U. S. 532, 595–596 (1965) (concurring opinion); *Olmstead* v. *United States,* 277 U. S. 438, 471 (1928) (Brandeis, J., dissenting); *United States* v. *Lovett,* 328 U. S. 303, 318 (1946) (Frankfurter, J., concurring).[11] B. Cardozo, The Nature of the Judicial Process (1921). This is not, however, a circumstance of giving a term "a meaning not necessarily envisioned . . . so as to adapt [it] to circumstances . . . uncontemplated." See my opinion concurring in the result in *Welsh* v. *United States,* 398 U. S. 333, 344 (1970). The right to a trial by jury, however, has no enduring meaning apart from historical form.

The second aspect of the Court's argument is that the number "12" is a historical accident—even though one that has recurred without interruption since the 14th century (see *ante,* at 89)—and is in no way essential to the "purpose of the jury trial" which is to "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Ante,* at 100. Thus history, the Court suggests, is no guide to the meaning of those rights whose form bears no relation to the policy they reflect. In this context the 12-member feature of the classical common-law jury is apparently regarded by the Court as mere adornment.

This second justification for cutting the umbilical cord that ties the form of the jury to the past is itself, as

[11] "Broadly speaking, two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution . . . . Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. . . . They were defined by history. Their meaning was so settled by history that definition was superfluous. . . ." 328 U. S., at 321.

I see it, the most compelling reason for maintaining that guarantee in its common-law form. For if 12 jurors are not essential, why are six? What if New York, now compelled by virtue of *Baldwin* to provide juries for the trial of misdemeanors, concludes that three jurors are adequate "interposition between the accused and his accuser of the common-sense judgment of a group of laymen," and constitute adequate "community participation and [provide] shared responsibility which results from that group's determination of guilt or innocence"? The Court's elaboration of what is required provides no standard and vexes the meaning of the right to a jury trial in federal courts, as well as state courts, by uncertainty. Can it be doubted that a unanimous jury of 12 provides a greater safeguard than a majority vote of six? The uncertainty that will henceforth plague the meaning of trial by jury is itself a further sufficient reason for not hoisting the anchor to history.

2. The circumvention of history is compounded by the cavalier disregard of numerous pronouncements of this Court that reflect the understanding of the jury as one of 12 members and have fixed expectations accordingly. Thus in *Thompson* v. *Utah* a unanimous Court answered in the affirmative the question whether the Sixth Amendment jury "is a jury constituted, as it was at common law, of twelve persons, neither more nor less." 170 U. S. 343, 349 (1898),[12] and it appears that before *Duncan* no Justice of this Court has seen fit to question this holding, one that has often been reiterated. See *Patton* v. *United States,* 281 U. S. 276, 288 (1930), where

[12] The significance of this pronouncement cannot be minimized. The holding that retrial by a jury of eight was an *ex post facto* law is perforce built upon the conclusion that the jury of 12 was a right of substance. If the right were merely a procedure mandated by statute, it would not have required the *ex post facto* holding.

the Court reaffirmed earlier pronouncements and stated that the Sixth Amendment jury is characterized by three essential features: "(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." See also *Maxwell* v. *Dow,* 176 U. S. 581, 586 (1900); *Rassmussen* v. *United States,* 197 U. S. 516, 527 (1905); *Andres* v. *United States,* 333 U. S. 740, 748 (1948) (unanimity).[13] As Mr. Justice Frankfurter stated in *Gore* v. *United States,* 357 U. S. 386, 392 (1958), in applying a constitutional provision "rooted in history . . . a long course of adjudication in this Court carries impressive authority."

The principle of *stare decisis* is multifaceted. It is a solid foundation for our legal system; yet care must be taken not to use it to create an unmovable structure. It provides the stability and predictability required for the ordering of human affairs over the course of time and a basis of "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne* v. *States Marine Lines,* 398 U. S. 375, 403

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[13] The Federal Rules of Criminal Procedure provide for a jury of 12, Fed. Rule Crim. Proc. 23, and as recently as last year lower federal courts have assumed this Court's commitment to the unanimous verdict of 12. *United States* v. *Fioravanti,* 412 F. 2d 407, 418 (C. A. 3d Cir. 1969); *Williams* v. *United States,* 332 F. 2d 36 (C. A. 7th Cir. 1964); see also, *e. g., United States* v. *Virginia Erection Corp.,* 335 F. 2d 868, 870 (C. A. 4th Cir. 1964); *United States* v. *Goldberg,* 330 F. 2d 30, 42 (C. A. 3d Cir. 1964); *Rogers* v. *United States,* 319 F. 2d 5 (C. A. 7th Cir. 1963); *Fournier* v. *Gonzalez,* 269 F. 2d 26 (C. A. 1st Cir. 1959); *Billeci* v. *United States,* 87 U. S. App. D. C. 274, 184 F. 2d 394 (1950); *Horne* v. *United States,* 264 F. 2d 40 (C. A. 5th Cir. 1959); *Hibdon* v. *United States,* 204 F. 2d 834 (C. A. 6th Cir. 1953).

(1970). See also *Helvering* v. *Hallock,* 309 U. S. 106 (1940); *Boys Markets* v. *Retail Clerks,* 398 U. S. 235 (1970); *Hertz* v. *Woodman,* 218 U. S. 205, 212 (1910); *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 405–406 (1932) (Brandeis, J., dissenting). Woodenly applied, however, it builds a stockade of precedent that confines the law by rules, ill-conceived when promulgated, or if sound in origin, unadaptable to present circumstances. No precedent is sacrosanct and one should not hesitate to vote to overturn this Court's previous holdings—old or recent—or reconsider settled dicta where the principles announced prove either practically (*e. g., Moragne* v. *States Marine Lines, supra; Boys Markets* v. *Retail Clerks, supra*), or jurisprudentially (*e. g., Desist* v. *United States,* 394 U. S. 244, 256 (1969) (dissenting opinion)) unworkable, or no longer suited to contemporary life (*e. g., Katz* v. *United States,* 389 U. S. 347, 360 (1967) (concurring opinion)). See also *Welsh* v. *United States,* 398 U. S. 333 (1970); *Chimel* v. *California,* 395 U. S. 752 (1969); *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Estes* v. *Texas,* 381 U. S., at 595–596 (concurring opinion); *Warden* v. *Hayden,* 387 U. S. 294 (1967); *Swift & Co.* v. *Wickham,* 382 U. S. 111 (1965); *James* v. *United States,* 366 U. S. 213, 241 (1961) (separate opinion of HARLAN, J.). Indeed, it is these considerations that move me to depart today from the framework of *Duncan.* It is, in part, the disregard of *stare decisis* in circumstances where it should apply, to which the Court is, of necessity, driven in *Williams* by the "incorporation" doctrine, that leads me to decline to follow *Duncan.* Surely if the principle of *stare decisis* means anything in the law, it means that precedent should not be jettisoned when the rule of yesterday remains viable, creates no injustice, and can reasonably be said to be no less sound than the rule sponsored by those who seek

change, let alone incapable of being demonstrated wrong. The decision in *Williams*, however, casts aside workability and relevance and substitutes uncertainty. The only reason I can discern for today's decision that discards numerous judicial pronouncements and historical precedent that sound constitutional interpretation would look to as controlling, is the Court's disquietude with the tension between the jurisprudential consequences wrought by "incorporation" in *Duncan* and *Baldwin* and the counter-pulls of the situation in *Williams* which presents the prospect of invalidating the common practice in the States of providing less than a 12-member jury for the trial of misdemeanor cases.

II

These decisions demonstrate that the difference between a "due process" approach, that considers each particular case on its own bottom to see whether the right alleged is one "implicit in the concept of ordered liberty," see *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), and "selective incorporation" is not an abstract one whereby different verbal formulae achieve the same results. The internal logic of the selective incorporation doctrine cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal Bill of Rights and recognizing the governmental diversity that exists in this country. The "backlash" in *Williams* exposes the malaise, for there the Court dilutes a federal guarantee in order to reconcile the logic of "incorporation," the "jot-for-jot and case-for-case" application of the federal right to the States, with the reality of federalism. Can one doubt that had Congress tried to undermine the common-law right to trial by jury before *Duncan* came on the books the history today recited would have barred such action? Can we

expect repeat performances when this Court is called upon to give definition and meaning to other federal guarantees that have been "incorporated"?

In *Ker* v. *California,* 374 U. S. 23 (1963), I noted in an opinion concurring in the result that: "The rule [of 'incorporation'] is unwise because the States, with their differing law enforcement problems, should not be put in a constitutional strait jacket . . . . And if the Court is prepared to relax [federal] standards in order to avoid unduly fettering the States, this would be in derogation of law enforcement standards in the federal system . . . ." *Id.,* at 45–46. Only last Term in *Chimel* v. *California, supra,* I again expressed my misgivings that "incorporation" would neutralize the potency of guarantees in federal courts in order to accommodate the diversity of our federal system. I reiterate what I said in dissent in *Duncan,* 391 U. S., at 175–176: "[N]either history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law." Since we now witness the first major attempt to wriggle free of that "straitjacket," it is appropriate, I think, to step back and view in perspective how far the incorporation doctrine has taken us, and to put the spotlight on a constitutional revolution that has inevitably become obscured by the process of case-by-case adjudication.

A

The recent history of constitutional adjudication in state criminal cases is the ascendancy of the doctrine of *ad hoc* ("selective") incorporation, an approach that absorbs one-by-one individual guarantees of the federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and holds them applicable to the States with all the subtleties and refinements born of history

and embodied in case experience developed in the context of federal adjudication. Thus, with few exceptions the Court has "incorporated," each time over my protest,[14] almost all the criminal protections found within the first eight Amendments to the Constitution, and made them "jot-for-jot and case-for-case" applicable to the States.

The process began with *Mapp* v. *Ohio,* 367 U. S. 643 (1961), where the Court applied to the States the so-called exclusionary rule, rendering inadmissible at trial evidence seized in violation of the Fourth Amendment, and thereby overruling *pro tanto Wolf* v. *Colorado,* 338 U. S. 25 (1949). See my dissenting opinion, 367 U. S., at 672. The particular course embarked upon in *Mapp* was blindly followed to its end in *Ker* v. *California,* 374 U. S. 23 (1963), where the Court made federal standards of probable cause for search and seizure applicable to the States, thereby overruling the remainder of *Wolf.* See my opinion concurring in the result, 374 U. S., at 44. Thereafter followed *Malloy* v. *Hogan,* 378 U. S. 1 (1964), and *Griffin* v. *California,* 380 U. S. 609 (1965), overruling *Twining* v. *New Jersey,* 211 U. S. 78 (1908), and *Adamson* v. *California,* 332 U. S. 46 (1947), and incorporating the

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[14] In addition to separate opinions noted in the text, see, *e. g., Poe* v. *Ullman,* 367 U. S. 497, 522, at 539–545 (1961) (dissenting opinion); *Griswold* v. *Connecticut,* 381 U. S. 479, 499 (1965) (concurring in the judgment); *Lanza* v. *New York,* 370 U. S. 139, 147 (1962) (concurring opinion); *Gideon* v. *Wainwright,* 372 U. S. 335, 349 (1963) (concurring opinion); *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 80 (1964) (concurring in the judgment); *Barber* v. *Page,* 390 U. S. 719, 726 (1968) (concurring opinion); *Berger* v. *New York,* 388 U. S. 41, 89 (1967) (dissenting opinion); *Chimel* v. *California, supra; Ashe* v. *Swenson,* 397 U. S. 436, 448 (1970) (concurring opinion); *Coleman* v. *Alabama, ante,* p. 19 (1970) (separate opinion); *Bloom* v. *Illinois,* 391 U. S. 194, 215 (1968) (dissenting opinion); *Washington* v. *Texas,* 388 U. S. 14, 23 (1967) (concurring in the result); *Dickey* v. *Florida,* 398 U. S. 30, 38 (1970) (concurring opinion).

Fifth Amendment privilege against self-incrimination by holding that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." 378 U. S., at 11. See my dissenting opinion in *Malloy,* 378 U. S., at 14, and my concurring opinion in *Griffin,* 380 U. S., at 615. The year of *Griffin* also brought forth *Pointer* v. *Texas,* 380 U. S. 400 (1965), overruling *Snyder* v. *Massachusetts,* 291 U. S. 97 (1934), and *Stein* v. *New York,* 346 U. S. 156, 194 (1953), by holding that the Sixth Amendment's Confrontation Clause applied equally to the States and Federal Government. See my opinion concurring in the result, 380 U. S., at 408. In 1967 incorporation swept in the "speedy trial" guarantee of the Sixth Amendment. *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967), and in 1968 *Duncan* v. *Louisiana, supra,* rendered the Sixth Amendment jury trial a right secured by the Fourteenth Amendment Due Process Clause. Only last Term the Court overruled *Palko* v. *Connecticut, supra,* and held that the "double jeopardy" protection of the Fifth Amendment was incorporated into the Fourteenth, and hence also carried to the States. *Benton* v. *Maryland,* 395 U. S. 784 (1969); see my opinion concurring in the result in *Klopfer,* 386 U. S., at 226; my dissenting opinion in *Duncan,* 391 U. S., at 171; my dissenting opinion in *Benton,* 395 U. S., at 801, and my separate opinion in *North Carolina* v. *Pearce,* 395 U. S. 711, 744 (1969).[15] In combination these cases have in effect restructured the Constitution in the field of state criminal law enforcement.

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[15] The right to counsel appears not to have been explicitly "incorporated," although *Gilbert* v. *California,* 388 U. S. 263 (1967), implicitly does so. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), purported to be a determination that "fundamental fairness" requires the State to afford trial counsel to the indigent accused. *Id.,* at 343. Although I have disagreed with particular holdings like *Gilbert* v. *California, supra,* where the Court held that the

There is no need to travel again over terrain trod in earlier opinions in which I have endeavored to lay bare the historical and logical infirmities of this "incorporationist" approach. On that score I am content to rest on what I said in dissent in *Duncan,* 391 U. S., at 171. I continue to consider the principles therein expressed as the sound basis for approaching the adjudication of state cases of the kind now before us. It is my firm conviction that "incorporation" distorts the "essentially federal nature of our national government," *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281, 285 (1970), one of whose basic virtues is to leave ample room for governmental and social experimentation in a society as diverse as ours, and which also reflects the view of the Framers that "the security of liberty in America rested primarily upon the dispersion of governmental power across a federal system," 391 U. S., at 173. The Fourteenth Amendment tempered this basic philosophy but did not unstitch the basic federalist pattern woven into our constitutional fabric. The structure of our Government still embodies a philosophy that presupposes the diversity that engendered the federalist system.

That these doctrines are not only alive in rhetoric but vital in the world of practical affairs is evidenced by contemporary debate concerning the desirability of returning to "local" government the administration of many programs and functions that have in late years increasingly been centralized in the hands of the National Government.

States must arrange presence of counsel at lineups, see MR. JUSTICE WHITE's separate opinion in *United States* v. *Wade,* 388 U. S. 218, 250 (1967), which I joined, this is because those decisions incorrectly require, in my view, counsel in circumstances where his presence is not necessary under either the Sixth Amendment or the Due Process Clause. See my separate opinion in *Coleman* v. *Alabama,* decided today, *ante,* p. 19.

B

But the best evidence of the vitality of federalism is today's decision in *Williams*. The merits or demerits of the jury system can, of course, be debated and those States that have diluted the common-law requirements evince a conclusion that the protection as known at common law is not necessary for a fair trial, or is only such marginal assurance of a fair trial that the inconvenience of assembling 12 individuals outweighs other gains in the administration of justice achieved by using only six individuals (or none at all as was the case in New York City).

The prevailing opinion rejects in *Baldwin* what would be the consistent approach, requiring affirmance, simply because New York City is the single jurisdiction in the Nation that sees fit to try misdemeanants without a jury. In doing so it, in effect, holds that "due process" is more offended by a trial without a jury for an offense punishable by no more than a year in prison than it is by a trial with a jury of six or less for offenses punishable by life imprisonment. This ignores both the basic fairness of the New York procedure and the peculiar local considerations that have led the New York Legislature to conclude that trial by jury is more apt to retard than further justice for criminal defendants in New York City.

I, for one, find nothing unfair in the New York system which provides the city defendant with an option, in lieu of a jury, of a bench trial before three judges, N. Y. C. Crim. Ct. Act § 40. Moreover, I think it counterproductive of fairness in criminal trials to hold by way of incorporation that juries are required of States in these days when congested calendars and attendant delays make what many students of criminal justice

feel is one of the most significant contributions to *injustice* and hardship to criminal defendants.

The statistics cited by the New York Court of Appeals and amplified in the briefs are revealing and trenchant evidence of the crisis that presently bedevils the administration of criminal justice in New York City. New York's population density, a factor which is, as noted by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 5, 28 (1967), directly associated with crime, is twice that of Buffalo, the second largest city in the State. Statistics supplied by the Office of the State Administrator of the Judicial Conference of the State of New York show that: "From July, 1966 through December, 1968 the New York City Criminal Court disposed of 321,368 nontraffic misdemeanor cases; whereas in the next largest city, Buffalo, the City Court disposed of 8,189 nontraffic misdemeanor cases." 24 N. Y. 2d 207, 218, 247 N. E. 2d 260, 266 (1969). Thus, New York City's misdemeanor caseload is 39 times that of Buffalo's although its population is only 17 times greater. After today each of such defendants in New York is entitled to a trial by some kind of a jury. It can hardly be gainsaid that a jury requirement with the attendant time for selection of jurors and deliberation, even if not invoked by all defendants, will increase delays in calendars, depriving all defendants of a prompt trial. Impressive evidence suggests that this requirement could conceivably increase delays in New York City courts by as much as a factor of eight. A study done of the administration of the Municipal Court in Minneapolis shows that the requirement of a trial by jury in cases of intoxicated driving increased court delays there from three to 24 months. Note, Right to a Jury Trial for Persons Accused of an Ordinance Violation, 47 Minn. L. Rev. 93 (1962).

Notwithstanding this critical situation the Court concludes that the Constitution requires a procedure fraught with delay even though the American Bar Association Project on Standards for Criminal Justice, Trial By Jury, has recognized the New York City three-judge procedure as a possible compromise measure where jury trials are not permitted or waived, and the further fact that one-half the defendants tried for misdemeanors in New York City are acquitted.[16]

III

Today's decisions demonstrate a constitutional schizophrenia born of the need to cope with national diversity under the constraints of the incorporation doctrine. In *Baldwin* the prevailing opinion overrides the consideration of local needs, but in *Williams* the Court seeks out a minimum standard to avoid causing disruption in numerous instances even though, *a priori*, incorporation would surely require a jury of 12. The six-man, six-month rule of today's decisions simply reflects the lowest common denominator in the scope and function of the right to trial by jury in this country, but the circumstance that every jurisdiction except New York City has a trial by a jury for offenses punishable by six months in prison obscures the variety of opinion that actually exists as to the proper place for the jury in the administration of justice. More discriminating analysis indicates that four States besides Florida authorize a jury of less than 12 to try felony

[16] The President of the Legal Aid Society in New York City recently reported that 49% of the society's clients who were tried in the New York City Criminal Court in 1967 (without a jury) were acquitted; there were 3,023 convictions after trial, 2,678 acquittals after trial. Speech at annual Judicial Conference of the Second Judicial Circuit of the United States, Lake Placid, N. Y., Sept. 14, 1968, reprinted in N. Y. L. J., September 25, 1968, p. 4.

offenses[17] and three States authorize a nonunanimous verdict[18] in felony cases, and at least two other States provide a trial without jury in the first instance for certain offenses punishable by more than one year with a right to *de novo* trial on appeal.[19] Eight States provide for juries ranging from five to 12 to try crimes punishable by one year in prison, and one State has provided for a verdict by nine in a jury of 12.[20] Five States first provide a bench trial for misdemeanors from which the defendant can seek a trial *de novo* by jury,[21] a procedure that this Court, in a federal trial, has deemed incompatible with the Sixth Amendment for putting the accused to the burden of two trials if he wishes a jury verdict. See *Callan* v. *Wilson,* 127 U. S. 540 (1888).[22]

These varying provisions, reflecting as they do differing estimates of the importance of the jury in securing a fair trial and the feasibility of administering such a procedure given the local circumstances, and the extensive study and debate about the merits and demerits of the jury system, demonstrate that the relevance and proper role of trial by jury in the administration of criminal justice is yet far from sure.

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[17] See the Court's opinion, *ante,* at 99 n. 45.

[18] See Appendix to this opinion.

[19] See *ibid.*

[20] See *ibid.*

[21] See *ibid.*

[22] "Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily . . . the guarantee of an impartial jury to the accused in a criminal prosecution, conducted . . . by . . . the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. . . . To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction . . . does not satisfy the requirements of the Constitution." 127 U. S., at 557.

"Incorporation" in *Duncan* closed the door on debate,[23] irrespective of local circumstances, such as the backlogs in urban courts like those of New York City, and has, without justification, clouded with uncertainty the constitutionality of these differing state modes of proceeding, see Appendix, pending approval by this Court; it now promises to dilute in other ways the settled meaning of the federal right to a trial by jury. Flexibility for experimentation in the administration of justice should be returned to the States here and in other areas that now have been swept into the rigid mold of "incorporation." I agree with THE CHIEF JUSTICE: "That the 'near-uniform judgment of the Nation' is otherwise than the judgment in some of its parts affords no basis . . . to read into the Constitution something not found there." Opinion of THE CHIEF JUSTICE in *Baldwin, ante,* at 77.

It is time, I submit, for this Court to face up to the reality implicit in today's holdings and reconsider the "incorporation" doctrine before its leveling tendencies further retard development in the field of criminal procedure by stifling flexibility in the States and by discarding the possibility of federal leadership by example.

APPENDIX TO OPINION OF HARLAN, J.

A. Nonunanimous Verdict For Felony-Type Offenses

1. *Louisiana:* La. Crim. Proc., Code., Art. 782. (Verdict of nine out of 12 in cases *necessarily* punished by hard labor.)

2. *Oregon:* Constitution, Art. I, § 11; Ore. Rev. Stat. §§ 136.330, 136.610 (1967) (five out of six sufficient for verdict in a circuit court except in capital cases).

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[23] See, *e. g.*, H. Kalven & H. Zeisel, The American Jury 5 (1966); Comment, Should Jury Verdicts Be Unanimous in Criminal Cases?, 47 Ore. L. Rev. 417 (1968).

3. *Texas:* Tex. Code Crim. Proc., Art. 36.29 (1966) (permitting verdict by less than 12 when juror is incapacitated).

B. Non-Jury Trial In Cases Punishable By More Than One Year's Imprisonment With *De Novo* Review

1. *Maryland:* Constitution, Declaration of Rights, Arts. 5, 21; Md. Ann. Code, Art. 51, § 18, Art. 52, § 13 (1968), Art. 66-1/2, §§ 48, 74, 75, 216, 325 (1967), § 327 (Supp. 1969); Md. Rules Proc. 743, 758. (Trial by jury appears not to be afforded in motor vehicle cases in the first instance even though some motor vehicle offenses carry a penalty of up to five years' imprisonment.)

2. *North Carolina:* Constitution, Art. I, § 13; *State* v. *Sherron,* 4 N. C. App. 386, 166 S. E. 2d 836 (1969); N. C. Gen. Stat. §§ 7A–272 (a), 7A–196 (b), 14–3 (1969). (District courts have jurisdiction to try, without a jury, all offenses below the grade of felony. Such offenses are denominated petty misdemeanors and the maximum sentence which may be imposed is a fine or *two* years' imprisonment.)

3. *Pennsylvania:* Constitution, Sched. Art. 5, § 16 (r) (iii) (offenses tried in the municipal division of the court of common pleas carrying penalties up to two years' imprisonment and indictable offenses under the motor vehicle laws for which punishment does not exceed three years' imprisonment).

C. 6-Man Jury For Misdemeanors

1. *Alaska:* Constitution, Art. I, § 11; Alaska Stat. §§ 11.75.030 (1962), 22.15.060, 22.15.150 (1967). (Jury of six in district magistrate's courts, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment.)

2. *Georgia:* Constitution, Art. I, § 2–105, Art. VI, § 2–5101; Ga. Code Ann. § 27–2506 (Supp. 1968); Ga.

Laws 1890–1891, pp. 935, 939, 942. (In county criminal courts, which have jurisdiction of misdemeanors—cases in which the maximum sentence imposable is a fine of up to $1000 or imprisonment for a term of up to 12 months or both—a defendant may demand a jury trial. Depending upon the county, however, a jury ranges in size from five to 12 persons. The Criminal Court of Atlanta, for example, tries misdemeanors with juries of five. In Hall County the same crimes are tried by juries of 12.)

3. *Iowa:* Constitution, Art. 1, § 9; Iowa Code §§ 602.15, 602.25, 602.39, 687.7 (1966). (Jury of six in municipal courts, which have jurisdiction of misdemeanors, carrying a maximum fine of $500 or imprisonment for one year or both.)

4. *Kentucky:* Constitution, §§ 7, 11, 248; Ky. Rev. Stat. §§ 25.010, 25.014, 26.400, 29.015 (1963). (Misdemeanors, carrying a maximum penalty of $500 or 12 months' imprisonment, are tried in inferior courts by a jury of six. Circuit courts, where a 12-member jury is used, have concurrent jurisdiction.)

5. *Mississippi:* Constitution, Art. 3, § 31, Art. 6, § 171; Miss. Code Ann. §§ 1831, 1836, 1839 (1956). (Jurisdiction of crimes punishable in the county jail may be tried in the justice of the peace courts by a six-man jury. Many such crimes have a one-year maximum term. Circuit courts have concurrent jurisdiction. Such crimes include, *e. g.*, offenses involving corruption in elections [Miss. Code Ann. §§ 2031, 2032], escape or aiding escape of prisoners [§§ 2133, 2134, 2135, 2141], public officers' interest in contracts [§§ 2301, 2302], and trade marks [§§ 2390, 2391].)

6. *Oklahoma:* Constitution, Art. 2, §§ 19, 20; Okla. Stat. Ann., Tit. 11, §§ 958.3, 958.6 (Supp. 1969–1970), Tit. 21, § 10 (1958). (In misdemeanor cases—those in which a sentence of up to one year's imprisonment may

be imposed—in courts of record, a defendant may demand a jury of 12; nine members of the jury may render a verdict. For violations of city ordinances tried in courts not of record, the defendant may demand six jurors, five of whom may render a verdict.)

7. *Oregon:* Constitution, Art. I, § 11; Constitution of 1857, Art. VII, § 12; Ore. Rev. Stat. §§ 5.110 (1965), 46.040, 46.175, 46.180 (1967). (Jury of six in county courts, which have jurisdiction of all crimes except those carrying the death penalty or life imprisonment. Jury of six in district courts, which have jurisdiction of all misdemeanors, punishable by one year's imprisonment.)

8. *Virginia:* Constitution, Art. I, § 8; Va. Code Ann. §§ 16.1–123, 16.1–124, 16.1–126, 16.1–129, 16.1–132, 16.1–136, 18.1–6 (1960), 18.1–9 (Supp. 1968), 19.1–206 (1960). (In courts not of record, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment, charges are tried without a jury. The defendant may appeal as of right to the circuit court, where he receives a trial *de novo*. All trials in the circuit court of offenses not felonious, whether in the first instance or on appeal, are with five jurors.)

D. Non-Jury Trial For Misdemeanors Subject to *De Novo* Review

1. *Arkansas:* Constitution, Art. 2, § 10; Ark. Stat. Ann. §§ 22–709, 22–737, 26–301 (1962), 41–106, 43–1901, 43–1902, 44–115, 44–116, 44–509 (1964); see generally Greenebaum, Arkansas' Judiciary: Its History and Structure, 18 Ark. L. Rev. 152 (1964). (No jury provided in municipal courts, which have jurisdiction of misdemeanors carrying a maximum penalty of one year's imprisonment. Upon conviction, the defendant may appeal to the circuit court where he is entitled to a trial *de novo* before a common-law jury.)

2. *Maine:* Constitution, Art. I, §§ 6, 7; Me. Rev. Stat. Ann., Tit. 4, § 152 (Supp. 1970), Tit. 15, §§ 1, 451 (1965); Me. Rules Crim. Proc. 23 (b), 31 (a); *Sprague* v. *Androscoggin County,* 104 Me. 352, 71 A. 1090 (1908); letter dated Dec. 17, 1968, from Maine Attorney General's office to New York County District Attorney's office. (Maine district courts try misdemeanors—crimes punishable by a sentence of up to one year—without a jury. A defendant may appeal his conviction to the Superior Court, however, where he is entitled to a common-law jury.)

3. *New Hampshire:* Constitution, pt. 1, Arts. 15, 16, pt. 2, Art. 77; N. H. Rev. Stat. Ann. § 599:1 (Supp. 1969), §§ 502–A:11, 502–A:12, 502:18 (1968); *State* v. *Despres,* 107 N. H. 297, 220 A. 2d 758 (1966). (District and municipal courts try, without a jury, misdemeanors carrying a maximum term of imprisonment of one year. The defendant in these courts has an absolute right of appeal to the Superior Court where he may demand a jury of 12 in his trial *de novo.*)

4. *Rhode Island:* Constitution, Art. 1, §§ 10, 15; R. I. Gen. Laws Ann. §§ 12–3–1, 12–17–1, 12–22–1, 12–22–9 (1956); *State* v. *Nolan,* 15 R. I. 529, 10 A. 481 (1887). (There are no juries in the district courts, which have jurisdiction of misdemeanors—crimes punishable by a fine of up to $500 or imprisonment for up to one year or both. A defendant may appeal his conviction to the Superior Court where he is entitled to a trial *de novo* before a jury of 12.)

5. *Virginia:* Constitution, Art. I, § 8; Va. Code Ann. §§ 16.1–123, 16.1–124, 16.1–126, 16.1–129, 16.1–132, 16.1–136, 18.1–6 (1960), 18.1–9 (Supp. 1968). (In courts not of record, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment, charges are

tried without a jury. The defendant may appeal as of right to the circuit court, where he receives a trial *de novo* with five jurors).

MR. JUSTICE STEWART, dissenting in No. 188, *ante*, p. 66, and concurring in the result in No. 927.

I substantially agree with the separate opinion MR. JUSTICE HARLAN has filed in these cases—an opinion that fully demonstrates some of the basic errors in a mechanistic "incorporation" approach to the Fourteenth Amendment. I cannot subscribe to his opinion in its entirety, however, if only for the reason that it relies in part upon certain dissenting and concurring opinions in previous cases in which I did not join.

The "incorporation" theory postulates the Bill of Rights as the substantive metes and bounds of the Fourteenth Amendment. I think this theory is incorrect as a matter of constitutional history, and that as a matter of constitutional law it is both stultifying and unsound. It is, at best, a theory that can lead the Court only to a Fourteenth Amendment dead end. And, at worst, the spell of the theory's logic compels the Court either to impose intolerable restrictions upon the constitutional sovereignty of the individual States in the administration of their own criminal law, or else intolerably to relax the explicit restrictions that the Framers actually did put upon the *Federal* Government in the administration of criminal justice. All this, and much more, is elaborated in MR. JUSTICE HARLAN's separate opinion, and I would affirm the judgments in both No. 188 and No. 927 for substantially the reasons he states.[1]

[1] Like MR. JUSTICE HARLAN, I join Part I of the Court's opinion in No. 927, relating to the "alibi" issue.

The architect of the contemporary "incorporation" approach to the Fourteenth Amendment is, of course, MR. JUSTICE BLACK. See *Adamson* v. *California*, 332 U. S. 46, 68 (dissenting opinion).[2] And the separate opinion my Brother BLACK has filed today in No. 927 could serve as Exhibit A to illustrate the extraordinary habits of thought into which some of us have fallen in conditioned reflex to that erroneous constitutional doctrine. "Incorporation" has become so Pavlovian that my Brother BLACK barely mentions the Fourteenth Amendment in the course of an 11-page opinion dealing with the procedural rule the State of Florida has adopted for cases tried in Florida courts under Florida's criminal laws.[3] His opinion relies instead upon the "plain and obvious meaning" of the "specific words" of the Fifth Amendment and other "provisions of the Bill of Rights" which, together with "the history surrounding

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[2] I have had occasion to state elsewhere my own understanding, for whatever it is worth, of the motivational origins of Fourteenth Amendment "incorporation":

"Shortly before Justice Jackson came to the Court, some of its then more junior members had embraced the comforting theory that the Fourteenth Amendment's substantive impact upon the states could be exactly measured by the specific restrictions that the first eight Amendments imposed upon the National Government. I call this a 'comforting' theory, because, for critics of the old Court's subjective approach to due process, it was a theory that appeared to give the Fourteenth Amendment objective content and definable scope." (Footnotes omitted.) P. Stewart, Robert H. Jackson's Influence on Federal-State Relationships, in Mr. Justice Jackson, Four Lectures in His Honor 57, 76 (1969).

[3] A worthy candidate for nomination as Exhibit B is the separate opinion filed today in *Coleman* v. *Alabama*, *ante*, p. 14, by my Brother DOUGLAS. In dealing with the procedure followed by Alabama in the administration of Alabama criminal law, my Brother's opinion advises us that "it is the Sixth Amendment that controls . . . ." And this statement is made in the name of "strict construction of the Constitution"!

the adoption of those provisions," make clear that "[t]he Framers . . . designed" those rights "to shield the defendant against state power."

Though I admire the rhetoric, I submit with all deference that those statements are, to quote their author, "plainly and simply wrong as a matter of fact and law . . . ." If the Constitution forbids the Florida alibi-defense procedure, it is because of the Fourteenth Amendment, and not because of either the "specific words" of the Bill of Rights or "the history surrounding" their adoption. For as every schoolboy knows, the Framers "designed" the Bill of Rights not against "state power," but against the power of the Federal Government.[4]

Surely MR. JUSTICE HARLAN is right when he says it is time for the Court to face up to reality.

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[4] This is not to say that I would agree that the Fifth Amendment or any other provisions of the Bill of Rights would render unconstitutional a federal alibi procedure similar to Florida's. See n. 1, *supra*.

ILLINOIS *v.* MISSOURI

DECREE

No. 18, Orig. Decree entered June 22, 1970

William J. Scott, Attorney General of Illinois, and *Terence F. MacCarthy,* Special Assistant Attorney General, for plaintiff.

John Danforth, Attorney General of Missouri, and *Merle L. Silverstein* for defendant.

The Court having referred this case to a Special Master who has filed his Report, and the parties having agreed as to the form of the decree, the Findings of Fact and Conclusions of Law are hereby adopted, and

IT IS ORDERED, ADJUDGED, AND DECREED That:

(1) The boundary line between the States of Illinois and Missouri for the geographical area involved in this action is hereby determined and decreed to consist of the following legal description:

> Beginning at a point in present centerline of the Mississippi River at the intersection of the centerline of the Old Mississippi River said point being designated as the Southeasterly corner of Kaskaskia Island; thence following the centerline of the slough which is the approximate centerline of the Old Mississippi River, described more particularly by the following courses and distances: S 39° 30′ W, 2100 feet; thence S 55° 30′ W, 900 feet; thence S 34° 30′ W, 850 feet; thence N 83° 00′ W, 500 feet; thence S 61° 00′ W, 1000 feet; thence S 42° 30′ W, 2500 feet; thence S 37° 00′ W, 4000 feet; thence S 45° 00′ W, 2000 feet; thence S 56° 30′ W, 4600 feet; thence S 63° 00′ W, 2150 feet; thence S 79° 30′

W, 1525 feet; thence N 86° 30′ W, 4500 feet; thence N 70° 00′ W, 5050 feet; thence N 57° 30′ W, 3850 feet; thence N 46° 00′ W, 1550 feet; thence N 24° 00′ W, 5650 feet; thence N 39° 00′ W, 1800 feet; thence N 17° 00′ W, 1900 feet; thence N 25° 30′ W, 3150 feet; thence N 32° 00′ W, 1580 feet; thence N 4° 30′ W, 3250 feet; thence N 53° 45′ E, 3300 feet; thence N 69° 00′ E, 1050 feet; thence 19° 00′ E, 2350 feet; thence N 75° 00′ E, 350 feet to a point at the northwest corner of Kaskaskia Island; thence S 47° 00′ E, 250 feet; thence N 81° 00′ E, 1050 feet; thence S 78° 00′ E, 600 feet; thence N 88° 45′ E, 1551 feet; thence N 70° 45′ E, 709 feet; thence N 48° 30′ E, 2986 feet; thence N 51° 45′ E, 627 feet; thence N 81° 45′ E, 990 feet; thence N 62° 45′ E, 495 feet; thence N 40° 00′ E, 2937 feet; thence N 28° 00′ E, 528 feet; thence N 04° 00′ E, 429 feet; thence N 12° 00′ W, 759 feet; thence N 6° 00′ E, 412 feet; thence N 33° 00′ E, 264 feet; to a point which intersects the centerline of a slough at the south side of Beaver Island; thence along the centerline of said slough S 85° 00′ W, 924 feet; thence S 79° 00′ W, 775 feet; thence N 88° 00′ W, 1452 feet; thence N 23° 00′ W, 825 feet; thence N 20° 00′ W, 3000 feet to the centerline of the Mississippi River.

(2) In incidence to the establishment of such boundary line, and upon Missouri's disclaimer herein, the territorial and sovereignty right claimed by Illinois to the body of land given identification in the evidence as "Kaskaskia Island" is hereby confirmed as against Missouri and decreed to exist in Illinois.

(3) In further incidence to the boundary establishment made, the territorial and sovereignty right claimed by Illinois to the body of land given identification in the

evidence as "Beaver Island" is hereby confirmed as against Missouri and decreed to exist in Illinois.

(4) In similar incidence, the territorial and sovereignty right claimed by Missouri to each of the two bodies of land given identification severally in the evidence as "Cottonwoods" and "Roth Island" is hereby sustained as against Illinois and decreed to exist in Missouri.

(5) The boundary description decreed in paragraph (1) hereof is taken from Attachment "C" of the parties' stipulation as being agreed upon by them to be appropriate and accurate for dispositional use in the event of and in relation to the result here reached. The bodies of land as to which Illinois' rights are confirmed in paragraphs (2) and (3) hereof are located on Illinois' side of the boundary line fixed, and those as to which Missouri's rights are sustained in paragraph (4) hereof are located upon Missouri's side thereof, so that no separate description is here necessary as to any of these bodies in order to effectuate the rights decreed in respect to them.

(6) The costs of the suit shall be assessed equally against the parties.

MR. JUSTICE BLACKMUN took no part in the entry of this decree.

CALIFORNIA *v.* GREEN

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 387. Argued April 20, 1970—Decided June 23, 1970

Respondent was convicted of furnishing marihuana to a minor in violation of California law, chiefly on the basis of evidence consisting of prior inconsistent statements made by the minor (Porter): (1) at respondent's preliminary hearing and (2) to a police officer. These statements were admitted under California Evidence Code § 1235 to prove the truth of the matters asserted therein. The District Court of Appeal reversed. The California Supreme Court affirmed, and held § 1235 unconstitutional insofar as it permitted the substantive use of a witness' prior inconsistent statements even though such statements were subject to cross-examination at a prior hearing. *Held:*

1. The Confrontation Clause of the Sixth Amendment, as made applicable to the States by the Fourteenth Amendment, is not violated by admitting a declarant's out-of-court statements as long as he is testifying as a witness at trial and is subject to full cross-examination. The purposes of the Amendment are satisfied at the time of trial, even if not before, since the witness is under oath, is subject to cross-examination, and his demeanor can be observed by the trier of fact. Pp. 153–164.

2. Even in the absence of an opportunity for full cross-examination at trial, the admission into evidence of the preliminary hearing testimony would not violate the Constitution. For the preliminary hearing in this case (where Porter was under oath, and where respondent was represented by counsel and had full opportunity for cross-examination) was not significantly different from an actual trial as far as the purposes of the Confrontation Clause are concerned, and it has long been held that admitting the prior trial testimony of an unavailable witness does not violate that clause. A different result should not follow where, as in this case, the witness was actually produced. Pp. 165–168.

3. The question whether Porter's claimed lapse of memory at the trial about important events described in his earlier statement to the officer so affected respondent's right to cross-examine as

to make a critical difference in the application of the Confrontation Clause is an issue that should first be resolved by the state court. Pp. 168–170.

70 Cal. 2d 654, 451 P. 2d 422, vacated and remanded.

William E. James, Assistant Attorney General of California, argued the cause for petitioner. With him on the briefs was *Thomas C. Lynch,* Attorney General.

E. Barrett Prettyman, Jr., by appointment of the Court, 396 U. S. 1048, argued the cause and filed a brief for respondent.

Solicitor General Griswold argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Wilson, Peter L. Strauss, Beatrice Rosenberg,* and *Roger A. Pauley.*

Mr. Justice White delivered the opinion of the Court.

Section 1235 of the California Evidence Code, effective as of January 1, 1967, provides that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." [1] In *People* v. *Johnson,* 68 Cal. 2d 646, 441 P. 2d 111 (1968), cert. denied, 393 U. S. 1051 (1969), the California Supreme Court held that prior statements of a witness that were not subject to cross-examination when originally made, could not be introduced under this section to prove the charges against a defendant without violating the defendant's right of confrontation guaranteed by the Sixth Amendment and made applicable to

[1] Cal. Evid. Code § 1235 (1966). Section 770 merely requires that the witness be given an opportunity to explain or deny the prior statement at some point in the trial. See Cal. Evid. Code § 770 (1966); *People* v. *Johnson,* 68 Cal. 2d 646, 650 n. 2, 441 P. 2d 111, 114 n. 2 (1968), cert. denied, 393 U. S. 1051 (1969).

the States by the Fourteenth Amendment. In the case now before us the California Supreme Court applied the same ban to a prior statement of a witness made at a preliminary hearing, under oath and subject to full cross-examination by an adequately counseled defendant. We cannot agree with the California court for two reasons, one of which involves rejection of the holding in *People* v. *Johnson*.

I

In January 1967, one Melvin Porter, a 16-year-old minor, was arrested for selling marihuana to an undercover police officer. Four days after his arrest, while in the custody of juvenile authorities, Porter named respondent Green as his supplier. As recounted later by one Officer Wade, Porter claimed that Green had called him earlier that month, had asked him to sell some "stuff" or "grass," and had that same afternoon personally delivered a shopping bag containing 29 "baggies" of marihuana. It was from this supply that Porter had made his sale to the undercover officer. A week later, Porter testified at respondent's preliminary hearing. He again named respondent as his supplier, although he now claimed that instead of personally delivering the marihuana, Green had showed him where to pick up the shopping bag, hidden in the bushes at Green's parents' house. Porter's story at the preliminary hearing was subjected to extensive cross-examination by respondent's counsel—the same counsel who represented respondent at his subsequent trial. At the conclusion of the hearing, respondent was charged with furnishing marihuana to a minor in violation of California law.

Respondent's trial took place some two months later before a court sitting without a jury. The State's chief witness was again young Porter. But this time Porter, in the words of the California Supreme Court, proved to be "markedly evasive and uncooperative on the

stand." *People* v. *Green*, 70 Cal. 2d 654, 657, 451 P. 2d 422, 423 (1969). He testified that respondent had called him in January 1967, and asked him to sell some unidentified "stuff." He admitted obtaining shortly thereafter 29 plastic "baggies" of marihuana, some of which he sold. But when pressed as to whether respondent had been his supplier, Porter claimed that he was uncertain how he obtained the marihuana, primarily because he was at the time on "acid" (LSD), which he had taken 20 minutes before respondent phoned. Porter claimed that he was unable to remember the events that followed the phone call, and that the drugs he had taken prevented his distinguishing fact from fantasy. See, *e. g.*, App. 7–11, 24–25.

At various points during Porter's direct examination, the prosecutor read excerpts from Porter's preliminary hearing testimony. This evidence was admitted under § 1235 for the truth of the matter contained therein. With his memory "refreshed" by his preliminary hearing testimony, Porter "guessed" that he had indeed obtained the marihuana from the backyard of respondent's parents' home, and had given the money from its sale to respondent. On cross-examination, however, Porter indicated that it was his memory of the preliminary testimony which was "mostly" refreshed, rather than his memory of the events themselves, and he was still unsure of the actual episode. See App. 25. Later in the trial, Officer Wade testified, relating Porter's earlier statement that respondent had personally delivered the marihuana. This statement was also admitted as substantive evidence. Porter admitted making the statement, App. 59, and insisted that he had been telling the truth as he then believed it both to Officer Wade and at the preliminary hearing; but he insisted that he was also telling the truth now in claiming inability to remember the actual events.

Respondent was convicted. The District Court of Appeal reversed, holding that the use of Porter's prior statements for the truth of the matter asserted therein, denied respondent his right of confrontation under the California Supreme Court's recent decision in *People* v. *Johnson, supra.* The California Supreme Court affirmed, finding itself "impelled" by recent decisions of this Court to hold § 1235 unconstitutional insofar as it permitted the substantive use of prior inconsistent statements of a witness, even though the statements were subject to cross-examination at a prior hearing. We granted the State's petition for certiorari, 396 U. S. 1001 (1970).

II

The California Supreme Court construed the Confrontation Clause of the Sixth Amendment to require the exclusion of Porter's prior testimony offered in evidence to prove the State's case against Green because, in the court's view, neither the right to cross-examine Porter at the trial concerning his current and prior testimony, nor the opportunity to cross-examine Porter at the preliminary hearing satisfied the commands of the Confrontation Clause. We think the California court was wrong on both counts.

Positing that this case posed an instance of a witness who gave trial testimony inconsistent with his prior, out-of-court statements,[2] the California court, on the authority of its decision in *People* v. *Johnson, supra,* held that belated cross-examination before the trial court, "is not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal." *People* v. *Green, supra,* at 659, 451 P. 2d, at 425. We disagree.

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[2] See *People* v. *Green,* 70 Cal. 2d 654, 657 n. 1, 451 P. 2d 422, 424 n. 1 (1969).

Section 1235 of the California Evidence Code represents a considered choice by the California Legislature [3] between two opposing positions concerning the extent to which a witness' prior statements may be introduced at trial without violating hearsay rules of evidence. The orthodox view, adopted in most jurisdictions,[4] has been that the out-of-court statements are inadmissible for the usual reasons that have led to the exclusion of hearsay statements: the statement may not have been made under oath; the declarant may not have been subjected to cross-examination when he made the statement; and the jury cannot observe the declarant's demeanor at the time he made the statement. Accordingly, under this view, the statement may not be offered to show the truth of the matters asserted therein, but can be introduced under appropriate limiting instructions to impeach the credibility of the witness who has changed his story at trial.

In contrast, the minority view adopted in some jurisdictions [5] and supported by most legal commentators and by recent proposals to codify the law of evidence [6] would

[3] See the comments of the California Law Revision Commission, Cal. Evid. Code § 1235 (1966).

[4] *E. g., Ellis* v. *United States,* 138 F. 2d 612, 616–621 (C. A. 8th Cir. 1943); *State* v. *Saporen,* 205 Minn. 358, 361–362, 285 N. W. 898, 900–901 (1939). The cases are collected in 3 J. Wigmore, Evidence § 1018 (3d ed. 1940) [hereinafter cited as Wigmore] and Annot., 133 A. L. R. 1454, 1455–1457 (1941).

[5] See *Jett* v. *Commonwealth,* 436 S. W. 2d 788 (Ky. 1969); *Gelhaar* v. *State,* 41 Wis. 2d 230, 163 N. W. 2d 609 (1969). See also *United States* v. *De Sisto,* 329 F. 2d 929 (C. A. 2d Cir.) (Friendly, J.), cert. denied, 377 U. S. 979 (1964); *United States* v. *Block,* 88 F. 2d 618, 620 (C. A. 2d Cir.) (L. Hand, J.), cert. denied, 301 U. S. 690 (1937); *Di Carlo* v. *United States,* 6 F. 2d 364, 368 (C. A. 2d Cir.) (L. Hand, J.), cert. denied, 268 U. S. 706 (1925).

[6] Dean Wigmore was the first noted commentator to adopt this position, abandoning his earlier approval, in the first edition of his Treatise, of the orthodox view. See 3 Wigmore § 1018 n. 2. Both the Model Code and the Uniform Rules have since followed the

permit the substantive use of prior inconsistent statements on the theory that the usual dangers of hearsay are largely nonexistent where the witness testifies at trial. "The whole purpose of the Hearsay rule has been already satisfied [because] the witness is present and subject to cross-examination [and] [t]here is ample opportunity to test him as to the basis for his former statement." [7]

Our task in this case is not to decide which of these positions, purely as a matter of the law of evidence, is the sounder. The issue before us is the considerably narrower one of whether a defendant's constitutional right "to be confronted with the witnesses against him" is necessarily inconsistent with a State's decision to change its hearsay rules to reflect the minority view described above. While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of

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Wigmore position, see Model Code of Evidence Rule 503 (b) (1942); Uniform Rule of Evidence 63 (1) (1953), as has the recent preliminary draft of the rules of evidence for the lower federal courts, see Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 8–01 (c)(2) (1969). For commentators who have urged views similar to Wigmore's see C. McCormick, Evidence § 39 (1954); Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand. L. Rev. 741, 747 (1961); Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 192–196 (1948).

[7] 3 Wigmore § 1018.

confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See *Barber* v. *Page,* 390 U. S. 719 (1968); *Pointer* v. *Texas,* 380 U. S. 400 (1965). The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.[8]

Given the similarity of the values protected, however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation. Such questions require attention to the reasons for, and the basic scope of, the protections offered by the Confrontation Clause.

The origin and development of the hearsay rules and of the Confrontation Clause have been traced by others and need not be recounted in detail here.[9] It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. Prosecuting attorneys "would frequently allege matters which the prisoner denied and called upon them to prove. The

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[8] See The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 236 (1968); Note, Confrontation and the Hearsay Rule, 75 Yale L. J. 1434, 1436 (1966).

[9] See, *e. g.,* McCormick, *supra,* n. 6, at 455–457; 5 Wigmore § 1364; Morgan, *supra,* n. 6, at 179–183. See also 9 W. Holdsworth, A History of English Law 177–187, 214–219 (3d ed. 1944); Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. Pa. L. Rev. 741, 746–747 (1965).

proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' *i. e.* the witnesses against him, brought before him face to face . . . ." [10]

But objections occasioned by this practice appear primarily to have been aimed at the failure to call the witness to confront personally the defendant at his trial. So far as appears, in claiming confrontation rights no objection was made against receiving a witness' out-of-court depositions or statements, so long as the witness was present at trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact.

Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity,

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[10] 1 J. Stephen, A History of the Criminal Law of England 326 (1883). See also 9 Holdsworth, *supra,* n. 9, at 225–228.

A famous example is provided by the trial of Sir Walter Raleigh for treason in 1603. A crucial element of the evidence against him consisted of the statements of one Cobham, implicating Raleigh in a plot to seize the throne. Raleigh had since received a written retraction from Cobham, and believed that Cobham would now testify in his favor. After a lengthy dispute over Raleigh's right to have Cobham called as a witness, Cobham was not called, and Raleigh was convicted. See 1 Stephen, *supra,* at 333–336; 9 Holdsworth, *supra,* at 216–217, 226–228. At least one author traces the Confrontation Clause to the common-law reaction against these abuses of the Raleigh trial. See F. Heller, The Sixth Amendment 104 (1951).

> not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States,* 156 U. S. 237, 242–243 (1895).

Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.

This conclusion is supported by comparing the purposes of confrontation with the alleged dangers in admitting an out-of-court statement. Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [11] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections. But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections. If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the

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[11] 5 Wigmore § 1367.

oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury; indeed, the very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy—an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth.

Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant. We cannot share the California Supreme Court's view that belated cross-examination can never serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement. The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth." *State* v. *Saporen,* 205 Minn. 358, 362, 285 N. W. 898, 901 (1939). That danger, however, disappears when the witness has changed his testimony so that, far from "hardening," his prior statement has softened to the point where he now repudiates it.[12]

[12] See Comment, Substantive Use of Extrajudicial Statements of Witnesses Under the Proposed Federal Rules of Evidence, 4 U. Rich. L. Rev. 110, 117–118 (1969); 82 Harv. L. Rev. 475 n. 16 (1968).

The defendant's task in cross-examination is, of course, no longer identical to the task that he would have faced if the witness had not changed his story and hence had to be examined as a "hostile" witness giving evidence for the prosecution. This difference, however, far from lessening, may actually enhance the defendant's ability to attack the prior statement. For the witness, favorable to the defendant, should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event. Under such circumstances, the defendant is not likely to be hampered in effectively attacking the prior statement, solely because his attack comes later in time.

Similar reasons lead us to discount as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement. The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story. The defendant's confrontation rights are not violated, even though some demeanor evidence that would have been relevant in resolving this credibility issue is forever lost.

It may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement. But the question as we

see it must be not whether one can somehow imagine the jury in "a better position," but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. On that issue, neither evidence [13] nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.

Finally, we note that none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial. The concern of most of our cases has been focused on precisely the opposite situation—situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial. These situations have arisen through application of a number of traditional "exceptions" to the hearsay rule, which permit the introduction of evidence despite the absence of the declarant usually on the theory that the evidence possesses other indicia of "reliability" and is incapable of being admitted, despite good-faith efforts of the State, in any way that will secure

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[13] The California Supreme Court in its earlier decision on this issue stated that "[t]his practical truth [the importance of immediate cross-examination] is daily verified by trial lawyers, not one of whom would willingly postpone to both a later date and a different forum his right to cross-examine a witness against his client." *People* v. *Johnson,* 68 Cal. 2d 646, 655, 441 P. 2d 111, 118 (1968), cert. denied, 393 U. S. 1051 (1969). The citations that follow this sentence are to books on trial practice that shed little empirical light on the actual comparative effectiveness of subsequent, as opposed to timely, cross-examination. As the text suggests, where the witness has changed his story at trial to favor the defendant he should, if anything, be more rather than less vulnerable to defense counsel's explanations for the inaccuracy of his former statement.

confrontation with the declarant.[14] Such exceptions, dispensing altogether with the literal right to "confrontation" and cross-examination, have been subjected on several occasions to careful scrutiny by this Court. In *Pointer* v. *Texas,* 380 U. S. 400 (1965), for example, the State introduced at defendant's trial the transcript of a crucial witness' testimony from a prior preliminary hearing. The witness himself, one Phillips, had left the jurisdiction and did not appear at trial. "Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips," 380 U. S., at 407, we held that its introduction violated the defendant's confrontation rights. Similarly, in *Barber* v. *Page,* 390 U. S. 719 (1968), the State introduced the preliminary hearing testimony of an absent witness, incarcerated in a federal prison, under an "unavailability" exception to its hearsay rules. We held that that exception would not justify the denial of confrontation where the State had not made a good-faith effort to obtain the presence of the allegedly "unavailable" witness.

We have no occasion in the present case to map out a theory of the Confrontation Clause that would determine the validity of all such hearsay "exceptions" permitting the introduction of an absent declarant's statements. For where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem. Thus, in *Douglas* v. *Alabama,* 380 U. S. 415 (1965), decided on the same day as *Pointer,* we reversed a conviction in which the prosecution read

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[14] See generally, *e. g.,* 5 Wigmore §§ 1420–1422.

into the record an alleged confession of the defendant's supposed accomplice, Loyd, who refused to testify on self-incrimination grounds. The confrontation problem arose precisely because Loyd could not be cross-examined as to his prior statement; had such cross-examination taken place, the opinion strongly suggests that the confrontation problem would have been nonexistent:

> "In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. . . . Loyd could not be cross-examined on a statement imputed to but not admitted by him. . . . [S]ince [the State's] evidence tended to show only that Loyd made the confession, cross-examination . . . as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself. . . .
>
> "Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his." 380 U. S., at 419–420.

Again, in *Bruton* v. *United States,* 391 U. S. 123 (1968), the Court found a violation of confrontation rights in the admission of a codefendant's confession, implicating Bruton, where the co-defendant did not take the stand. The Court again emphasized that the error arose because the declarant "does not testify and cannot be tested by cross-examination," 391 U. S., at 136, suggesting that no confrontation problem would have existed if Bruton had been able to cross-examine his co-defendant.[15] Cf.

[15] Whether admission of the statement would have violated federal evidentiary rules against hearsay, see 391 U. S., at 128 n. 3, is, as emphasized earlier in this opinion, a wholly separate question. Indeed, failure to comply with federal evidentiary standards appears to be the reason for the result in *Bridges* v. *Wixon,* 326 U. S. 135 (1945)—the only case which might be thought to suggest the exist-

Harrington v. *California,* 395 U. S. 250, 252–253 (1969). Indeed, *Bruton*'s refusal to regard limiting instructions as capable of curing the error, suggests that there is little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used only for impeachment purposes, and permitting them to be used for substantive purposes as well.

We find nothing, then, in either the history or the purposes of the Confrontation Clause, or in the prior decisions of this Court, that compels the conclusion reached by the California Supreme Court concerning the validity of California's § 1235. Contrary to the judgment of that court, the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories.

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ence of a possible constitutional problem in admitting a witness' prior inconsistent statements as substantive evidence. There the Court reversed a deportation order based on such evidence, but the holding was an alternative one and explicitly rested on the ground that the relevant agency rules did not permit the use of such statements. See 326 U. S., at 151–153. While the Court did suggest that the use of such statements in a criminal case would run "counter to the notions of fairness on which our legal system is founded," *id.,* at 154, the discussion and citations appear to refer to the "orthodox" position earlier adopted by this Court as a matter of federal evidentiary, not constitutional, law. See *Hickory* v. *United States,* 151 U. S. 303, 309 (1894). While we may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking, see *Thompson* v. *Louisville,* 362 U. S. 199 (1960), we do not read *Bridges* as declaring that the Constitution is necessarily violated by the admission of a witness' prior inconsistent statement for the truth of the matter asserted. The Court's opinion in *Bridges* does not discuss the Confrontation Clause.

III

We also think that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable, despite good-faith efforts of the State to produce him. That being the case, we do not think a different result should follow where the witness is actually produced.

This Court long ago held that admitting the prior testimony of an unavailable witness does not violate the Confrontation Clause. *Mattox* v. *United States,* 156 U. S. 237 (1895). That case involved testimony given at the defendant's first trial by a witness who had died by the time of the second trial, but we do not find the instant preliminary hearing significantly different from an actual trial to warrant distinguishing the two cases for purposes of the Confrontation Clause. Indeed, we indicated as much in *Pointer* v. *Texas,* 380 U. S. 400, 407 (1965), where we noted that "[t]he case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a

complete and adequate opportunity to cross-examine." And in *Barber* v. *Page,* 390 U. S. 719, 725–726 (1968), although noting that the preliminary hearing is ordinarily a less searching exploration into the merits of a case than a trial, we recognized that "there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable . . . ." In the present case respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness Porter at the preliminary hearing. If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing—the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State. Compare *Barber* v. *Page, supra,* with *Motes* v. *United States,* 178 U. S. 458 (1900).

But nothing in *Barber* v. *Page* or in other cases in this Court indicates that a different result must follow where the State produces the declarant and swears him as a witness at the trial. It may be that the rules of evidence applicable in state or federal courts would restrict resort to prior sworn testimony where the declarant is present at the trial. But as a constitutional matter, it is untenable to construe the Confrontation Clause to permit the use of prior testimony to prove the State's case where the declarant never appears, but to bar that testimony where the declarant is present at the trial, exposed to the defendant and the trier of fact, and subject

to cross-examination.[16] As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through the live testimony of the witness; it produced Porter at trial, swore him as a witness, and tendered him for cross-examination. Whether Porter then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege

[16] The explanation advanced for the contrary conclusion seems to be that where the witness is dead or otherwise unavailable, the State may in good faith assume he would have given the same story at trial, and may introduce the former testimony as reasonably reliable and as prompted by the factor of "necessity." On the contrary, it is argued, where the witness is present to testify but does not relate the same story, "necessity," "reliability," and the assumption that the story would be the same are all destroyed. See *People* v. *Green*, 70 Cal. 2d 654, 664 and n. 11, 451 P. 2d 422, 428–429 and n. 11 (1969); Brief for Respondent 32. But the only "necessity" that exists in either case is the State's "need" to introduce relevant evidence that through no fault of its own cannot be introduced in any other way. And the "assumption" that the witness would have given the same story if he had been available at trial, is little more than another way of saying that the testimony was given under circumstances that make it reasonably reliable—there is nothing in a witness' death by itself, for example, which would justify assuming his story would not have changed at trial. Finally, the "reliability" of the statement is based on the circumstances under which it was given—circumstances that remain unaffected regardless of whether the witness is present or absent at the later trial. Surely in terms of protecting the defendant's interests, and the jury's ability to assess the reliability of the evidence it hears, it seems most unlikely that respondent in this case would have been better off, as the dissent seems to suggest, if Porter had died, and his prior testimony were admitted, than he was in the instant case where Porter's conduct on the stand cast substantial doubt on his prior statement. As long as the State has made a good-faith effort to produce the witness, the actual presence or absence of the witness cannot be constitutionally relevant for purposes of the "unavailability" exception.

against compulsory self-incrimination, or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against Green.[17]

IV

There is a narrow question lurking in this case concerning the admissibility of Porter's statements to Officer Wade. In the typical case to which the California court addressed itself, the witness at trial gives a version of the ultimate events different from that given on a prior occasion. In such a case, as our holding in Part II makes clear, we find little reason to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given. The subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, off-hand remark to a stranger, and the carefully recorded testimony at a prior hearing. Here, however, Porter claimed at trial that he could not remember the events that occurred after respondent telephoned him and hence failed to give any current version of the more important events described in his earlier statement.

Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause

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[17] The hearsay exception itself has generally recognized that a witness is "unavailable" for purposes of the exception where through lapse of memory or a plea of the Fifth Amendment privilege, the State cannot secure his live testimony. See 5 Wigmore §§ 1408, 1409.

in this case [18] is an issue which is not ripe for decision at this juncture. The state court did not focus on this precise question, which was irrelevant given its broader and erroneous premise that an out-of-court statement of a witness is inadmissible as substantive evidence, whatever the nature of the opportunity to cross-examine at the trial. Nor has either party addressed itself to the question. Its resolution depends much upon the

[18] Even among proponents of the view that prior statements should be admissible as substantive evidence, disagreement appears to exist as to whether to apply this rule to the case of a witness who disclaims all present knowledge of the ultimate event. Commentators have noted that in such a case the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished. See Falknor, The Hearsay Rule and Its Exceptions, 2 U. C. L. A. L. Rev. 43, 53 (1954); 31 N. Y. U. L. Rev. 1101, 1105 (1956). While both the Model Code and the Uniform Rules would apparently admit prior inconsistent statements even where the witness claims to have no present knowledge or recollection of the event, see Model Code of Evidence Rule 503 (b), Comment *b*, at 234 (1942); Uniform Rule of Evidence 63 (1), Comment (1953), the preliminary draft of proposed rules of evidence for lower federal courts seems to limit admissibility to the case where the witness actually testifies concerning the substance of the event at issue, see Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, rule 8–01 (c)(2)(i), Advisory Comm. Notes at 165 (1969). See Comment, Substantive Use of Extrajudicial Statements of Witnesses Under the Proposed Federal Rules of Evidence, 4 U. Rich. L. Rev. 110, 119 and n. 40 (1969). The latter position accords with the common-law practice of not permitting prior inconsistent statements to be introduced even for impeachment purposes until and unless the witness has actually given "inconsistent" testimony concerning the substance of the event described in the prior statement. *Id.*, at 119, 121; see *e. g.*, *Westinghouse Electric Corp.* v. *Wray Equipment Corp.*, 286 F. 2d 491, 493 (C. A. 1st Cir.), cert. denied, 366 U. S. 929 (1961); 3 Wigmore § 1043.

unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses relevant to this particular issue. What is more, since we hold that the admission of Porter's preliminary hearing testimony is not barred by the Sixth Amendment despite his apparent lapse of memory, the reception into evidence of the Porter statement to Officer Wade may pose a harmless-error question which is more appropriately resolved by the California courts in the first instance. Similarly, faced on remand with our decision that § 1235 is not invalid on its face, the California Supreme Court may choose to dispose of the case on other grounds raised by Green but not passed upon by that court; for example, because of its ruling on § 1235, the California court deliberately put aside the issue of the sufficiency of the evidence to sustain conviction.[19]

We therefore vacate the judgment of the California Supreme Court and remand the case to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

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

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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[19] This issue is not insubstantial. Conviction here rests almost entirely on the evidence in Porter's two prior statements which were themselves inconsistent in some respects. See, *e. g.*, Brief for Respondent 3 and n. 2, 49–50. The California Supreme Court also found it unnecessary to reach respondent's additional contentions of suppression of evidence and prejudicial misconduct. See *People* v. *Green*, 70 Cal. 2d 654, 666, 451 P. 2d 422, 429 (1969). Moreover, as noted earlier in this opinion, *ante*, at 153 and n. 2, the California court suggested that Porter's prior statements may not

MR. CHIEF JUSTICE BURGER, concurring.

I join fully in MR. JUSTICE WHITE's opinion for the Court. I add this comment only to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice. If new standards and procedures are tried in one State their success or failure will be a guide to others and to the Congress.

Here, California, by statute, recently adopted a rule of evidence [1] that, as MR. JUSTICE WHITE observes, has long been advocated by leading commentators. Two other States, Kentucky [2] and Wisconsin,[3] have within the past year embraced similar doctrines by judicial decisions. None of these States has yet had sufficient experience with their innovations to determine whether or not the modification is sound, wise, and workable. The California Supreme Court, in striking down the California statute, seems to have done so in the mistaken belief that this Court, through the Confrontation Clause, has imposed rigid limits on the States in this area. As the Court's opinion indicates, that conclusion is erroneous. The California statute meets the tests of the Sixth and Fourteenth Amendments, and accordingly, the wisdom of the statute is properly left to the State of California; other jurisdictions will undoubtedly watch the experiment with interest. The circumstances of this case demonstrate again that neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the

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even have been admissible under § 1235 as "inconsistent" with his testimony at trial. Compare *People* v. *Green, supra,* at 657 n. 1, 451 P. 2d, at 424 n. 1, with n. 18, *supra.*

[1] Cal. Evid. Code § 1235 (1966).

[2] *Jett* v. *Commonwealth,* 436 S. W. 2d 788 (Ky. 1969).

[3] *Gelhaar* v. *State,* 41 Wis. 2d 230, 163 N. W. 2d 609 (1969), petition for certiorari pending, No. 389, Misc., O. T. 1969.

criminal law in all the States. Federal authority was never intended to be a "ramrod" to compel conformity to nonconstitutional standards.

MR. JUSTICE HARLAN, concurring.

The precise holding of the Court today is that the Confrontation Clause of the Sixth Amendment does not preclude the introduction of an out-of-court declaration, taken under oath and subject to cross-examination, to prove the truth of the matters asserted therein, when the declarant is available as a witness at trial. With this I agree.[1]

The California decision that we today reverse demonstrates, however, the need to approach this case more broadly than the Court has seen fit to do, and to confront squarely the Confrontation Clause because the holding of the California Supreme Court is the result of an understandable misconception, as I see things, of numerous decisions of this Court, old and recent, that have indiscriminately equated "confrontation" with "cross-examination."[2] See *Bruton* v. *United States,* 391 U. S. 123 (1968); *Roberts* v. *Russell,* 392 U. S. 293 (1968); *Pointer* v. *Texas,* 380 U. S. 400 (1965); *Douglas* v. *Alabama,* 380 U. S. 415 (1965); *Brookhart* v. *Janis,* 384 U. S. 1 (1966);

[1] The Court declines to consider the admissibility of Porter's out-of-court declaration to Officer Wade and remands for a determination as to whether it was properly admissible under California law. I consider this in Part IV, *infra.*

[2] While this broad problem that lies beneath the surface of today's case would, in my view, have been more appropriately considered in a more conventional hearsay setting, where the maker of extrajudicial statement is not present at trial, it has been briefed and argued by both sides, and I reach it now, notwithstanding the pendency of No. 21, *Dutton* v. *Evans,* on our docket. *Dutton* was argued before us on Oct. 15, 1969, and on Apr. 27, 1970, was set for reargument. 397 U. S. 1060. The case will be heard at the next Term.

Barber v. *Page,* 390 U. S. 719 (1968); *Smith* v. *Illinois,* 390 U. S. 129 (1968); *Bridges* v. *Wixon,* 326 U. S. 135 (1945); *Salinger* v. *United States,* 272 U. S. 542, 548 (1926) (dictum); *Reynolds* v. *United States,* 98 U. S. 145 (1879); *Mattox* v. *United States,* 156 U. S. 237 (1895); *Motes* v. *United States,* 178 U. S. 458 (1900); *Kirby* v. *United States,* 174 U. S. 47 (1899); and *Dowdell* v. *United States,* 221 U. S. 325, 330 (1911).[3]

These decisions have, in my view, left ambiguous whether and to what extent the Sixth Amendment "constitutionalizes" the hearsay rule of the common law.

If "confrontation" is to be equated with the right to cross-examine, it would transplant the ganglia of hearsay rules and their exceptions into the body of constitutional protections. The stultifying effect of such a course upon this aspect of the law of evidence in both state and federal systems need hardly be labored, and it is good that the Court today, as I read its opinion, firmly eschews that course.

Since, in my opinion, this state decision imperatively demonstrates the need for taking a fresh look at the constitutional concept of "confrontation," I do not think that *stare decisis* should be allowed to stand in the way, albeit the presently controlling cases are of recent vintage.[4] As the Court's opinion suggests, the Confron-

[3] The easy assumption that confrontation is the right to exclude hearsay also appears in cases involving state criminal prosecutions where this Court, as a matter of due process, declined to hold applicable to the States the Sixth Amendment's right to confrontation. See, *e. g., Stein* v. *New York,* 346 U. S. 156 (1953); but see *West* v. *Louisiana,* 194 U. S. 258 (1904).

[4] This is not merely a case of prior decisions that may have been incorrectly decided or rationalized. The unworkability of constitutionalizing any aspect of the conventional hearsay rule means what is at stake is the future of sound constitutional development in this area. Cf. *Swift & Co.* v. *Wickham,* 382 U. S. 111, 116 (1965), where we noted the mischief of "perpetuation of an unworkable

tation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause. Commentators have been prone to slide too easily from confrontation to cross-examination.

Against this amorphous backdrop I reach two conclusions. First, the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial. Second, even were this conclusion deemed untenable as a matter of Sixth Amendment law, it is surely agreeable to Fourteenth Amendment "due process," which, in my view, is the constitutional framework in which state cases of this kind should be judged. For it could scarcely be suggested that the Fourteenth Amendment takes under its umbrella all common-law hearsay rules and their exceptions.

I begin with the Sixth Amendment, and defer until Parts III and IV the application of these principles to the instant case.

I

The Confrontation Clause of the Sixth Amendment is not one that we may assume the Framers understood as the embodiment of settled usage at common law. Cf. my dissenting opinion in *Baldwin* v. *New York, ante,* p. 117. Such scant evidence as can be culled from the usual sources suggests that the Framers understood "confrontation" to be something less than a right to exclude hearsay, and the common-law signifi-

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rule." *Moragne* v. *States Marine Lines,* 398 U. S. 375 (1970); *Boys Markets* v. *Retail Clerks,* 398 U. S. 235 (1970); my dissenting opinion in *Baldwin* v. *New York, ante,* p. 117, and my separate opinion in *Welsh* v. *United States,* 398 U. S. 333, 344 (1970), and my dissenting opinion in *Desist* v. *United States,* 394 U. S. 244, 256 (1969).

cance of the term is so ambiguous as not to warrant the assumption that the Framers were announcing a principle whose meaning was so well understood that this Court should be constrained to accept those dicta in the common law that equated confrontation with cross-examination.

A

The text of the Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Simply as a matter of English the clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial.[5] Since, however, an extrajudicial declarant is no less a "witness," the clause is equally susceptible of being interpreted as a blanket prohibition on the use of any hearsay testimony.

Neither of these polar readings is wholly satisfactory, still less compelling. Similar guarantees to those of the Sixth Amendment are found in a number of the colonial constitutions[6] and it appears to have been assumed that a confrontation provision would be included in the Bill of Rights that was to be added to the Constitution after ratification.[7] The Congressmen who drafted the Bill of

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[5] The Georgia Constitution of 1877 lends some support for this restricted reading of confrontation. See Art. I, § 1, ¶ 5, which provided that the accused "shall be confronted with the witnesses *testifying* against him . . . ." (Emphasis added.) The natural reading of the provision, phrased as it is, would be to restrict the guarantee to individuals who are appearing in court.

[6] Massachusetts, New Hampshire, North Carolina, Maryland, and Virginia all included in their early constitutions a confrontation provision. See F. Heller, The Sixth Amendment 22–24 (1951). The documents are reprinted in F. Thorpe, The Federal and State Constitutions *passim* (1909). Wigmore has collected the state provisions. 5 J. Wigmore, Evidence § 1397, at 127–130 (3d ed. 1940).

[7] See 1 J. Elliot's Debates 328, 334 (1876).

Rights amendments were primarily concerned with the political consequences of the new clauses and paid scant attention to the definition and meaning of particular guarantees. Thus, the Confrontation Clause was apparently included without debate along with the rest of the Sixth Amendment package of rights—to notice, counsel, and compulsory process—all incidents of the adversarial proceeding before a jury as evolved during the 17th and 18th centuries.[8] If anything, the confrontation guarantee may be thought, along with the right to compulsory process, merely to constitutionalize the right to a defense as we know it, a right not always enjoyed by the accused, whose only defense prior to the late 17th century was to argue that the prosecution had not completely proved its case.[9] See H. Stephen, "The Trial of

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[8] See 1 Annals of Cong. (1789–1790). Thus, my own research satisfies me that the prevailing view—that the usual primary sources and digests of the early debates contain no informative material on the confrontation right—is correct. Note, Confrontation and the Hearsay Rule, 75 Yale L. J. 1434, 1436 n. 10 (1966); Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. Pa. L. Rev. 741, 742 (1965); Note, Confrontation, Cross-Examination, And the Right to Prepare a Defense, 56 Geo. L. J. 939, 953 (1968). For a review of the history of confrontation at English common law see Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381 (1959).

[9] See H. Stephen, "The Trial of Sir Walter Raleigh," Transactions of the Royal Historical Society 172, 184 (4th ser. Vol. 2, 1919). In discussing Raleigh's trial Stephen notes, "The modern reader of Raleigh's trial is struck by the fact that he had no assistance from counsel. He likewise would not have been allowed to call witnesses had he wished to do so. . . . [The accused was] defended by the argument that the case against [him] had to be completely proved. If this was done no witnesses or counsel on the other side need be attended to; if it was not done none were needed." See also Heller, *supra*, n. 6, at 106–107, and the remarks of Governor Randolph at the Virginia ratification convention reported at 3 J. Elliot's Debates 467 (1876).

Sir Walter Raleigh," Transactions of the Royal Historical Society 172, 184 (4th ser. Vol. 2, 1919); F. Heller, The Sixth Amendment 106–107 (1951). Such glimmer of light as history may be thought to shed comes from the brief congressional colloquy on the reach of the companion guarantee of compulsory process. The debate suggests that this also broad and sweeping right was understood to be qualified by an availability requirement. After what is now the Sixth Amendment was put on the floor, the annals report the following:

> "Mr. BURKE moved to amend this proposition in such a manner as to leave it in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witnesses, for whom process was granted but not served, was material to his defence.
>
> "Mr. HARTLEY said, that in securing him the right of compulsory process, *the Government did all it could; the remainder must lie in the discretion of the court.*
>
> "Mr. SMITH, of South Carolina, thought the regulation would come properly in, as part of the Judicial system." 1 Annals of Cong. 756. (Emphasis added.)

In the face of this colloquy I cannot accept Professor Heller's assertion in his book on the Sixth Amendment attributing to the Framers a sweeping intent to prevent "introduction of evidence given by witnesses whom the accused has not had an opportunity to cross-examine," *supra,* at 105. So far as I have been able to ascertain, this thesis finds support only in the assumption, traceable to Professor Hadley,[10] that: "The right of the accused in a

[10] Hadley, The Reform of Criminal Procedure, 10 Proceedings of the Academy of Political Science 396, 400–401 (1923). Hadley's brief remarks would seem to indicate that the abuse that provoked concern was the use of affidavit and deposition testimony.

criminal prosecution to be confronted with the witnesses against him did not originate with the provision of the Sixth Amendment, but was a common law right which had gained recognition as a result of the abuses in the trial of Sir Walter Raleigh." *Id.*, at 104. Heller's approach, resting as it does essentially on assertion,[11] is neither persuasive as a historical reading, nor tenable in view of decisions by this Court that have held that the confrontation right is not abridged by the use of hearsay that would not have satisfied the dying-declaration exception, which was, according to Heller, the only apparent extant exception to the hearsay exclusionary rule at the time the Sixth Amendment was ratified.[12]

Wigmore's more ambulatory view—that the Confrontation Clause was intended to constitutionalize the hearsay rule and all its exceptions as evolved by the courts—rests also on assertion without citation, and attempts to settle on ground that would appear to be equally infirm

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[11] The only support offered for this reading is the assertion that the Framers were concerned to prevent the abuses that occurred at the infamous treason trial of Sir Walter Raleigh. The abuses there, however, went far beyond a conviction based on hearsay. As one commentator has noted, the reams of deposition testimony given by Raleigh's alleged accomplice, who turned State's evidence, contained only innuendo and no credible assertion of substance sufficient to support a verdict. See Stephen, "The Trial of Sir Walter Raleigh," *supra*, n. 9. In this light, the Sixth Amendment guarantee might well be read as establishing a basic presumption of producing witnesses without dignifying every hearsay ruling with constitutional significance.

[12] Heller, *supra*, n. 6, at 105, citing H. Rottschaefer, Handbook of American Constitutional Law 796 (1939). This view is open to question. Wigmore, for one, takes the position that several exceptions to the hearsay rule existed as of the time the Sixth Amendment was adopted. 5 Wigmore, Evidence § 1397, at 130.

as a matter of logic.[13] Wigmore's reading would have the practical consequence of rendering meaningless what was assuredly in some sense meant to be an enduring guarantee. It is inconceivable that if the Framers intended to constitutionalize a rule of hearsay they would have licensed the judiciary to read it out of existence by creating new and unlimited exceptions.

From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses. That the Clause was intended to ordain common law rules of evidence with constitutional sanction is doubtful, notwithstanding English decisions that equate confrontation and hearsay. Rather, having established a broad principle, it is far more likely that the Framers anticipated it would be supplemented, as a matter of judge-made common law, by prevailing rules of evidence.

B

Judicial Precedent.—The history tending to suggest that *availability* underlies the confrontation right, as discussed above, is, in my view, confirmed by a circumspect analysis of the early decisions of this Court.[14]

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[13] The basis of Wigmore's assertion is that the only right to confrontation known at common law was that enshrined in the hearsay rule. He concludes that in view of the seemingly absolute prohibition on the use of hearsay declarations, it is impossible to apply literally to the Confrontation Clause and that the Framers intended confrontation to mean common-law hearsay principles. See 5 Wigmore, Evidence § 1397, at 130–131.

[14] The early decisions and recent cases are replete with dicta to the effect that confrontation is equivalent to cross-examination. Instead of treating cases like *Brookhart* v. *Janis, supra; Pointer* v. *Texas, supra;* and *Douglas* v. *Alabama, supra;* as denials of "due process," see *infra,* the Court has employed sweeping language, and said, for example, "a major reason underlying the constitutional

The early decisions that consider the confrontation right at any length all involved *ex parte* testimony submitted by deposition and affidavit. See *Reynolds* v. *United States,* 98 U. S. 145 (1879); *Mattox* v. *United States,* 156 U. S. 237 (1895); *Motes* v. *United States,* 178 U. S. 458 (1900); *Kirby* v. *United States,* 174 U. S. 47 (1899).[15] It was in this context that Mr. Justice Brown

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confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Pointer* v. *Texas,* 380 U. S., at 406–407. This kind of broad language, tending to equate confrontation and cross-examination, and the holding in *Bruton* have conjured the spectre of the constitutionalization of the hearsay rule that the dissent is apparently willing to treat with.

It is not surprising that confrontation and hearsay have been considered fungible. The labels were not until recently likely to affect the result in a federal trial. See comment in the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates 156 (1969). Cf. *Alford* v. *United States,* 282 U. S. 687 (1931) (right to cross-examine not treated as a denial of confrontation).

The portent of the label now emerges to the fore in federal cases, however, against the backdrop of recent developments that accord special treatment to constitutional errors, see *Harrington* v. *California,* 395 U. S. 250 (1969) (harmless error); *Chapman* v. *California,* 386 U. S. 18 (1967); *Kaufman* v. *United States,* 394 U. S. 217, 226 (1969) (collateral relief), and, for the States, in the context of incorporation, which makes every hearsay ruling a potential 28 U. S. C. § 2254 issue. An additional consequence of constitutionalizing the hearsay rules would be to put them beyond the reach of Congress. But see *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966).

[15] Only *Kirby* did not, strictly speaking, involve the use of deposition testimony. In Kirby's case the Government sought to introduce a judgment of conviction obtained against three perpetrators of a theft in order to prove that property found in Kirby's possession was, in fact, stolen. In *Reynolds* the Court held that an accused cannot complain about the introduction of prior recorded testimony when the witness' absence is procured by the defense. In *Mattox* the Court, analogizing to the exception to the hearsay rule for dying declarations, held admissible prior recorded testimony taken under oath and subjected to cross-examination where the witness

in an oft-quoted passage from *Mattox* v. *United States* set forth as the primary objective of the constitutional guarantee, the prevention of "depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but also of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 156 U. S., at 242–243. See also *Dowdell* v. *United States,* 221 U. S.

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had died since the first trial. In *Motes* the Court declined to countenance testimony taken subject to cross-examination where it appeared the Government might have produced the witness.

Most later cases have also involved written testimony. See, *e. g., Barber* v. *Page, supra; Pointer* v. *Texas, supra; Douglas* v. *Alabama, supra* (confession); *Stein* v. *New York,* 346 U. S. 156, 194 (1953) (confession); *West* v. *Louisiana,* 194 U. S. 258 (1904); cf. *Greene* v. *McElroy,* 360 U. S. 474 (1959). Other problems treated under the rubric of confrontation have included, *inter alia,* the exclusion of the accused from his trial, *In re Oliver,* 333 U. S. 257 (1948); *Brookhart* v. *Janis, supra;* cf. *Snyder* v. *Massachusetts,* 291 U. S. 97 (1934) (a viewing); *Parker* v. *Gladden,* 385 U. S. 363 (1966) (improper remarks by bailiff); *Turner* v. *Louisiana,* 379 U. S. 466 (1965).

That, historically, the primary concern was the possibility of trial by affidavit may be evidenced by several early state constitutional provisions that specifically made exceptions to confrontation by providing for use of depositions when the witness is unavailable. See, *e. g.,* California Const., 1879, Art. I, § 13 ("The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial."); Colorado Const., 1876, Art. II, § 16; Montana Const., 1889, Art. III, §§ 16, 17; Ohio Const., 1851, Art. I, § 10; Texas Const., 1876, Art. I, § 10, as amended 1918.

325, 330 (1911); *Snyder* v. *Massachusetts,* 291 U. S. 97, 107 (1934).

This restricted reading of the clause cannot be defended—taking, as it does, a metaphysical approach, one that attempts to differentiate between affidavits, as a substitute for first-hand testimony, and extra-judicial testimonial utterances. Indeed, the problems with the latter are somewhat greater, and the difficulty in establishing accurately what an extra-judicial declarant said has sometimes been considered an infirmity of hearsay evidence. See C. McCormick, Evidence § 224, at 458 (1954). Conceptual difficulties aside, it would seem that the early recognition of the dying declaration as an exception to the Confrontation Clause, *Mattox* v. *United States, supra; Kirby* v. *United States, supra; Robertson* v. *Baldwin,* 165 U. S. 275 (1897), proceeded on the assumption that extrajudicial testimonial declarations were also a concern of the Sixth Amendment.[16]

Notwithstanding language that appears to equate the Confrontation Clause with a right to cross-examine, and, by implication, exclude hearsay, the early holdings and dicta can, I think, only be harmonized by viewing the confrontation guarantee as being confined to an availability rule, one that requires the production of a witness when he is available to testify. This view explains the recognition of the dying declaration exception, which dispenses with any requirement of cross-examination, and the refusal to make an exception for prior recorded statements, taken subject to cross-examination

[16] Interestingly in *Hopt* v. *Utah,* 110 U. S. 574 (1884), the Court, speaking through the same Justice who wrote *Kirby,* in holding that it was error to permit a surgeon to testify that he had examined the body of the alleged victim of the charged homicide when the surgeon's knowledge as to the identity of the deceased came from a third party, relied only on hearsay principles and made no allusion to the Confrontation Clause.

by the accused, when the witness is still available to testify. Compare *Mattox* v. *United States, supra,* with *Motes* v. *United States, supra.*

This rationalization of the early decisions is not only justified by logic but also anchored in precedent. In *West* v. *Louisiana,* 194 U. S. 258 (1904), this Court in reviewing its early confrontation decisions emphasized *availability* as the thread that tied them together. *West* involved the admission into evidence at trial of deposition testimony, taken subject to cross-examination and under oath, where the deponent was "permanently absent from the State and was a non-resident thereof, and . . . his attendance could not be procured." *Ibid.* Referring, *inter alia,* to *Motes, Mattox, Kirby,* and *Reynolds,* the Court concluded that "in not one of those cases was it held that, under facts such as [were before the Court], there would have been a violation of the Constitution in admitting the deposition in evidence." 194 U. S., at 266. That the uppermost consideration was the availability of the witness is further underscored by the *West* discussion of the common-law rule that admitted deposition testimony "upon proof being made to the satisfaction of the court that the witness was at the time of the trial dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant." 194 U. S., at 262.[17]

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[17] That the critical element is *availability* cannot be doubted. The *West* opinion does not emphasize the opportunity to cross-examine at the time of taking the depositions, and, as already remarked, that would appear to be of secondary concern given the recognition in *Mattox* of the dying declaration exception. *West,* moreover, perforce stands for the proposition that confrontation is indifferent to any limitations on the nature of cross-examination at a preliminary hearing that underlie the dissent in this case.

In view of the extended discussion of federal precedents and the express rejection of West's contentions thereunder, for present pur-

II

Recent decisions have, in my view, fallen into error on two scores. As a matter of jurisprudence I think it unsound, for reasons I have often elaborated, see, *e. g.*, my dissenting opinions in *Duncan* v. *Louisiana,* 391 U. S. 145, 171 (1968), and *Baldwin* v. *New York, ante,* p. 117, to incorporate *as such* the guarantees of the Bill of Rights into the Due Process Clause. While, in this particular instance, this would be of little practical consequence if the Court had confined the Sixth Amendment guarantee to an "availability" requirement, some decisions have, unfortunately, failed to separate, even as a federal matter, restrictions on the abuse of hearsay testimony, part of the due process right of a reliable and trustworthy conviction, and the right to confront an available witness. See n. 20, *infra.*

By incorporating into the Fourteenth Amendment its misinterpretation of the Sixth Amendment these decisions have in one blow created the present dilemma, that of bringing about a potential for a constitutional rule of hearsay for both state and federal courts. However ill-advised would be the constitutionalization of hearsay rules in federal courts, the undesirability of imposing those brittle rules on the States is manifest. Given the ambulatory fortunes of the hearsay doctrine, evidenced by the disagreement among scholars over the value of excluding hearsay and the trend toward liberalization of the exceptions,[18] it would be most unfortunate for this

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poses it is of no consequence that the case involved a state criminal prosecution and that the Court declined to hold the Sixth Amendment applicable *as such.*

[18] While the importance of the right to cross-examine is not to be minimized, see 5 Wigmore, *supra,* § 1367, the desirability of excluding otherwise relevant evidence simply because it has not been tested by cross-examination has been frequently questioned. See generally C. McCormick, Evidence §§ 224, 302–305, at 459, 628–634 (1954);

Court to limit the flexibility of the States and choke experimentation in this evolving area of the law. Cf. *Baldwin* v. *New York, supra.*[19] I adhere to what I con-

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ALI Model Code of Evidence Rules 502, 503, and Comment, at 231–232 (1942); Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 8–03, at 173 (1969); Uniform Rules of Evidence, Rule 63 (liberalized exceptions). See also James, The Role of Hearsay in a Rational Scheme of Evidence, 34 Ill. L. Rev. 788 (1940); Chadbourn, Bentham and The Hearsay Rule—A Benthamic View of Rule 63 (4)(c) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932, 942–951 (1962) (Uniform Rules too restricted); McCormick, Hearsay, 10 Rutgers L. Rev. 620, 630 (1956) (commenting on Uniform Rules); cf. Quick, Evidence, 6 Wayne L. Rev. 163, 168 (1959) (apparently critical of the trend toward admissibility). Judges, too, have disagreed on the desirability of excluding hearsay, compare Chief Justice Marshall's view set forth in *Queen* v. *Hepburn,* 7 Cranch 290 (1813), and that of Justice Story in *Ellicott* v. *Pearl,* 10 Pet. 412, 436 (1836), with that of Judge Learned Hand set forth in his lecture to the Association of the Bar of the City of New York, The Deficiencies of Trials to Reach the Heart of the Matter, 3 Lectures on Legal Topics, 1921–1922, p. 89 (1926).

[19] See Report of the New Jersey Supreme Court Committee on Evidence (1963). The potential for suffocating creative thinking is suggested by the commentary on the Uniform Rules of Evidence by the California Law Revision Commission. Prior to *Pointer* in 1962 the commission noted that despite the federal rule, it was free, consistent with due process, to consider and adopt Uniform Rule 63 (3)(b)(ii), providing for use of testimony from a former trial when there was an identity of issues and reason to believe there would have been adequate cross-examination and the declarant is unavailable. The commission recommended adoption of Rule 63 (3)(b)(ii). See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (1962), in 4 California Law Revision Commission: Reports, Recommendations and Studies 454–457 (1963). The provision was omitted from the new evidence code with a comment that a defendant in a criminal prosecution should not be made to rely on another individual's cross-examination. Evidence Code with Official Comments 1250 (California Law Revision Commission 1965). While this Court's decision in *Pointer* was apparently not responsible for the decision to omit this provision,

sider to be the sound view expressed in *Stein* v. *New York*, 346 U. S. 156, 196 (1953): "The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, [should] not be read into the Fourteenth Amendment."

What I would hold binding on the States as a matter of due process is what I also deem the correct meaning of the Sixth Amendment's Confrontation Clause—that a State may not in a criminal case use hearsay when the declarant is available. See *West* v. *Louisiana, supra.*[20]

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since the final commission report was submitted in January 1965, prior to *Pointer*, it is clear that were hearsay constitutionalized, California could not even have considered this innovation.

[20] This is not to say that the right to cross-examination is not an element of due process. *Alford* v. *United States*, 282 U. S. 687 (1931); *In re Oliver*, 333 U. S. 257 (1948); *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934); *Smith* v. *Illinois*, 390 U. S. 129 (1968). Due process does not permit a conviction based on no evidence, *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960); *Nixon* v. *Herndon*, 273 U. S. 536 (1927), or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court. Cf. *In re Oliver, supra; Turner* v. *Louisiana*, 379 U. S. 466 (1965).

In *Stovall* v. *Denno*, 388 U. S. 293 (1967), and *Simmons* v. *United States*, 390 U. S. 377 (1968), the underlying principle was refined. The Court there recognized that evidence of identification—always a critical issue in a criminal trial—should not be received if the circumstances of a pretrial confrontation were so infected by suggestiveness as to give rise to an irreparable likelihood of misidentification. By the same token I would not permit a conviction to stand where the critical issues at trial were supported only by *ex parte* testimony not subjected to cross-examination, and not found to be reliable by the trial judge. Cf. *United States* v. *Kearney*, 136 U. S. App. D. C. 328, 420 F. 2d 170 (1969). It will, of course, be the unusual situation where the prosecution's entire case is built upon hearsay testimony of an unavailable witness. In such circumstance the defendant would be entitled to a hearing on the reliability of the testimony. Cf. ALI, Model Code of Evidence; *United States* v. *Kearney, supra.* Due process also requires that the defense be given ample opportunity to alert the jury

There is no reason in fairness why a State should not, as long as it retains a traditional adversarial trial, produce a witness and afford the accused an opportunity to cross-examine him when he can be made available. That this principle is an essential element of fairness is attested to not only by precedent, *Motes* v. *United States, supra; Barber* v. *Page, supra; Smith* v. *Illinois, supra,* but also by the traditional and present exceptions to the hearsay rule which recognize greater flexibility for receiving evidence when the witness is not available. Furthermore it accommodates the interest of the State in making a case, yet recognizes the obligation to accord the accused the fullest opportunity to present his best defense.[21] For those rare cases where a conviction occurs after a trial where no credible evidence could be said to justify the result, there remains the broader due process requirement that a conviction cannot be founded on no evidence. See n. 20, *supra.*

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to the pitfalls of accepting hearsay at face value, and the defendant would, of course, upon request be entitled to cautionary instructions. Cf. § 6.17, Manual on Jury Instructions, 33 F. R. D. 601 (missing witnesses). On the basis of this approach I would stand by my concurrence in the result in *Pointer* v. *Texas, supra,* both because the out-of-court statement formed the bulk of the prosecutor's case and also because there was no showing that the witness could not have been made available for cross-examination. See also *Brookhart* v. *Janis,* 384 U. S. 1 (1966); *Barber* v. *Page,* 390 U. S. 719 (1968). The result in *Douglas* v. *Alabama,* to which I also still adhere, can be rationalized under this test since there the inadmissible confession "constituted the only direct evidence" that petitioner had committed the murder. 380 U. S., at 419. An additional factor would move me to stand by *Douglas.* It was a case of prosecutorial misconduct. By placing the witness on the stand and reading in the confession, the prosecutor, in effect, increased the reliability of the confession in the jury's eyes in view of the witness' apparent acquiescence as opposed to repudiation.

[21] Cf. *Napue* v. *Illinois,* 360 U. S. 264 (1959); *Mooney* v. *Holohan,* 294 U. S. 103 (1935).

III

Putting aside for the moment the "due process" aspect of this case, see n. 20, *supra,* it follows, in my view, that there is no "confrontation" reason why the prosecution should not use a witness' prior inconsistent statement for the truth of the matters therein asserted. Here the prosecution has produced its witness, Porter, and made him available for trial confrontation. That, in my judgment, perforce satisfies the Sixth Amendment. Indeed, notwithstanding the conventional characterization of an available witness' prior out-of-court statements as hearsay when offered affirmatively for the truth of the matters asserted, see *Hickory* v. *United States,* 151 U. S. 303, 309 (1894); *Southern R. Co.* v. *Gray,* 241 U. S. 333, 337 (1916); *Bridges* v. *Wixon,* 326 U. S. 135 (1945), this is hearsay only in a technical sense since the witness may be examined at the trial as to the circumstances of memory, opportunity to observe, meaning, and veracity. See Comment, Model Code of Evidence, *supra,* n. 18. I think it fair to say that the fact that the jury has no opportunity to reconstruct a witness' demeanor at the time of his declaration, and the absence of oath are minor considerations.

The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available. To the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts, for reasons

stated in Part II, I think confrontation is nonetheless satisfied.[22]

IV

I turn finally to the question of whether this conviction stands on such unreliable evidence that reversal is required. Cf. *Stovall* v. *Denno,* 388 U. S. 293 (1967); *Thompson* v. *City of Louisville,* 362 U. S. 199 (1960). I cannot conclude that the preliminary hearing testimony was obtained under circumstances, as such, so unreliable that its admission requires reversal as a matter of due process, even though it was crucial to the central issue in the case. Compare *Stovall* v. *Denno, supra; Simmons* v. *United States,* 390 U. S. 377 (1968). The statement given to Officer Wade does, however, raise such a possibility. I accordingly would remand the case to the California Supreme Court for consideration of that question and, whether or not it deems the second statement too unreliable to have been admitted, to decide whether this conviction should be reversed under California law for want of sufficient evidence to sustain a conviction beyond a reasonable doubt. See *In re Winship,* 397 U. S. 358 (1970).

MR. JUSTICE BRENNAN, dissenting.

Respondent was convicted of violating California Health and Safety Code § 11532 which prohibits furnishing narcotics to a minor. The only issue at his trial was

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[22] The lengths to which the prosecution must go to produce a witness before it may offer evidence of an extra-judicial declaration is a question of reasonableness. *Barber* v. *Page, supra;* cf. *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306 (1950). A good-faith effort is, of course, necessary, and added expense or inconvenience is no excuse. It should also be open to the accused to request a continuance if the unavailability is only temporary. Cf. *Peterson* v. *United States,* 344 F. 2d 419, 425 (C. A. 5th Cir. 1965).

whether he had in fact furnished Porter, a minor, with marihuana. On the direct testimony, it does not appear that he could have been constitutionally convicted, for it seems that there would have been insufficient evidence to sustain a finding of guilt. The State presented three witnesses to prove respondent's guilt: Porter and Officers Wade and Dominguez. As the Court states, Porter testified at trial that "he was uncertain how he obtained the marihuana, primarily because he was at the time on 'acid' (LSD), which he had taken 20 minutes before respondent phoned. Porter claimed that he was unable to remember the events that followed the phone call, and that the drugs he had taken prevented his distinguishing fact from fantasy." *Ante,* at 152. Officer Wade had no personal knowledge of the facts of the alleged offense; he was able only to report the content of an extrajudicial statement that Porter had made to him. Officer Dominguez testified about an incident wholly separate from the alleged offense; his testimony was consistent with the defense account of the facts.[1]

Thus, the evidence on which respondent was found guilty consisted of two pretrial statements by Porter. The first was the account given Officer Wade. It was unsworn and not subject to defense cross-examination. Porter's demeanor while making the statement was not observed by the trial factfinder. The statement was made under unreliable circumstances—it was taken four days after Porter's arrest for selling marihuana to an undercover agent and while he was still in custody.[2] No

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[1] See *People* v. *Green,* 70 Cal. 2d 654, 657–658, 451 P. 2d 422, 424 (1969).

[2] Porter declared under oath on May 12, 1967, that "when I was arrested and was in custody, the police kept telling me that they knew it was JOHN GREEN I was involved with and that unless I implicated him that they would see that I was out of circulation for a long time . . . ."

written transcript of the statement was introduced at trial. Officer Wade recounted it simply as he remembered Porter's words.[3] The second statement was given by Porter during respondent's preliminary hearing. It was sworn and subject to cross-examination. Defense counsel, however, did not engage in a searching examination.[4] Again, Porter's demeanor while he made this statement was unobserved by the trial factfinder. The statement was put before this factfinder, of course, when at various points during Porter's direct examination at trial the prosecutor read excerpts from his preliminary hearing testimony.

Accordingly, the facts of this case present two questions regarding the application of California Evidence Code § 1235: first, whether the Confrontation Clause permits a witness' extrajudicial statement to be admitted at trial as substantive evidence when the witness claims to be unable to remember the events with which his prior statement dealt, and, second, whether the clause permits a witness' preliminary hearing statement, made under oath and subject to cross-examination, to be introduced at trial as substantive evidence when the witness claims to be unable to remember the events with which the statement dealt. In my view, neither statement can be introduced without unconstitutionally restricting the right of the accused to challenge incriminating evidence in the presence of the factfinder who will determine his guilt or innocence.

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[3] Cf. *Goldberg* v. *Kelly,* 397 U. S. 254, 269 (1970), where the Court stated that "[t]he second-hand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him."

[4] No question, for example, was asked Porter by either the defense or prosecution as to whether he was under the influence of drugs at the time of the alleged offense.

I

The Court points out that "the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *Ante,* at 156. A face-to-face encounter, of course, is important, not so that the accused can view at trial his accuser's visage, but so that he can directly challenge the accuser's testimony before the factfinder. See 5 J. Wigmore, Evidence §§ 1364, 1365 (3d ed. 1940). We made this clear in *Mattox* v. *United States,* 156 U. S. 237, 242–243 (1895), where we stressed the necessity of "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

There is no way to test the recollection and sift the conscience of a witness regarding the facts of an alleged offense if he is unwilling or unable to be questioned about them; [5] defense counsel cannot probe the story of a silent witness and attempt to expose facts that qualify or discredit it. The impetus to truth inherent in the oath sworn by the witness, in the penalty for perjury, and in

[5] If, on the other hand, the witness is willing and able to testify at trial about the operative events, the demands of the Confrontation Clause may be met, even though the witness contradicts his pretrial assertions. I see no need on the facts presented here, however, to resolve this issue.

the serious purpose of the courtroom have no effect on him so far as the facts of the alleged offense are concerned. Nor, obviously, can the factfinder view his demeanor while he recounts the facts. If the witness claims that he is unable to remember the pertinent events, it is true that this assertion can be challenged, and that in making and defending it the witness will be affected by his oath, the penalty for perjury, and the courtroom atmosphere. It is equally true that the trial factfinder can observe and weigh the witness' demeanor as he makes and defends such a claim. But a decision by the factfinder that the witness is lying sheds no direct light on the accuracy of any pretrial statement made by him; that statement remains without the support or discredit that can come only from the probing of its factual basis while the witness stands face to face with the accused and the factfinder. If the factfinder decides that the witness is honestly unable to remember the events in question, that conclusion may or may not directly guide the factfinder in assessing the reliability of the pretrial statement. If, for example, the witness were unable to remember the pertinent facts because he was under the influence of drugs at the time they occurred, the factfinder might reasonably disregard any pretrial account of these events given by the witness.

This Court has already explicitly held in *Douglas* v. *Alabama,* 380 U. S. 415, 419–420 (1965), that the Confrontation Clause forbids the substantive use at trial of a prior extrajudicial statement, when the declarant is present at trial but unwilling to testify about the events with which his prior statement dealt. In *Douglas* the prosecution introduced the alleged confession of the accused's supposed accomplice, one Loyd, who was unwilling to testify about the pertinent events for fear of self-incrimination. We held that "petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied

him the right of cross-examination secured by the Confrontation Clause. Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so . . . . [E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer."

For purposes of the Confrontation Clause, there is no significant difference between a witness who fails to testify about an alleged offense because he is unwilling to do so and a witness whose silence is compelled by an inability to remember. Both are called to the stand to testify. The jury may view the demeanor of each as he indicates why he will not discuss the crucial events. But in neither instance are the purposes of the Confrontation Clause satisfied, because the witness cannot be questioned at trial concerning the pertinent facts. In both cases, if a pretrial statement is introduced for the truth of the facts asserted, the witness becomes simply a conduit for the admission of stale evidence, whose reliability can never be tested before the trial factfinder by cross-examination of the declarant about the operative events, and by observation of his demeanor as he testifies about them.

Unlike the Court, I see no reason to leave undecided the inadmissibility of Porter's statements to Officer Wade. We have before us the transcript of Porter's trial testimony. He could not remember the operative events. Whether he feigned loss of memory is irrelevant to respondent's confrontation claim. Under *Douglas* his statement to Officer Wade must be excluded as substantive evidence.[6]

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[6] The fact that in appropriate circumstances such a statement may be admitted to impeach a witness is not as anomalous as the Court suggests, *ante*, at 164. If, for example, Porter's pretrial statements

II

The question remains whether the fact that a pretrial statement was obtained at a preliminary hearing, under oath and subject to cross-examination, distinguishes that statement for confrontation purposes from an extrajudicial statement. I thought that our decision in *Barber* v. *Page,* 390 U. S. 719 (1968), resolved this issue. In *Barber* we stated that confrontation at a preliminary hearing cannot compensate for the absence of confrontation at trial, because the nature and objectives of the two proceedings differ significantly. In that case, the prosecution argued that the accused had waived his right to cross-examination at the preliminary hearing. Though we rejected that argument, to put beyond doubt the necessity for confrontation *at trial,* we stated:

> "Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined [the witness] at the preliminary hearing. . . . The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Id.,* at 725.[7]

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had been admitted at respondent's trial solely for impeachment purposes, they would not have provided substantive proof of his guilt, and, as noted, there would then very likely have been insufficient evidence to sustain his conviction.

[7] The California Supreme Court in the present case discussed in more detail the distinctions between a preliminary hearing and trial, stating that "the purpose of a preliminary hearing is not a full exploration of the merits of a cause or of the testimony of the witnesses. It is designed and adapted solely to answer the

We applied *Barber* retroactively in *Berger* v. *California*, 393 U. S. 314 (1969), a case in which defense counsel did have an opportunity to cross-examine the witness at the preliminary hearing. We held, nonetheless, that "[c]learly, petitioner's inability to cross-examine . . . at trial may have had a significant effect on the 'integrity of the fact-finding process.'" *Id.*, at 315.

Preliminary hearings in California are not atypical in their nature and objectives:

> "In most California criminal prosecutions the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouement—an order holding the defendant for trial. Only television lawyers customarily demolish the prosecution in the magistrate's court. The prosecution need show only 'probable cause,' a burden vastly lighter than proof beyond a reasonable doubt." *People* v. *Gibbs*, 255 Cal. App. 2d 739, 743–744, 63 Cal. Rptr. 471, 475 (1967).

It follows that the purposes of the Confrontation Clause cannot be satisfied by a face-to-face encounter at

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far narrower preliminary question of whether probable cause exists for a subsequent trial. The judge in preliminary proceedings is not required to be convinced of the defendant's guilt 'beyond a reasonable doubt,' but need only look for reasonable credibility in the charge against him. *A fortiori* a witness' testimony, though the only evidence adduced, need not be convincing or credible beyond a reasonable doubt, and cross-examination which would surely impeach a witness at trial would not preclude a finding of probable cause at the preliminary stage. Even given the opportunity . . . neither prosecution nor defense is generally willing or able to fire all its guns at this early stage of the proceedings, for considerations both of time and efficacy. . . . Indeed, it is seldom that either party has had time for investigation to obtain possession of adequate information to pursue in depth direct or cross-examination." 70 Cal. 2d, at 663, 451 P. 2d, at 428. See also *Virgin Islands* v. *Aquino*, 378 F. 2d 540, 549 (C. A. 3d Cir. 1967).

the preliminary hearing. Cross-examination at the hearing pales beside that which takes place at trial. This is so for a number of reasons. First, as noted, the objective of the hearing is to establish the presence or absence of probable cause, not guilt or innocence proved beyond a reasonable doubt; thus, if evidence suffices to establish probable cause, defense counsel has little reason at the preliminary hearing to show that it does not conclusively establish guilt—or, at least, he had little reason before today's decision. Second, neither defense nor prosecution is eager before trial to disclose its case by extensive examination at the preliminary hearing; thorough questioning of a prosecution witness by defense counsel may easily amount to a grant of gratis discovery to the State. Third, the schedules of neither court nor counsel can easily accommodate lengthy preliminary hearings. Fourth, even were the judge and lawyers not concerned that the proceedings be brief, the defense and prosecution have generally had inadequate time before the hearing to prepare for extensive examination. Finally, though counsel were to engage in extensive questioning, a part of its force would never reach the trial factfinder, who would know the examination only second hand. As the California Supreme Court stated:

> "[L]ost in a cold reading of the preliminary transcript is the more subtle yet undeniable effect of counsel's rhetorical style, his pauses for emphasis and his variations in tone, as well as his personal rapport with the jurors, as he pursues his cross-examination. For example, . . . while the lawyer 'must keep control of himself . . . [t]his does not mean that the cross-examiner never should fight with a witness, raise his voice, or become angry. Forensic indignation, whether expressed physically or verbally, may produce good results in special circumstances.' In addition, counsel may well conduct

> his cross-examination in a different manner before a committing magistrate than before a trial court or jury. Thus, . . . counsel must always temper his cross-examination to the individual jurors, using their reactions as a guide to the most effective line of questioning. 'The cross-examiner must remember that he is a performer and the jurors are his audience. No good performer ignores his audience, and all performances are conducted for the purpose of favorably impressing the audience.' . . . We conclude that experience demonstrates the essentiality of truly contemporaneous cross-examination." 70 Cal. 2d, at 662–663, 451 P. 2d, at 427.

If cross-examination at the preliminary hearing rarely approximates that at trial, observation by the trial factfinder of the witness' demeanor as he gives his prior testimony is virtually nonexistent. Unless the committing magistrate is also the trial factfinder, the demeanor purpose of the Confrontation Clause is wholly negated by substituting confrontation at the preliminary hearing for confrontation at trial. And yet, in the words of the California court, "[i]t is because demeanor—attitude and manner—is a significant factor in weighing testimonial evidence that it is axiomatic the trier of fact, before whom the witness testified and was cross-examined . . . , is the sole judge of the credibility of a witness and of the weight to be given his testimony." *Id.*, at 662, 451 P. 2d, at 427. No such determination of credibility is possible when the witness comes before the trial factfinder by the reading of a cold transcript.

It appears, then, that in terms of the purposes of the Confrontation Clause, an equation of face-to-face encounter at the preliminary hearing with confrontation at trial must rest largely on the fact that the witness testified

at the hearing under oath, subject to the penalty for perjury, and in a courtroom atmosphere. These factors are not insignificant, but by themselves they fall far short of satisfying the demands of constitutional confrontation. Moreover, the atmosphere and stakes are different in the two proceedings. In the hurried, somewhat *pro forma* context of the average preliminary hearing, a witness may be more careless in his testimony than in the more measured and searching atmosphere of a trial. Similarly, a man willing to perjure himself when the consequences are simply that the accused will stand trial may be less willing to do so when his lies may condemn the defendant to loss of liberty. In short, it ignores reality to assume that the purposes of the Confrontation Clause are met during a preliminary hearing. Accordingly, to introduce preliminary hearing testimony for the truth of the facts asserted, when the witness is in court and either unwilling or unable to testify regarding the pertinent events, denies the accused his Sixth Amendment right to grapple effectively with incriminating evidence.

The Court's ruling, moreover, may have unsettling effects on the nature and objectives of future preliminary hearings. The California Court defined the problem: "Were we to equate preliminary and trial testimony one practical result might be that the preliminary hearing, designed to afford an efficient and speedy means of determining the narrow question of probable cause, would tend to develop into a full-scale trial. This would invite thorough and lengthy cross-examination, with the consequent necessity of delays and continuances to bring in rebuttal and impeachment witnesses, to gather all available evidence, and to assure generally that nothing remained for later challenge. In time this result would prostitute the accepted purpose of pre-

liminary hearings and might place an intolerable burden on the time and resources of the courts of first instance." 70 Cal. 2d, at 664, 451 P. 2d, at 428.

Conscientious defense counsel, aware that today's decision has increased the likelihood of the use of preliminary hearing testimony at trial, may well wish to conduct a full-scale, unlimited cross-examination of prosecution witnesses at the hearing. We held in *Coleman* v. *Alabama, ante,* p. 1, that an accused has a right to assistance of counsel during a preliminary hearing. And we have made clear that "it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel." *White* v. *Ragen,* 324 U. S. 760, 764 (1945). In light of today's decision, may defense counsel be denied requests for delay that are reasonably necessary to enable him to conduct a thorough examination at the preliminary hearing? What limits, if any, may still be placed on the defense's use of the preliminary hearing as a discovery device to extract information from the prosecution that is reasonably necessary, not to a determination of probable cause, but to a rigorous examination of government witnesses? Do the requisites of "effective assistance of counsel" require defense counsel to conduct such an examination? [8]

[8] Beyond these problems, today's holding raises another practical difficulty: how extensive must cross-examination at the preliminary hearing be before constitutional confrontation is deemed to have occurred? Is the mere opportunity for face-to-face encounter sufficient? Perhaps so. The Court states that "respondent had every opportunity to cross-examine Porter as to his statement" at the hearing. *Ante,* at 165. Does that mean that if defense counsel fails to take advantage of the opportunity that the accused can subsequently be convicted at trial on the basis of wholly untested evidence? If more than an unexercised chance to cross-examine is required, how thorough and effective must the questioning be before it satisfies the Confrontation Clause? Is it significant,

The Court relies heavily on the traditional practice of admitting the prior testimony of a witness who is physically unavailable at trial. It finds no ground for distinguishing between the pretrial declarant who fails to testify at trial because he is not physically present and the pretrial declarant who, though present at trial, fails to testify because he is unwilling or unable to do so. The Court reasons that the "necessity" for the introduction of either declarant's prior statement is "the State's 'need' to introduce relevant evidence," and that the testimony's "reliability" rests "on the circumstances under which it was given—circumstances that remain unaffected regardless of whether the witness is present or absent at the later trial." *Ante,* at 167 n. 16. I disagree.

The State, obviously, does need to introduce relevant evidence. But the "necessity" that justifies the admission of pretrial statements is not the prosecution's need to convict, but the factfinder's need to be presented with reliable evidence to aid its determination of guilt or innocence. Whether a witness' assertions are reliable ordinarily has little or no bearing on their admissibility, for they are subject to the corrective influences of his demeanor and cross-examination. If, however, there is no possibility that his assertions can be so tested at trial, then their reliability becomes an important factor in deciding whether to permit their presentation to the factfinder. When a probability exists that incriminating pretrial testimony is unreliable, its admission, absent confrontation, will prejudicially distort the factfinding process.

The reliability of pretrial testimony, in turn, is not determined simply by the circumstances under which it

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for example, that in the present case neither the defense nor prosecution explored the most elemental fact about Porter's testimony—the possibility that he was under the influence of drugs at the time of the alleged offense?

was given. It is also influenced by subsequent developments. If, for example, prior testimony is later disavowed by the declarant in an extrajudicial but convincing statement, it would be unrealistic to argue at a later trial, from which the declarant was physically absent, that the reliability of his prior testimony was unaffected by the intervening event.

The subsequent developments under consideration here are (1) failure to testify at trial because of physical unavailability and (2) failure to testify because of unwillingness to do so or inability to remember. In my view, these developments have very different implications for the reliability of prior testimony. Physical unavailability is generally a neutral factor; in most instances, it does not cast doubt on the witness' earlier assertions. Inability to remember the pertinent events, on the other hand, or unwillingness to testify about them, whether because of feigned loss of memory or fear of self-incrimination, does cast such doubt. Honest inability to remember at trial raises serious question about clarity of memory at the time of the pretrial statement. The deceit inherent in feigned loss of memory lessens confidence in the probity of prior assertions. And fear of self-incrimination at trial suggests that the witness may have shaped prior testimony so as to avoid dangerous consequences for himself. Reliability cannot be assumed simply because a prior statement was made at a preliminary hearing.

In sum, I find that Porter's real or pretended lapse of memory about the pertinent events casts serious doubt upon the reliability of his preliminary hearing testimony. It is clear that so long as a witness, such as Porter, cannot or will not testify about these events at trial, the accused remains unable to challenge effectively that witness' prior assertions about them. The probable unreliability of the prior testimony, coupled with the im-

possibility of its examination during trial, denies the accused his right to probe and attempt to discredit incriminating evidence. Accordingly, I would hold California Evidence Code § 1235 in violation of the Confrontation Clause to the extent that it permits the substantive use at trial of prior statements, whether extrajudicial or testimonial, when the declarant is present at trial but unable or unwilling to be questioned about the events with which the prior statements dealt. I would therefore affirm the reversal of respondent's conviction.

CITY OF PHOENIX ET AL. *v.* KOLODZIEJSKI

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

No. 1066. Argued March 31, 1970—Decided June 23, 1970

The City of Phoenix held an election in June 1969 at which the issuance of general obligation bonds to finance various municipal improvements was approved. Under Arizona law only real property taxpayers were permitted to vote. Six days after the election this Court held in *Cipriano* v. *City of Houma*, 395 U. S. 701, that restricting the franchise to property taxpayers in elections on revenue bonds violated the Equal Protection Clause. In August 1969 appellee, who owned no realty, challenged the franchise restriction and attacked the validity of the June election. The District Court, finding no significant difference between revenue bonds and general obligation bonds, held the nonproperty-owner exclusion unconstitutional. It declared the June bond election invalid, since the authorization for the issuance of the bonds was not final on the date of the *Cipriano* decision. *Held:*

1. The Equal Protection Clause does not permit a State to restrict the franchise to real property taxpayers in elections to approve the issuance of general obligation bonds, as the differences between the interests of property owners and nonproperty owners are not sufficiently substantial to justify excluding the latter from voting. Pp. 207–213.

2. This decision will apply only to authorizations for general obligation bonds that are not final as of the date of this decision. Pp. 213–215.

Affirmed.

Rex E. Lee argued the cause for appellants. With him on the brief were *Robert J. Backstein* and *Alan K. Polley*.

Fred H. Rosenfeld argued the cause for appellee. With him on the brief was *Ivan Robinette*.

Briefs of *amici curiae* were filed by *Jack P. F. Gremillion*, Attorney General, *Edward Donald Moseley*, *Harold B. Judell*, and *James Hugh Martin* for the State

of Louisiana; by *Phillip H. Holm* for the Parish School Board of Caddo Parish; by *John F. Ward, Jr., Fred G. Benton, Jr.,* and *Fred G. Benton, Sr.,* for the Louisiana School Boards Association; by *Myles P. Tallmadge* for Poudre School District R–1 of Larimer County, Colorado; and by *Richard H. Frank* for Elizabeth M. Axtell et al.

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Kramer* v. *Union Free School District,* 395 U. S. 621 (1969), this Court held that a State could not restrict the vote in school district elections to owners and lessees of real property and parents of school children because the exclusion of otherwise qualified voters was not shown to be necessary to promote a compelling state interest. This ruling, by its terms applicable to elections of public officials, was extended to elections for the approval of revenue bonds to finance local improvements in *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969). Our decision in *Cipriano* did not, however, reach the question now presented for decision: Does the Federal Constitution permit a State to restrict to real property taxpayers the vote in elections to approve the issuance of general obligation bonds?

This question arises in the following factual setting: On June 10, 1969, the City of Phoenix, Arizona, held an election to authorize the issuance of $60,450,000 in general obligation bonds as well as certain revenue bonds. Under Arizona law, property taxes were to be levied to service this indebtedness, although the city was legally privileged to use other revenues for this purpose.[1] The

[1] The relevant Arizona statute provides as follows:

"A. After the bonds are issued, the governing body or board shall enter upon its minutes a record of the bonds sold, their numbers and dates, and shall annually levy and cause to be collected a tax, at the same time and in the same manner as other taxes are levied and collected upon all taxable property in such political

general obligation bonds were to be issued to finance various municipal improvements, with the largest amounts to go for the city sewer system, parks and playgrounds, police and public safety buildings, and libraries. Pursuant to Arizona constitutional and statutory provisions,[2] only otherwise qualified voters who were also real property taxpayers were permitted to vote on these bond issues. All of the bond issues submitted to the voters were approved by a majority of those voting.

On June 16, 1969, six days after the election in Phoenix, this Court held in *Cipriano* v. *City of Houma, supra,* that restricting the franchise to property taxpayers in elections on revenue bonds violated the Equal Protection Clause of the Fourteenth Amendment. That ruling was applied to the case before the Court in which under local law the authorization of the revenue bonds was not yet final when the challenge to the election was raised in the District Court. On August 1, 1969, appellee Kolodziejski, a Phoenix resident who was otherwise qualified to vote but who owned no real property, filed

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subdivision, sufficient to pay the interest on the bonds when due, and shall likewise annually levy a tax sufficient to redeem the bonds when they mature.

"B. Monies derived from the levy of the tax when collected shall constitute a fund for payment of interest and the bonds. The fund shall be kept separately and shall be known as the 'Interest Fund' and 'Redemption Fund.'" Ariz. Rev. Stat. Ann. § 35–458 (1956).

In *Allison* v. *City of Phoenix*, 44 Ariz. 66, 33 P. 2d 927 (1934), the Arizona Supreme Court ruled that the predecessor of this section permitted an issuing municipality to use other funds for debt service if such funds were available. In this case the parties have stipulated that for the 1969–1970 fiscal year $3,244,773 of the city's total general obligation debt service requirement of $5,594,937 was met from sources other than ad valorem property taxes and that this apportionment of debt service burden is typical of recent years.

[2] Ariz. Const., Art. 7, § 13, Art. 9, § 8; Ariz. Rev. Stat. Ann. §§ 9–523, 35–452 (1956), § 35–455 (Supp. 1969).

her complaint in the United States District Court for the District of Arizona challenging the constitutionality of the restriction on the franchise in Arizona bond elections and attacking the validity of the June 1969 election approving the Phoenix bond issues. A District Court of three judges was convened. In the District Court, appellants conceded that, under this Court's decisions in *Cipriano* and *Kramer, supra,* the bond election was invalid with regard to the revenue bonds that had been approved. The District Court perceived no significant difference between revenue bonds and general obligation bonds and therefore held that the exclusion of nonproperty-owning voters from the election on the general obligation bonds was unconstitutional under *Cipriano* and *Kramer.* Because the authorization of the Phoenix general obligation bonds was not final on the date of the *Cipriano* decision, the court held the *Cipriano* rule applicable and declared the June 10, 1969, bond election invalid. The appellants were enjoined from taking further action to issue the bonds approved in that election. The City of Phoenix and the members of the City Council appealed from the judgment of the District Court with respect to the general obligation bonds. We noted probable jurisdiction, 397 U. S. 903 (1970). We affirm the judgment of the District Court but do not agree that the ruling in this case should be retroactive to the date of the *Cipriano* decision.

I

In *Cipriano* v. *City of Houma, supra,* the denial of the franchise to nonproperty owners in elections on revenue bonds was held to be a denial of the Fourteenth Amendment rights of the nonproperty owners since they, as well as property owners, are substantially affected by the issuance of revenue bonds to finance municipal utilities. It is now argued that the rationale of *Cipriano* does not render unconstitutional the exclusion of non-

property owners from voting in elections on general obligation bonds.

The argument proceeds on two related fronts. First, it is said that the Arizona statutes require that property taxes be levied in an amount sufficient to service the general obligation bonds,[3] the law thus expressly placing a special burden on property owners for the benefit of the entire community. Second, and more generally, whereas revenue bonds are secured by the revenues from the operation of particular facilities and these revenues may be earned from both property owners and non-property owners, general obligation bonds are secured by the general taxing power of the issuing municipality. Since most municipalities rely to a substantial extent on property tax revenues which will be used to make debt service payments if other revenue sources prove insufficient,[4] general obligation bonds are in effect a lien on the real property subject to taxation by the issuing municipality. Whatever revenues are actually used to service the bonds, an unavoidable potential tax burden is imposed only on those who own realty since that property cannot be moved beyond the reach of the municipality's taxing power. Hence, according to appellants, the State is justified in recognizing the unique interests of real property owners by allowing only property taxpayers to participate in elections to approve the issuance of general obligation bonds.

Concededly, the case of elections to approve general obligation bonds was not decided in *Cipriano* v. *City of Houma, supra.* But we have concluded that the prin-

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[3] See n. 1, *supra.*

[4] In 1967–1968, property taxes yielded $26.835 billion (approximately 86%) of the $31.171 billion raised in taxes by local governments. U. S. Dept. of Commerce, Bureau of the Census, Governmental Finances in 1967–68, p. 20 (1969).

ciples of that case, and of *Kramer* v. *Union Free School District, supra,* dictate a like result where a State excludes nonproperty taxpayers from voting in elections for the approval of general obligation bonds. The differences between the interests of property owners and the interests of nonproperty owners are not sufficiently substantial to justify excluding the latter from the franchise. This is so for several reasons.

First, it is unquestioned that all residents of Phoenix, property owners and nonproperty owners alike, have a substantial interest in the public facilities and the services available in the city and will be substantially affected by the ultimate outcome of the bond election at issue in this case. Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. Arizona nevertheless excludes nonproperty owners from participating in bond elections and vests in the majority of individual property owners voting in the election the power to approve or disapprove facilities that the municipal government has determined should be financed by issuing general obligation bonds. Placing such power in property owners alone can be justified only by some overriding interest of those owners that the State is entitled to recognize.

Second, although Arizona law ostensibly calls for the levy of real property taxes to service general obligation bonds, other revenues are legally available for this purpose. According to the parties' stipulation in this case, it is anticipated with respect to the instant bonds, as has been true in the past, that more than half of the debt service requirements will be satisfied not from real property taxes but from revenues from other local taxes paid by nonproperty owners as well as those who own real

property.[5] Not only do those persons excluded from the franchise have a great interest in approving or disapproving municipal improvements, but they will also contribute, as directly as property owners, to the servicing of the bonds by the payment of taxes to be used for this purpose.

Third, the justification for restricting the franchise to the property owners would seem to be strongest in the case of a municipality which, unlike Phoenix, looks only to property tax revenues for servicing general obligation bonds. But even in such a case the justification would be insufficient. Property taxes may be paid initially by property owners, but a significant part of the ultimate burden of each year's tax on rental property will very likely be borne by the tenant rather than the landlord since, as the parties also stipulated in this case, the landlord will treat the property tax as a business expense and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent.[6] Since most city residents not owning their

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[5] For the 1969–1970 fiscal year, the City of Phoenix utilized revenues other than revenues from property taxes to meet over 55% of its general obligation debt service requirements. See n. 1, *supra*.

[6] In this case the parties stipulated that "the amount of money paid as real property taxes is a cost of doing business of the [appellee's] landlord and as such has a material bearing on the cost of the [appellee's] rental payments."

The extent to which a landlord can pass along an increase in property taxes to his tenants generally depends on how changes in rent levels in the municipality affect the amount of rental property demanded—the less responsive the demand for rental property to changes in rent levels, the larger the proportion of property taxes that will ultimately be borne by tenants. See C. Shoup, Public Finance 385–390 (1969); D. Netzer, Economics of the Property Tax 32–40 (1966); Simon, The Incidence of a Tax on Urban Real Property, in Readings in the Economics of Taxation 416 (published by the American Economic Assn. 1959).

own homes are lessees of dwelling units, virtually all residents share the burden of property taxes imposed and used to service general obligation bonds. Moreover, property taxes on commercial property,[7] much of which is owned by corporations having no vote, will be treated as a cost of doing business and will normally be reflected in the prices of goods and services purchased by nonproperty owners and property owners alike.

While in theory the expected future income from real property, and hence property values in a municipality, may depend in part on the predicted future levels of property taxes,[8] the actual impact of an increase in property taxes is problematical.[9] Moreover, to the extent that property values are directly affected by the additional potential tax burden entailed in the bond issue, any adverse effect would normally be offset at least in substantial part by the favorable effects on property values of the improvements to be financed by the bond issue.[10]

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[7] In 1957, about 28½% of real property taxes paid to local governments in the United States were paid on commercial and industrial properties. See Netzer, *supra,* n. 6, at 19.

[8] In theory, the value of property is the present value of the expected income to be earned from the property in the future; in the case of owner-occupied residences, this "income" is the satisfaction which the homeowners derive from the enjoyment of their residences. Property taxes on rental property will reduce the expected future earnings from the property to the extent that it is expected that the taxes cannot be passed on to tenants in the form of higher rent. See n. 6, *supra.* For owner-occupiers the property tax will reduce the expected "income" net of costs and will thus reduce the value of their property. For a further discussion of this "capitalization" of unshiftable future property taxes, see H. Newman, An Introduction to Public Finance 262 (1968); Shoup, *supra,* n. 6, at 442–443; Netzer, *supra,* n. 6, at 34–36; J. Jensen, Property Taxation in the United States 63–75 (1931).

[9] The empirical evidence on capitalization of unshifted property taxes has been described as "most unsatisfactory." See Netzer, supra, n. 6, at 34–35; see also Shoup, *supra,* n. 6, at 443.

[10] See Netzer, *supra,* n. 6, at 34.

It is true that a general obligation bond may be loosely described as a "lien" on the property within the jurisdiction of the municipality in the sense that the issuer undertakes to levy sufficient taxes to service the bond. In theory, if the economy of the issuing city were to collapse, the levy of sufficiently high property taxes on property producing little or no income might result in some cases in defaults, foreclosures, and tax sales. Nothing before us, however, indicates that the possibility of future foreclosures to meet bond obligations significantly affects current real estate values or the ability of the concerned property owner to liquidate his holdings to avoid the risk of those future difficulties; the price of real estate appears to be more a function of the health of the local economy than a reflection of the level of property taxes imposed to finance municipal improvements. In any event, we are not convinced that the risk of future economic collapse that might result in bond obligations becoming an unshiftable, unsharable burden on property owners is sufficiently real or substantial to justify denying the vote in a current bond election to all those nonproperty owners who have a significant interest in the facilities to be financed, who are now indirectly sharing the property tax burden, and who will be paying other taxes used by the municipality to service its general obligation bonds.

We thus conclude that, although owners of real property have interests somewhat different from the interests of nonproperty owners in the issuance of general obligation bonds, there is no basis for concluding that nonproperty owners are substantially less interested in the issuance of these securities than are property owners. That there is no adequate reason to restrict the franchise on the issuance of general obligation bonds to property owners is further evidenced by the fact that only 14

States now restrict the franchise in this way;[11] most States find it possible to protect property owners from excessive property tax burdens by means other than restricting the franchise to property owners. The States now allowing all qualified voters to vote in general obligation bond elections do not appear to have been significantly less successful in protecting property values and in soundly financing their municipal improvements. Nor have we been shown that the 14 States now restricting the franchise have unique problems that make it necessary to limit the vote to property owners. We must therefore affirm the District Court's declaratory judgment that the challenged provisions of the Arizona Constitution and statutes, as applied to exclude nonproperty owners from elections for the approval of the issuance of general obligation bonds, violate the Equal Protection Clause of the United States Constitution.

II

In view of the fact that over the years many general obligation bonds have been issued on the good-faith assumption that restriction of the franchise in bond elections was not prohibited by the Federal Constitution,

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[11] It appears from the briefs filed in this case that 13 States besides Arizona restrict the franchise to property owners or property taxpayers in some or all general obligation bond elections:

Alaska (Alaska Stat. § 07.30.010 (b) (Supp. 1969)); Colorado (Colo. Const., Art XI, §§ 6, 7, and 8); Florida (Fla. Const., Art. 7, § 12); Idaho (Idaho Code Ann. § 31–1905 (1963), § 33–404 (Supp. 1969), § 50–1026 (1967)); Louisiana (La. Const., Art. 14, § 14 (a)); Michigan (Mich. Const., Art. II, § 6); Montana (Mont. Const., Art. IX, § 2, Art. XIII, § 5; Mont. Rev. Codes Ann. § 11–2310 (1968), § 75–3912 (1962)); New Mexico (N. M. Const., Art. IX, §§ 10, 11, and 12); New York (N. Y. Town Law § 84 (1965); N. Y. Village Law § 4–402 (1966)); Oklahoma (Okla. Const., Art. X, § 27); Rhode Island (R. I. Const. amdt. 29, § 2); Texas (Tex. Const., Art. 6, § 3a); Utah (Utah Const., Art. XIV, § 3).

it would be unjustifiably disruptive to give our decision in this case full retroactive effect. We therefore adopt a rule similar to that employed with respect to the applicability of the *Cipriano* decision: our decision in this case will apply only to authorizations for general obligation bonds that are not final as of June 23, 1970, the date of this decision. In the case of States authorizing challenges to bond elections within a definite period, all elections held prior to the date of this decision will not be affected by this decision unless a challenge on the grounds sustained by this decision has been or is brought within the period specified by state law. In the case of States, including apparently Arizona,[12] that do not have a well-defined period for bringing challenges to bond elections, all elections held prior to the date of this decision that have not yet been challenged on the grounds sustained in this decision prior to the date of this decision will not be open to challenge on the basis of our ruling in this case. In addition, in States with no definite challenge period, the validity of general obligation bonds that have been issued before this decision and prior to the commencement of an action challenging the issuance on the grounds sustained by this decision will not be affected by the decision in this case. Since appellee in this case brought her constitutional challenge to the Phoenix election prior to the date of our decision in this case and no bonds have been issued pursuant to

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[12] Ariz. Rev. Stat. Ann. § 16–1202 (Supp. 1969) and § 16–1204 (1956) provide that election contest suits generally must be brought by "electors" within five days after completion of the canvass and declaration of the result of an election. Under the Arizona Supreme Court's decision in *Morgan* v. *Board of Supervisors*, 67 Ariz. 133, 192 P. 2d 236 (1948), it is unclear whether suits brought after the expiration of the five-day period to challenge a bond election on constitutional grounds would in all cases be barred. The District Court found there was no bar to suit in this case.

that election, our decision applies to the election involved in this case. The District Court was therefore correct in holding that the June 10, 1969, bond election in Phoenix was constitutionally invalid and in enjoining the issuance of bonds pursuant to the approval obtained in that election.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and in Part I of the opinion of the Court.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, whom THE CHIEF JUSTICE and MR. JUSTICE HARLAN join, dissenting.

If this case really involved an "election," that is, a choice by popular vote of candidates for public office under a system of representative democracy, then our frame of reference would necessarily have to be *Reynolds* v. *Sims,* 377 U. S. 533, and its progeny. For, rightly or wrongly, the Court has said that in cases where public officials with legislative or other governmental power are to be elected by the people, the Constitution requires that the electoral franchise must generally reflect a regime of political suffrage based upon "one man, one vote." Recent examples of that constitutional doctrine are the Court's decisions in *Kramer* v. *Union Free School District,* 395 U. S. 621, involving the franchise to vote for the members of a school board; and *Hadley* v. *Junior College District,* 397 U. S. 50, involving the apportionment of voting districts for the election of the trustees of a state junior college.

Whether or not one accepts the constitutional doctrine embodied in those decisions, they are of little relevance here. For in this case nobody has claimed that the

members of the City Council of Phoenix, Arizona—the individual appellants here—were elected in any way other than on a one man, one vote basis, or that they do not fully and fairly represent the entire electorate of the municipality. And it was these councilmen who initiated the program for borrowing money so that the city might have a sewer system, parks and playgrounds, police and public safety buildings, a new library, and other municipal improvements. Having made that initial decision, the councilmen submitted the borrowing and construction program for final approval by those upon whom the burden of the municipal bonded indebtedness would legally fall—the property owners of the city. These property owners *approved* the entire program by a majority vote. Yet the Court today says the Equal Protection Clause prevents the city of Phoenix from borrowing the money to build the public improvements that the council and the property owners of the city have both approved. I cannot believe that the United States Constitution lays such a heavy hand upon the initiative and independence of Phoenix, Arizona, or any other city in our Nation.

In *Cipriano* v. *City of Houma,* 395 U. S. 701, the Court held unconstitutional a Louisiana law that permitted only property owners to vote on the question of approving bonds that were to be financed exclusively from the revenues of municipally operated public utilities. I agreed with that decision, because the State had created a wholly irrelevant voting classification. *Id.,* at 707 (BLACK and STEWART, JJ., concurring in the judgment). As the Court there noted:

> "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue

> bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." *Id.*, at 705.

The case before us bears only a superficial resemblance to *Cipriano,* for we deal here, not with income-producing utilities that can pay for themselves, but with municipal improvements that must be paid for by the taxpayers. Under Arizona law a city's general bonded indebtedness effectively operates as a lien on all taxable real estate located within the city's borders. During the entire life of the bonds the privately owned real property in the city is burdened by the city's pledge—and statutory obligation—to use its real estate taxing power for the purpose of repaying both interest and principal under the bond obligation.[1] Whether under these circumstances Arizona could constitutionally confer upon its municipal governing bodies exclusive and absolute power

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[1] Ariz. Rev. Stat. Ann. § 35–458 provides: "After the bonds are issued, the governing body or board . . . shall annually levy and cause to be collected a tax . . . upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and . . . to redeem the bonds when they mature."

In *Allison* v. *City of Phoenix,* 44 Ariz. 66, 33 P. 2d 927 (1934), the Arizona Supreme Court held that if a city has money available from another source "it may from time to time be transferred to the interest and redemption funds created by the statute. . . ." 44 Ariz., at 77, 33 P. 2d, at 931. The court made clear, however, that the predecessor of Ariz. Rev. Stat. Ann. § 35–458 "is mandatory and binding upon all parties mentioned therein, and that they must levy and cause to be collected a tax for the payment of bonds issued under such article, in the manner provided by such section." *Id.*, at 74, 33 P. 2d, at 930. The use of excise taxes to repay general obligation bonds is thus optional, but the imposition of *ad valorem* taxes for these purposes is mandatory.

Taxes imposed on real property in Arizona become a lien on that property. Ariz. Rev. Stat. Ann. § 42–312.

to incur general bonded indebtedness without limit at the expense of real property owners is a question that is not before us. For the State has chosen a different policy, reflected in both its constitutional and statutory law.[2] It has told the governing bodies of its cities that while they are free to plan and propose capital improvements, general obligation bonds cannot be validly issued to finance them without the approval of a majority of those upon whom the weight of repaying those bonds will legally fall.

This is not the invidious discrimination that the Equal Protection Clause condemns, but an entirely rational public policy. I would reverse the judgment, because I cannot hold that the Constitution denies the City of Phoenix the public improvements that its Council and its taxpayers have endorsed.[3]

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[2] The constitutional and statutory provisions applicable to all bond authorization elections of incorporated cities and towns in the State of Arizona limit the right to vote in such elections to persons who are qualified electors and who are also real property taxpayers. Ariz. Const., Art. 7, § 13; Art. 9, § 8. Ariz. Rev. Stat. Ann. § 9–523 and § 35–455. These constitutional and statutory provisions apply to all political subdivisions within the State of Arizona, and not just to cities and towns.

[3] Since the Court's contrary view today prevails, I add that upon that premise THE CHIEF JUSTICE and I agree with Part II of the Court's opinion, and that MR. JUSTICE HARLAN also joins in Part II of the Court's opinion, subject, however, to the views expressed in his concurring opinion in *United States* v. *Estate of Donnelly*, 397 U. S. 286, 295 (1970).

ARKANSAS *v.* TENNESSEE

DECREE

No. 33, Orig. Decided February 25, 1970—Decree entered (*inter alia*, appointing Boundary Commissioner) February 25, 1970—Decree entered (establishing boundary line) June 23, 1970

Opinion reported: 397 U. S. 88.
Decree reported: 397 U. S. 91.

This Court on February 25, 1970, 397 U. S. 88, 91, having entered a decree and appointed a Boundary Commissioner to survey the boundary between Arkansas and Tennessee and pursuant to that decree the said Commissioner having filed a "Report on Commission to Survey" in which he sets forth the General Location and Specific Location of such boundary to which the parties have approved and consented,

It is ordered, adjudged, and decreed That such boundary shall be fixed as follows:

General Location

The state boundary line involved herein is located between Crittenden County, Arkansas, and Shelby County, Tennessee, in an area formerly known as Cow Island Bend, and more recently called Scanlan Chute, Frog Chute, Ike Chute or Lake, and 96 Chute; and is generally within a rectangle between latitudes 35° 00′ and 35° 03′, and longitudes 90° 15′ and 90° 19′, and is more particularly described as follows:

Specific Location

Beginning at a point, designated as Station No. 1, which point is, S 6° 34′ E, at 1,359.0 feet from, Mississippi River Commission Permanent Bench

Mark "Scanlan," whose coordinates are, latitude 35° 02′ plus 1,555.76 feet, and longitude 90° 15′ plus 1,014.42 feet. (Reference for PBM "Scanlan," see page 118 of Permanent Marks, Volume One of Mississippi River Commission.)

Said above beginning point being on a line running, S 75° 39′ E, 3,500.0 feet more or less from, the present Steamboat Channel (thalweg) of the Mississippi River; thence N 75° 39′ W, 645.8 feet to a point; thence N 75° 54′ W, 2,112.0 feet to a point; thence N 17° 18′ W, 920.4 feet to a point; thence N 35° 25′ W, 436.3 feet to a point; thence N 62° 36′ W, 491.3 feet to a point, designated as Station No. 2; thence S 85° 53′ W, 2,161.6 feet to a point; thence S 82° 00′ W, 1,443.3 feet to a point; thence N 87° 38′ W, 2,739.7 feet to a point; thence S 79° 35′ W, 1,808.5 feet to a point; thence S 38° 47′ W, 1,033.1 feet to a point; thence S 24° 52′ W, 811.0 feet to a point; thence S 7° 38′ W, 2,085.5 feet to a point; thence S 11° 29′ W, 1,725.2 feet to a point, designated as Station No. 3; thence S 23° 31′ W, 3,098.3 feet to a point; thence S 0° 51′ E, 1,370.5 feet to a point; thence S 13° 15′ E, 1,258.1 feet to a point, designated as Station No. 4; thence S 38° 45′ W, 814.5 feet to a point; thence S 23° 55′ W, 864.1 feet to a point; thence S 12° 30′ W, 644.4 feet to a point; thence S 6° 30′ W, 1,270.5 feet to a point, which point is, S 81° 52′ E (Mag.), 2,736.5 feet from, United States Engineer Arkansas Levee Bench Mark for Mile Post 170/171; thence S 17° 40′ E, 1,627.0 feet to a point; thence S 6° 50′ E, 1,485.0 feet to a point; thence S 22° 10′ E, 2,500.0 feet more or less, to the present Steamboat Channel (thalweg) of the Mississippi.

The above surveyed boundary line between the States of Arkansas and Tennessee in the area involved is shown by a broken line marked on the attached 1965 aerial photograph of said area, which aerial photograph is also designated Appendix A–I to this Court's decree of February 25, 1970.*

*[REPORTER'S NOTE: The aerial photograph is not reproduced here, since it has been published in connection with the Court's previous decree. See 397 U. S. 91 (immediately following 92).]

PERKINS *v.* STANDARD OIL CO. OF CALIFORNIA

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

No. 1507. Decided June 23, 1970*

1. The allowance in § 4 of the Clayton Act for attorneys' fees includes fees for appellate legal services rendered in a successfully prosecuted private antitrust action, and the amount of those fees should in general be initially fixed by the District Court after a hearing.

2. Failure to mention attorneys' fees in the Court's mandate in *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, left the matter open for consideration by the District Court.

Certiorari granted; No. 1507, vacated and remanded to the Court of Appeals; No. 1556, vacated and remanded to the District Court.

PER CURIAM.

Following his success in this Court in *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, the petitioner filed in the District Court for the District of Oregon an application for allowance of attorneys' fees, pursuant to § 4 of the Clayton Act,† for legal services performed during the appellate stages of that litigation, both in the Court of Appeals and in this Court. The District Court denied the application, ruling that § 4 did not authorize the allowance of attorneys' fees for services performed in connection with appellate proceedings.

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*Together with No. 1556, *Perkins* v. *Standard Oil Co. of California*, on petition for writ of certiorari to the same court.

†That section provides in pertinent part as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731, 15 U. S. C. § 15.

Petitioner appealed this decision to the Court of Appeals and simultaneously filed in that court two separate applications for attorneys' fees for legal services performed there and in this Court. The Court of Appeals denied the latter application, believing that our mandate in *Perkins,* by not mentioning attorneys' fees, was intended to preclude an award of such fees.

The District Court was in error in holding that § 4 does not authorize the award of counsel fees for legal services performed at the appellate stages of a successfully prosecuted private antitrust action. Both the language and purpose of § 4 make that construction untenable. See *American Can Co.* v. *Ladoga Canning Co.,* 44 F. 2d 763, cert. denied, 282 U. S. 899. The amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered. See, *e. g., Osborn* v. *Sinclair Refining Co.,* 207 F. Supp. 856, 864. The Court of Appeals was also in error in interpreting our mandate as precluding the award of such fees for services performed in connection with the litigation in this Court. Our failure to make explicit mention in the mandate of attorneys' fees simply left the matter open for consideration by the District Court, to which the mandate was directed.

The petitions for certiorari are granted and the judgments are vacated. No. 1556 is remanded to the District Court, and No. 1507 to the Court of Appeals, for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN took no part in the consideration or decision of these cases.

NELSON, WARDEN *v.* GEORGE

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

No. 595. Argued March 31, 1970—Decided June 29, 1970

Respondent, who is serving a sentence under a California conviction, was tried, convicted, and sentenced in North Carolina, and a detainer, requested by North Carolina, was noted by petitioner California warden. Respondent sought a writ of habeas corpus from a Federal District Court in California, attacking his North Carolina conviction. His application was denied and in his petition for rehearing he argued that the detainer acted as a form of constructive custody as it adversely affected his parole potential and the degree of security in which he was detained. Rehearing was denied on the basis of *McNally* v. *Hill,* 293 U. S. 131, and respondent appealed to the Court of Appeals. The intervening decision in *Peyton* v. *Rowe,* 391 U. S. 54, overruled *McNally* v. *Hill,* and held that a state prisoner serving consecutive sentences in the forum State is "in custody" for purposes of jurisdiction for collateral attack. The Court of Appeals held that the District Court had jurisdiction to consider respondent's claims concerning the impact of the detainer. *Held:*

1. Since the California courts, which are not required to enforce a foreign penal judgment, have not been presented with the question of what effect, if any, they will give the North Carolina detainer in terms of respondent's present "custody," respondent has not exhausted his California remedies. P. 229.

2. The Federal District Court should retain jurisdiction of the petition for writ of habeas corpus pending respondent's application to the California courts for appropriate relief if he establishes his claim that the detainer interferes with relief that California might grant in the absence of the detainer. Pp. 229–230.

410 F. 2d 1179, affirmed.

Louise H. Renne, Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Thomas C. Lynch,* Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Edward P. O'Brien,* Deputy Attorney General.

George A. Cumming, Jr., by appointment of the Court, 397 U. S. 901, argued the cause and filed a brief for respondent.

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

We granted the writ in this case to consider whether the respondent, presently confined in California under a state conviction, may utilize the federal courts in California to test the validity of a North Carolina sentence before beginning to serve that sentence and while under a detainer filed by North Carolina. Respondent claims the sentence yet to be served in North Carolina is "consecutive" under *Peyton* v. *Rowe*, 391 U. S. 54 (1968). However, since his petition challenges the present effect being given the North Carolina detainer by the California authorities, particularly with respect to granting him parole, we have concluded that as to that claim respondent failed to exhaust his state remedies and accordingly do not reach the question for which the writ was granted.

The record discloses that on April 27, 1964, John Edward George was convicted on a plea of guilty in a California court of first-degree robbery. He began serving his sentence of five years to life at San Quentin.[1] Following his conviction, detainers were filed in California by the States of Kansas, Nevada, and North Carolina, on June 4, 10, and 11, 1964, respectively.

Exercising his right under Article III (a) of the interstate "Agreement on Detainers," [2] George requested temporary release to stand trial on the underlying robbery charge pending in North Carolina. Accordingly, on July 20, 1966, he was released to North Carolina author-

[1] Under California law the sentence for first-degree robbery is an indeterminate five years to life sentence in the discretion of the California Adult Authority. Cal. Pen. Code § 213.

[2] Cal. Pen. Code § 1389 (Supp. 1968).

ities and transported there to stand trial. The North Carolina trial was held, and on February 8, 1967, George was convicted and sentenced to imprisonment for 12 to 15 years. The conviction was thereafter affirmed, *State* v. *George,* 271 N. C. 438, 156 S. E. 2d 845 (1967).

Following the North Carolina trial George was returned to San Quentin to complete service of his California sentence. On April 14, 1967, the clerk of the Gaston County Superior Court addressed a letter to the Records Officer at San Quentin advising that George was "wanted at the termination of his imprisonment there for return to this jurisdiction to serve the sentence imposed in the Superior Court of Gaston County, North Carolina." The Warden of San Quentin acknowledged the detainer, indicating that it was "noted in our records."

George then brought a petition for habeas corpus in the United States District Court for the Northern District of California in which he sought to attack not his California conviction, for which he was then incarcerated, but the North Carolina conviction for which the detainer had been filed. The District Court denied the application by order dated March 1, 1968, on the ground that *McNally* v. *Hill,* 293 U. S. 131 (1934), foreclosed habeas corpus relief on the North Carolina conviction while George was still in custody under the prior California judgment.

George filed a petition for rehearing in the District Court in which he argued that even though he was actually serving time in a California jail and thus not technically serving his North Carolina sentence, habeas corpus was not foreclosed since the North Carolina detainer operated as a form of constructive custody. In support of his contention he drew upon the language in *Arketa* v. *Wilson,* 373 F. 2d 582 (C. A. 9th Cir. 1967), to the effect that the strict rule of *McNally* v. *Hill* had been somewhat

eroded by this Court's subsequent decisions in *Ex parte Hull,* 312 U. S. 546 (1941), and *Jones* v. *Cunningham,* 371 U. S. 236 (1963), and that "it appears that there are situations in which the writ can be used to free a petitioner from a certain type of custody, rather than from all custody." *Arketa* v. *Wilson, supra,* at 584. George argued that the North Carolina warrant was "a form of custody" since it affected his custodial classification and probability of parole on his California sentence.[3] On March 20, 1968, the District Court denied the petition for rehearing and George appealed to the Court of Appeals for the Ninth Circuit.

Our decision in *Peyton* v. *Rowe* intervened. In that case we overruled *McNally* v. *Hill,* 293 U. S. 131 (1934), and held that a state prisoner serving consecutive sentences in the forum state is "in custody" under each sentence for purposes of jurisdiction for collateral attack under 28 U. S. C. § 2241 (c)(3),[4] thus permitting a federal habeas corpus action to test a future state sentence while he is serving an earlier sentence. In *Peyton* v. *Rowe* the consecutive sentences were imposed by the forum State, and the sentences were being served in that State's prison. Unlike the case now before us, in such a

[3] App. 26.

[4] "§ 2241. Power to grant writ.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

. . . . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

. . . . . .

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

single-state situation the challenge to the continuing vitality of *Ahrens* v. *Clark,* 335 U. S. 188 (1948), does not arise. See *Word* v. *North Carolina,* 406 F. 2d 352 (C. A. 4th Cir. 1969).[5]

As we have noted, having named the Warden of San Quentin as the respondent in his amended petition to the Federal District Court in California and having had his petition refused, George sought rehearing. In that application George alleged that the California authorities had imposed upon him a "form of custody" because of the North Carolina detainer. Specifically, he alleged

[5] In that case Chief Judge Haynsworth, expressing the views of the majority of the Court of Appeals for the Fourth Circuit sitting *en banc,* concluded that *Ahrens* v. *Clark* was a venue decision, and that the physical presence of the petitioner within the district was not an invariable requirement if rigid adherence to the rule would leave one in prison without an effective remedy. The legislative history of the 1966 amendments to 28 U. S. C. § 2241 (d) (1964 ed., Supp. V) suggests that Congress may have intended to endorse and preserve the territorial rule of *Ahrens* to the extent that it was not altered by those amendments. See H. R. Rep. No. 1894, 89th Cong., 2d Sess., 1–2 (1966). See also S. Rep. No. 1502, 89th Cong., 2d Sess. (1966). Those changes were made by Congress, of course, prior to our decision in *Peyton* v. *Rowe;* necessarily Congress could not have had the multistate problem with which we are now confronted in mind. Whether, in light of the legislative history of § 2241 (d) and the changed circumstances brought about by *Peyton* v. *Rowe,* the rigor of our *Ahrens* holding may be reconsidered is an issue upon which we reserve judgment.

However, we note that prisoners under sentence of a federal court are confronted with no such dilemma since they may bring a challenge at any time in the sentencing court irrespective of where they may be incarcerated. 28 U. S. C. § 2255. It is anomalous that the federal statutory scheme does not contemplate affording state prisoners that remedy. The obvious, logical, and practical solution is an amendment to § 2241 to remedy the shortcoming that has become apparent following the holding in *Peyton* v. *Rowe.* Sound judicial administration calls for such an amendment.

that the mere presence of the detainer adversely affected the probability of his securing parole and the degree of security in which he was detained by state authorities. California denies that the existence of the detainer has any consequences affecting his parole potential or custodial status.

Since the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment, *Huntington* v. *Attrill,* 146 U. S. 657 (1892); cf. *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, 279 (1935), California is free to consider what effect, if any, it will give to the North Carolina detainer in terms of George's present "custody." [6] Because the petition for rehearing raised precisely such a challenge to the California "custody," a matter that has not yet been presented to the California courts, we conclude that respondent George has not yet exhausted his California remedies. See *Ex parte Royall,* 117 U. S. 241 (1886).

Respondent insists that the very presence of the North Carolina detainer has and will continue to have an adverse impact on California's consideration of his claim for parole. Therefore, the United States District Court in California should retain jurisdiction of the petition for habeas corpus relief pending respondent's further application to the California courts for whatever relief, if any, may be available and appropriate if he establishes his claim that North Carolina's detainer interferes with relief that might, in the absence of the detainer, be granted by California. We affirm the judgment of the

[6] We are not here concerned with the scope of California's ultimate duty, imposed by Art. IV, § 2, cl. 2, of the Constitution, to extradite persons wanted for trial or execution of sentence in a sister State. We note only that, until the obligation to extradite matures, the Full Faith and Credit Clause does not require California to enforce the North Carolina penal judgment in any way.

Court of Appeals to the extent it finds jurisdiction in the District Court to consider respondent's claims with respect to the impact of the detainer if respondent elects to press those claims after he exhausts his remedies in the California courts.

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the Court's opinion with the following observations. First, I do not understand the Court to suggest that respondent's failure to exhaust state remedies with respect to his claim that California is giving a constitutionally impermissible effect to his North Carolina conviction, rendered it improper for the federal courts to consider his challenge to the validity of the North Carolina conviction to the extent that he had exhausted North Carolina remedies with respect thereto. Second, agreeing with the reasons given by the Court for not reaching the propriety of the Court of Appeals' resolution of respondent's challenge to the North Carolina conviction, I would dismiss that part of the writ as improvidently granted. Third, pending the congressional action that the Court's opinion envisages, I think it not inappropriate to leave undisturbed such conflicts as exist between the decision of the Court of Appeals in the present case and decisions in other circuits, see *Word* v. *North Carolina,* 406 F. 2d 352 (C. A. 4th Cir. 1969); *United States ex rel. Van Scoten* v. *Pennsylvania,* 404 F. 2d 767 (C. A. 3d Cir. 1968), respecting the proper treatment of habeas corpus claims such as those involved in respondent's challenge in the California courts to the validity of his North Carolina conviction.

MR. JUSTICE DOUGLAS, dissenting.

This California prisoner is seeking to challenge by federal habeas corpus the constitutionality of his conviction in North Carolina, the sentence for which he must serve when he finishes his California term. The infirmities of the North Carolina judgment that he alleges relate to the absence of a speedy trial and to the knowing use of perjured testimony. North Carolina filed a detainer against him in California; and it is that detainer, not the North Carolina judgment, that the Court uses to avoid decision on the basic issue raised in the petition. The petition for habeas corpus stated, "It is the North Carolina Supreme Court decision that is under attack here." The only reference to a detainer made in the petition was to the detainer filed prior to his return to North Carolina for trial. The reference to the detainer filed after his North Carolina conviction was made in his petition for rehearing. The District Court had dismissed the petition before *Peyton* v. *Rowe,* 391 U. S. 54, was decided; and in his argument for a rehearing the prisoner sought to distinguish *McNally* v. *Hill,* 293 U. S. 131, which *Peyton* v. *Rowe* overruled, by arguing that his case was different because the North Carolina detainer was being used to his disadvantage in California. Both the petition for habeas corpus and the petition for rehearing were *pro se* products. Thus the false issue got into the case.

The Court holds that the challenge of the North Carolina judgment may not yet be made in California because the prisoner has not yet shown under California law whether the existence of the North Carolina detainer can affect or is affecting his parole potential or custodial status and therefore that he has not exhausted his remedies under 28 U. S. C. § 2254 (1964 ed., Supp. V).

The remedies with which 28 U. S. C. § 2254 (1964 ed., Supp. V)[1] is concerned relate to those which would remove the infirmities in the North Carolina judgment, making unnecessary federal intervention. Plainly, California can supply no such remedies.

The remedies to which the Court adverts are of a wholly different character—they concern California procedures for correcting any improper use in California of North Carolina's judgment. They are wholly irrelevant to the reasons why we held in *Peyton* v. *Rowe* that a state prisoner serving one sentence may challenge by federal habeas corpus the constitutionality of a second state sentence scheduled for future service. We ruled that if prisoners had to wait until the first sentence was served before the constitutionality of the second could be challenged, grave injustices might be done:

> "By that time, dimmed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact. . . . To name but a few examples [of prejudice resulting from the kind of delay *McNally* imposes], factual determinations are often dispositive of claims of coerced confession . . . ; lack of competency to stand trial . . . ; and denial of a fair trial . . . . Postponement of the adjudication of

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[1] "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

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

> such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." 391 U. S., at 62.

If the prisoner was seeking to escape the rigors of the detainer filed by North Carolina, the exhaustion of California remedies would of course be proper. But the gravamen of the petition for habeas corpus concerned the validity of North Carolina's judgment and that is "the question presented" within the meaning of 28 U. S. C. § 2254 (1964 ed., Supp. V).

The Court of Appeals, 410 F. 2d 1179, did not decide that only California, not North Carolina, could pass on the merits of the petition, *viz.,* on the validity or invalidity of the North Carolina judgment. It emphasized that there were practical difficulties whichever forum were chosen. *Id.,* at 1182. Trying the issues in California would put a burden on North Carolina prosecutors and witnesses. Trying the issues in North Carolina would entail problems of expense and security insofar as the prisoner's appearance there was needed. The fact that the federal court in California has "jurisdiction," it ruled, does not mean that it could not transfer the cause to the federal court in North Carolina.[2]

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[2] See 28 U. S. C. § 1404 (a); *Word* v. *North Carolina,* 406 F. 2d 352.

In H. R. Rep. No. 1894, 89th Cong., 2d Sess., 1–2, it is stated: "Section 2241 of title 28, United States Code, vests jurisdiction to entertain habeas corpus applications only in the district court for the district in which the prisoner is confined (*Ahrens* v. *Clark,* 335 U. S. 188). Further, since there is no other forum '. . . where it might have been brought,' the application may not be transferred to a different district pursuant to the provisions of section 1404 (a) of title 28, United States Code (*Hoffman* v. *Blaski,* 363 U. S. 335)." See also S. Rep. No. 1502, 89th Cong., 2d Sess. These reports are concerned with the 1966 amendment to § 2241, which permits the

The Court of Appeals left open for the informed discretion of the District Court the question of how and where the prisoner may be heard on the constitutionality of the North Carolina judgment. I would affirm the Court of Appeals and reserve for another day the question whether the application could be transferred to North Carolina for hearing.

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district court in whose district a habeas petitioner was convicted to consider the habeas petition even though the habeas petitioner is incarcerated outside the jurisdiction of that district court so long as the habeas petitioner is incarcerated within the State in which the district court sits. The 1966 amendment thus solves the problem posed by *Ahrens* but only where the district of his incarceration and the district in which he was convicted are in the same State. Section 2241, as construed in *Ahrens*, was thus left unaffected where the districts involved are in different States.

WILLIAMS *v.* ILLINOIS

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 1089. Argued April 22, 1970—Decided June 29, 1970

Appellant was given the maximum sentence for petty theft under Illinois law of one year's imprisonment and a $500 fine, plus $5 in court costs. The judgment, as permitted by statute, provided that if when the one-year sentence expired he did not pay the monetary obligations, he had to remain in jail to work them off at the rate of $5 a day. While in jail appellant, alleging indigency, unsuccessfully petitioned the sentencing judge to vacate that portion of the order confining him to jail after the sentence expired, because of nonpayment of the fine and costs. The Illinois Supreme Court rejected appellant's claim that the state statutory provision constituted discriminatory treatment against those unable to pay a fine and court costs, and affirmed the lower court's dismissal of appellant's petition, holding that "there is no denial of equal protection of the law when an indigent defendant is imprisoned to satisfy payment of the fine." *Held:* Though a State has considerable latitude in fixing the punishment for state crimes and may impose alternative sanctions, it may not under the Equal Protection Clause subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency. Pp. 239–245.

41 Ill. 2d 511, 244 N. E. 2d 197, vacated and remanded.

Stanley A. Bass argued the cause for appellant. With him on the brief were *Jack Greenberg, Michael Meltsner,* and *Anthony G. Amsterdam.*

James R. Thompson, Assistant Attorney General of Illinois, argued the cause for appellee. With him on the brief were *William J. Scott,* Attorney General, and *Joel M. Flaum,* Assistant Attorney General.

The National Legal Aid and Defender Assn. filed a brief as *amicus curiae* urging reversal.

Richard L. Curry, Marvin E. Aspen, and *Edmund Hatfield,* filed a brief for the City of Chicago as *amicus curiae* urging affirmance.

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

This appeal from Illinois presents an important question involving a claim of discriminatory treatment based upon financial inability to pay a fine and court costs imposed in a criminal case. The narrow issue raised is whether an indigent may be continued in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence. We noted probable jurisdiction [1] and set the case for oral argument with No. 782, *Morris* v. *Schoonfield, post,* p. 508, also decided today.

On August 16, 1967, appellant was convicted of petty theft and received the maximum sentence provided by state law: one year imprisonment and a $500 fine.[2] Appellant was also taxed $5 in court costs. The judgment directed, as permitted by statute, that if appellant was in default of the payment of the fine and court costs at the expiration of the one year sentence, he should remain in jail pursuant to § 1–7 (k) of the Illinois Criminal Code to "work off" the monetary obligations at the rate of $5 per day.[3] Thus, whereas the maximum term of imprisonment for petty theft was one year, the effect of the sentence imposed here required appellant to be

[1] 396 U. S. 1036.

[2] Ill. Rev. Stat., c. 38, § 16–1 (1967), which proscribes theft of property not from the person and not exceeding $150 in value.

[3] Section 1–7 (k) of the Criminal Code of 1961 provides:

"Working out Fines.

"A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; Provided, however, that in such judgment imposing the fine the court may further order that upon non-payment of such fine, the offender may be imprisoned until the fine is paid, or satisfied at the rate of $5.00 per day of imprisonment; Provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months."

confined for 101 days beyond the maximum period of confinement fixed by the statute since he could not pay the fine and costs of $505.

On November 29, 1967, appellant, while still an inmate in the county jail, petitioned the sentencing judge [4] to vacate that portion of the order requiring that he remain imprisoned upon expiration of his one year sentence because of nonpayment of the fine and court costs. Appellant alleged that he was indigent at all stages of the proceedings, was without funds or property to satisfy the money portion of the sentence, and that he would "be able to get a job and earn funds to pay the fine and costs, if . . . released from jail upon expiration of his one year sentence." The State did not dispute the factual allegations [5] and the trial court granted the State's motion to dismiss the petition

> "for the reason that [appellant] was not legally entitled at that time to the relief requested . . . because he still has time to serve on his jail sentence, and when that sentence has been served his financial ability to pay a fine might not be the same as it is of the date [of sentencing]."

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[4] The post-conviction petition was filed pursuant to § 72 of the Illinois Civil Practice Act.

[5] Parenthetically we note that appellant was unable to post pretrial bail of $2,000 and was therefore required to remain in custody.

On May 23, 1968, appellant completed service of his one year sentence, less time off for time spent in custody prior to trial. He then began serving the period of incarceration required to satisfy the $505 fine and costs. On May 28, 1968, however, the Supreme Court of Illinois, on motion of appellant's counsel, set bail pending appeal at $500; the 10% deposit was posted by the Civil Legal Aid Service. Appellant is free on bond, and since he has not yet served the full period of incarceration to satisfy the fine and costs the case is not moot.

Appeal was taken directly to the Supreme Court of Illinois, which appears to have rejected any suggestion by the trial court that the petition was premature and went on to decide appellant's constitutional claim on the merits. It held that "there is no denial of equal protection of the law when an indigent defendant is imprisoned to satisfy payment of the fine." *People* v. *Williams,* 41 Ill. 2d 511, 517, 244 N. E. 2d 197, 200 (1969).[6]

In addition to renewing the constitutional argument rejected by the state courts, appellant advances a host of other claims[7] which, in light of our disposition, we find unnecessary to reach or decide. Appellant challenges the constitutionality of § 1–7 (k) of the Illinois Criminal Code and argues primarily that the Equal Protection Clause of the Fourteenth Amendment prohibits imprisonment of an indigent beyond the maximum term authorized by the statute governing the substantive offense when that imprisonment flows directly from his present inability to pay a fine and court costs. In response the State asserts its interest in the collection of revenues produced by payment of fines and contends that a "work off" system, as provided by § 1–7 (k), is a rational means of implementing that policy. That interest is substantial and legitimate but for present purposes it is not unlike the State's interest in collecting a fine from an indigent person in circumstances where no imprisonment is included in the judgment. The State argues further that the statute is not constitutionally infirm simply because the legislature could have achieved the same result

[6] The Supreme Court of Illinois dealt exclusively with that portion of the unpaid sum stemming from the fine. Its opinion contains no discussion of the constitutionality of incarceration arising from failure to pay court costs even though the issue was tendered.

[7] Appellant also argues that every instance of default imprisonment violates either the Equal Protection and/or Due Process Clause(s) of the Fourteenth Amendment. He also asserts that the $5 per diem figure is unreasonable and irrational.

by some other means. With that general proposition we have no quarrel but that generality does not resolve the issue.

As noted earlier, appellant's incarceration beyond the statutory maximum stems from separate albeit related reasons: nonpayment of a fine and nonpayment of court costs. We find that neither of those grounds can constitutionally support the type of imprisonment imposed here, but we treat the fine and costs together because disposition of the claim on fines governs our disposition on costs.[8]

The custom of imprisoning a convicted defendant for nonpayment of fines dates back to medieval England[9] and has long been practiced in this country. At the present time almost all States and the Federal Government have statutes authorizing incarceration under such circumstances. Most States permit imprisonment beyond the maximum term allowed by law, and in some there is no limit on the length of time one may serve for nonpayment.[10] While neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack, these factors should be weighed in

[8] See n. 20, *infra.*

[9] See generally 2 W. Holdsworth, A History of English Law 43–44 (3d ed. 1927); 1 J. Bishop on Criminal Law § 940, p. 693 (9th ed. 1923); 1 J. Stephen, A History of the Criminal Law of England 57 (1883). See also, Comment, Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days," 57 Calif. L. Rev. 778, 780–787 (1969).

[10] The National Legal Aid and Defender Association, as *Amicus Curiae,* has filed a brief containing an extensive appendix which includes state statutes with helpful annotations. We have reproduced this portion of its brief as an appendix to this opinion. The corresponding federal statutes are 18 U. S. C. §§ 3565, 3569. See also Note, The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines, 64 Mich. L. Rev. 938 (1966).

the balance.[11] Indeed, in prior cases this Court seems to have tacitly approved incarceration to "work off" unpaid fines. See *Hill* v. *Wampler,* 298 U. S. 460 (1936); *Ex parte Jackson,* 96 U. S. 727 (1878).[12]

The need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country.[13] Default imprisonment has traditionally been justified on the ground that it is a coercive device to ensure obedience to the judgment of the court.[14] Thus, commitment for failure to pay has not been viewed as a part of the punishment or as an increase in the penalty; rather, it has been viewed as a means of enabling the court to enforce collection of money that a convicted defendant was obligated by the sentence to pay. The additional imprisonment, it has been said, may always be avoided by payment of the fine.[15]

We conclude that when the aggregate imprisonment exceeds the maximum period fixed by the statute and

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[11] See *Walz* v. *Tax Comm'n,* decided May 4, 1970, 397 U. S. 664, 678, where we noted that, "Nearly 50 years ago Mr. Justice Holmes stated:

" 'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . .' *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31 (1922)."

[12] We note, however, that neither in those cases, nor at any other time, were the constitutional issues flowing from lack of funds presented to this Court for resolution.

[13] See, *e. g.,* American Bar Foundation, L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 123 (1965); S. Rubin, The Law of Criminal Correction 253 (1963).

[14] See, *e. g.,* Chief Judge Desmond's excellent treatment of the historical development in *People* v. *Saffore,* 18 N. Y. 2d 101, 218 N. E. 2d 686 (1966).

[15] See, *e. g., Peeples* v. *District of Columbia,* 75 A. 2d 845, 847 (D. C. Mun. Ct. App. 1950).

results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay, and accordingly, we vacate the judgment below.

Griffin v. *Illinois,* 351 U. S. 12 (1956), marked a significant effort to alleviate discrimination against those who are unable to meet the costs of litigation in the administration of criminal justice. In holding that the failure to provide an indigent criminal defendant with a trial transcript at public expense in order to prosecute an appeal was a violation of the Equal Protection Clause, this Court declared that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.,* at 19. In the years since the *Griffin* case the Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons.[16] Subsequent decisions of this Court have pointedly demonstrated that the passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process.[17] Applying the teaching of the *Griffin* case here, we conclude that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense.

A State has wide latitude in fixing the punishment for state crimes. Thus, appellant does not assert that Illinois could not have appropriately fixed the penalty, in the first instance, at one year and 101 days. Nor has the claim been advanced that the sentence imposed was excessive in light of the circumstances of the commission of this particular offense. However, once the State has

[16] See Note, Discriminations Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435 (1967).

[17] See, *e. g., Rinaldi* v. *Yeager,* 384 U. S. 305 (1966); *Douglas* v. *California,* 372 U. S. 353 (1963); *Smith* v. *Bennett,* 365 U. S. 708 (1961).

defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.

It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in *Griffin* v. *Illinois, supra,* "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Id.,* at 17 n. 11. Here the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds.[18] Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.[19]

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[18] See, *e. g.,* Goldberg, Equality and Governmental Action, 39 N. Y. U. L. Rev. 205, 221 (1964).

[19] We wish to make clear that nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs. See *Ex parte Smith,* 97 Utah 280, 92 P. 2d 1098 (1939). Cf. *Illinois* v. *Allen,* 397 U. S. 337 (1970).

The mere fact that an indigent in a particular case may be imprisoned for a longer time than a non-indigent convicted of the same offense does not, of course, give rise to a violation of the Equal Protection Clause. Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences. Thus it was that in *Williams* v. *New York,* 337 U. S. 241, 247 (1949), we said: "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."

Nothing in today's decision curtails the sentencing prerogative of a judge because, as noted previously, the sovereign's purpose in confining an indigent beyond the statutory maximum is to provide a coercive means of collecting or "working out" a fine. After having taken into consideration the wide range of factors underlying the exercise of his sentencing function, nothing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law.

It bears emphasis that our holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of "$30 or 30 days." We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly. We have no

occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction. We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.[20]

The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.

It is unnecessary for us to canvass the numerous alternatives to which the State by legislative enactment—or judges within the scope of their authority—may resort in order to avoid imprisoning an indigent beyond the statutory maximum for involuntary nonpayment of a fine or court costs. Appellant has suggested several plans, some of which are already utilized in some States, while others resemble those proposed by various studies.[21] The State

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[20] What we have said regarding imprisonment for involuntary nonpayment of fines applies with equal force to imprisonment for involuntary nonpayment of court costs. Although the actual amounts prescribed for fines and court costs reflect quite different considerations, see generally Note, Litigation Costs: The Hidden Barrier to the Indigent, 56 Geo. L. J. 516 (1968), the purpose of incarceration appears to be the same in both instances: ensuring compliance with a judgment. Thus inability to pay court costs cannot justify imprisoning an indigent beyond the maximum statutory term since the Equal Protection Clause prohibits expanding the maximum term specified by the statute simply because of inability to pay.

[21] Appellant has suggested that the fine and costs could be collected through an installment plan as is currently used in several States. *E. g.*, Cal. Penal Code § 1205; Mich. Comp. Laws § 769.3

is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones.[22]

We are not unaware that today's holding may place a further burden on States in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmities which apathy or absence of challenge has permitted to stand. But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo. "Any supposed administrative inconvenience would be minimal, since . . . [the unpaid portion of the judgment] could be reached through the ordinary processes of garnishment in the event of default." *Rinaldi* v. *Yeager,* 384 U. S. 305, 310 (1966).

Nothing we hold today limits the power of the sentencing judge to impose alternative sanctions permitted by Illinois law; the definition of such alternatives, if any, lies with the Illinois courts. We therefore vacate the judgment appealed from and remand to the Supreme Court of Illinois for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

(1948); Pa. Stat. Ann., Tit. 19, §§ 953–956 (1964). See also American Bar Association Project, Standards for Criminal Justice, Sentencing Alternatives and Procedures § 2.7 (b), pp. 117–123 (Approved Draft 1968).

Appellant also suggests that the trial judge could impose a parole requirement on an indigent that he do specified work during the day to satisfy the fine. Cf. 50 U. S. C. App. § 456.

See also Model Penal Code § 7.02 (3) (a) (Proposed Official Draft 1962).

[22] Cf. *United States* v. *Wade,* 388 U. S. 218, 239 (1967).

APPENDIX TO OPINION OF THE COURT*

State Statutory Provisions Concerning Incarceration For Failure To Pay Fine

Alabama

If the fine is not paid defendant is imprisoned in the county jail, possibly at hard labor. The statute is so worded that defendants who have been fined differing amounts may be imprisoned for the same amount of time in satisfaction of the fine. There is no provision in the statute for payment by installment. Ala. Code Tit. 15, Sec. 341 (1958).

Alaska

The judgment that defendant pay a fine shall also direct imprisonment until the fine is satisfied. Rate of credit: $5 per day (additional $5 if prisoner works.) Alas. Stat. Sec. 12.55.010 (1962).

When an indigent defendant has been confined in prison 30 days solely for the nonpayment of the fine, the defendant may petition the magistrate for discharge if certain conditions are met. *Id.* 12.55.030.

Arizona

The sentence of fine may also direct that defendant be imprisoned until the fine is satisfied, but the imprisonment shall not extend beyond the term for which defendant might be sentenced to imprisonment for the offense of which he has been convicted. Rate of credit: $1 per day. Ariz. Rev. Ann. Sec. 13–1648 (1956).

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*[Reporter's Note: This appendix is reproduced in virtually the same form in which it appeared in the brief filed by the National Legal Aid and Defender Assn. as *amicus curiae*. See *supra*, at 239 n. 10. Any changes in the statutes listed herein are not indicated, except for the bracketed entry applicable to Maryland, *infra*, at 251.]

Arkansas

If the punishment of an offense is a fine, the judgment shall direct that defendant be imprisoned until fine and costs are paid. Rate of credit: $1 per day. Ark. Stat. Ann. Sec. 43–2315 (1964).

Specifically applying to convictions of misdemeanor and also providing for imprisonment at the rate of $1 per day. *Id.* Sec. 46–510.

Providing that confinement shall not discharge the fine which can only be collected by proceeding against the defendant's property. *Id.* Sec. 43–2606.

California

Judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied. Rate of credit: not less than $2 per day. When defendant is convicted of a misdemeanor, the judgment may provide for payment of the fine in installments with imprisonment in the event of default. Cal. Pen. Code Sec. 1205 (1968).

But imprisonment for nonpayment of a fine may not exceed in any case the term for which the defendant might be sentenced for the offense of which he has been convicted. *Id.*

Colorado

Court shall have power as part of its judgment to order that the offender be committed to jail until the fine is paid or otherwise legally discharged. Colo. Rev. Stat. Ann. Sec. 39–10–10 (1964).

Persons confined in jail for fines who have no estate with which to pay such fines may be discharged from imprisonment. *Id.* Sec. 39–10–9.

Connecticut

If a convict fails to pay a fine lawfully imposed, he shall be committed to jail until the fine is paid. Conn. Gen. Stat. Ann. Sec. 18–63 (1968).

Rate of credit: $3 per day. *Id.* Sec. 18–50.

When a person is convicted of a crime punishable by a fine or imprisonment, the court may impose upon the offender a conditional sentence and order him to pay a fine within a limited time and in default of so doing, to be imprisoned. *Id.* Sec. 54–119.

Delaware

When a person is sentenced to pay a fine, the courts named in this section may order imprisonment up to one year, if no term for such nonpayment is otherwise fixed by law. Del. Code Ann. Tit. 11, Sec. 4103 (a), (Supp. 1968).

In the same situation, justices of the peace and other named courts may order the person defaulting imprisoned for no longer than 90 days. *Id.* Tit. 11, Sec. 4103 (b).

Florida

When a court sentences a person to pay a fine, the court shall also provide in the sentence a period of time of imprisonment in case of default. Fla. Stat. Ann. Sec. 921.14 (Supp. 1969).

In cases of convictions for misdemeanor, the court may order the defendant to serve not exceeding sixty days in default of payment of a fine. *Id.* Sec. 775.07.

Rate of credit: *Id.* Sec. 951.16.

Georgia

Fines imposed by the court shall be paid immediately or within such reasonable time as the court may grant. Ga. Code Ann. Sec. 27–2901 (1969 Supp.).

Judge may provide as a means of enforcing payment of a fine that the defendant be imprisoned until the fine is paid. *R. E. Lee* v. *State,* 118 S. E. 2d 599 (1961).

Hawaii

When a judgment to pay a fine is not satisfied by immediate payment, the offender shall be committed to

prison until the judgment is satisfied. Hawaii Rev. Stat. Sec. 712–4 (1968).

A poor person, after having been confined for thirty days, solely for the nonpayment of a fine, may make application to the circuit court for the circuit in which he is imprisoned for release. The person may then be discharged upon the taking of an oath. *Id.*

Idaho

A judgment that defendant pay a fine may also direct that the defendant be imprisoned until the fine has been satisfied. Rate of credit: $5 per day. Idaho Code Ann. Sec. 19–2517 (1969 Supp.).

Substantially the same is provided, for both felonies and misdemeanors, by *Id.* Sec. 18–303.

Illinois

In a judgment imposing a fine, the court may order that upon nonpayment of the fine the offender may be imprisoned. Rate of credit: $5 per day. But no person may be imprisoned in this fashion for longer than six months. Ill. Rev. Stat. (1969) ch. 38, Sec. 1–7 (k).

If a person confined in jail for failure to pay a fine has no estate with which to pay the fine, the court may release that person. *Id.* ch. 38, Sec. 180–6.

Indiana

Whenever a person is fined for a felony or a misdemeanor, the judgment shall be that he is committed until the fine is paid. Ind. Ann. Stat. Sec. 9–2228 (1956).

Rate of credit: $5 per day. *Id.* Sec. 9–2227a (Supp. 1969).

Iowa

The judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied. Iowa Code Ann. Sec. 762.32 (1950).

Rate of credit: $3⅓ per day. *Id.* Sec. 789.17.

Kansas

Defendant to be ordered committed to county jail until fine is paid. Kan. Gen. Stat. Ann. Sec. 62–1513 (1964).

Rate of credit: $2 per day. *Id.* Sec. 62–2109.

A person imprisoned for failure to pay a fine may be discharged from imprisonment if found to be unable to pay. *Id.* Sec. 62–1515.

Kentucky

Judgment shall be rendered directing that the defendant shall work at hard labor until the fine and costs are satisfied. Ky. Rev. Stat. Sec. 431.140 (1969).

Rate of credit: $2 per day. *Id.*

Louisiana

If a fine is imposed, the sentence shall provide that in default the defendant shall be imprisoned for a specified period not to exceed one year. But: where the maximum prison sentence which may be imposed as a penalty for a misdemeanor is six months or less, the total period of imprisonment upon conviction of the offense, including imprisonment for default, shall not exceed six months for that offense. La. Crim. Pro. Code Ann. Art. 884 (1970 Pocket part).

Maine

Convict sentenced to pay fine may be committed or confined for default thereof, but not longer than 11 months for any single fine. Me. Rev. Stat. Ann. Tit. 15, Sec. 1904 (Supp. 1970).

Rate of credit: $5 per day. *Id.*

Maryland

In default of payment of a fine, a person adjudged guilty shall be committed to jail until discharged by due course of law. Md. Ann. Code Art. 38, Sec. 1 (1965).

[This provision has been amended by Chapter 147 of the 1970 Laws of Maryland (approved April 15, 1970). See *Morris* v. *Schoonfield, post,* p. 508.]

Installment payments in some counties are provided for. *Id.* Art. 52, Sec. 18 (1969 Supp.).

Rate of credit: $2 per day (with some modifications resulting in shorter periods of confinement in some cases than would result at $2 per day). *Id.* Art. 38, Sec. 4 (1969 Supp.).

Massachusetts

When a person convicted is sentenced to pay a fine, he may also be sentenced to be committed until it is paid. Mass. Ann. Laws, ch. 279, Sec. 1; ch. 127, Sec. 144 (1969).

Rate of credit: $1 per day. *Id.* ch. 127, Sec. 144.

The execution of the sentence of confinement may be suspended and the defendant placed on probation on condition that he pay the fine within a certain time, either in one payment or in installments. In case of default, the court may revoke the suspension of the execution of the sentence. *Id.* ch. 279, Sec. 1.

Discharge of poor prisoners incarcerated for failure to pay fines. *Id.* ch. 127, Sec. 145, (when fine is less than ten dollars); Sec. 146, (when the prisoner has been confined for three months).

Michigan

The court may impose upon the offender a conditional sentence and order him to pay a fine within a limited time and in default of so doing to be imprisoned. The court may also place the offender on probation with a condition that he pay a fine in installments and in default of such payments be imprisoned. Mich. Comp. Laws Ann. Sec. 769.3 (1968).

Execution may issue for the collection of fines in cases where no alternative sentence or judgment of imprison-

ment has been rendered, but no one may be imprisoned under such execution for longer than 90 days. *Id.* Sec. 600.4815.

Minnesota

If a defendant's fine exceeds the amount of his bail, the defendant shall be committed until the balance is paid. Minn. Stat. Ann. Sec. 629.53 (1947).

Rate of credit: $3 per day. *Id.* Sec. 641.10 (Supp. 1969).

Mississippi

Convicts to be imprisoned until fine is fully paid. However, no convict may be held for more than two years for failure to pay the fine for any one offense. Miss. Code Ann. Sec. 7899 (1957).

Rate of credit: $3 per day. *Id.* Sec. 7906.

Missouri

When a defendant is sentenced to pay a fine, he shall be imprisoned until the sentence is fully complied with. Mo. Ann. Stat. Sec. 546.830 (1953).

The judge, on petition of the prisoner, may sentence him to imprisonment for a limited time in lieu of the fine. *Id.* Sec. 546.840.

Rate of credit: $2 per day. *Id.* Sec. 551.010.

Magistrates' courts have similar powers but the rate of credit may vary from $2 to $10 for each day of confinement. *Id.* Secs. 543.260 and 543.270.

Montana

The judgment may be for fine and imprisonment until the fine is paid. Mont. Rev. Codes Ann. Sec. 95–2302 (b) (1969).

Rate of credit: $10 per day. *Id.*

Nebraska

In cases where courts or magistrates have power to sentence an offender to pay a fine, those courts or mag-

istrates may make it a part of the sentence that the party be committed until the fine is paid. Neb. Rev. Stat. Sec. 29–2206 (1965).

Rate of credit: $6 per day. *Id.* Sec. 29–2412.

In cases of misdemeanor, offenders may be committed to the county jail until the fine is paid. *Id.* Sec. 29–2404.

Nevada

A person sentenced to pay a fine may be confined until the fine is satisfied. Nev. Rev. Stat. Sec. 176.065 (1967).

Rate of credit: $4 per day. *Id.*

New Hampshire

A person sentenced to pay a fine shall be ordered to be imprisoned until sentence is performed. N. H. Rev. Stat. Ann. Sec. 618.6 (1969 Supp.).

Rate of credit: $5 per day. *Id.* Sec. 618.9.

New Jersey

Defendant may be placed at labor in a county jail or penitentiary until the fine is paid. N. J. Stat. Ann. Sec. 2A:166–14 (1953).

Defendant may also be permitted to remain at large for a fixed time to enable him to pay the fine. If defendant fails to pay, the court may then order him into custody. *Id.* Sec. 2A:166–15.

Rate of credit: $5 per day. *Id.* Sec. 2A:166–16 (Supp. 1969).

A disorderly person who defaults in the payment of a fine may be committed by the court. *Id.* Sec. 2A:169–5 (Supp. 1969).

New Mexico

A person may be committed to prison for nonpayment of a fine. N. M. Stat. Ann. Sec. 42–2–9 (Supp. 1969). (Applies to both county jails and the state penitentiary—Compiler's Note).

Rate of credit: $5 per day. *Id.*

If a person so confined makes an affidavit that he has no property out of which to pay the fine, he must be released after three months of confinement. *Id.* sub. B.

But convicts sentenced to the state penitentiary may not be required to serve more than thirty days for a fine. *Id.* Sec. 42–1–60 (1964).

New York

In the event the defendant fails to pay a fine as directed, the court may direct that he be imprisoned until the fine is satisfied (limitations: for a felony, the imprisonment may not exceed one year; for a misdemeanor, it may not exceed one third of the maximum authorized sentence.) N. Y. Code Crim. Proc. Sec. 470–d (Supp. 1969).

Sec. 470–d has been limited by *People* v. *Saffore,* 18 N. Y. 2d 101, 218 N. E. 2d 686 (1966).

North Carolina

If a guilty party is sentenced to pay a fine and it is not immediately paid, the guilty person may be committed to the county jail until the fine is paid. N. C. Gen. Stat. Sec. 6–65 (Supp. 1970).

Persons committed for fines may be discharged from imprisonment upon taking an insolvent debtor's oath. *Id.* Secs. 23–23 and 23–24 (1965).

North Dakota

A judgment that the defendant pay a fine also may direct that he be imprisoned until the fine is satisfied. N. D. Cent. Code Sec. 29–26–21 (1960).

Rate of credit: $2 per day (but such imprisonment does not discharge the judgment for the fine.) *Id.*

Ohio

When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced remain in jail until the fine is paid but no commitment may exceed six months. Ohio Rev. Code Ann. Sec. 2947.14 (1954).

Rate of credit: $3 per day. *Id.*

In a case of conviction for a misdemeanor, the judge or magistrate has the same power as above, but there is no limit of six months. *Id.* Sec. 2947.20.

Oklahoma

Persons sentenced to pay a fine who refuse or fail to pay it, may be imprisoned. Okla. Stat. Tit. 11, Sec. 794 (Supp. 1969).

Rate of credit: $2 per day. *Id.*

A poor convict who has been imprisoned for nonpayment of a fine may be discharged after serving six months if two justices of the peace are satisfied that the convict has not had since his conviction any estate with which he might have paid the fine. *Id.* Tit. 57, Sec. 15 (1969).

Oregon

A judgment that the defendant pay a fine shall also direct that he be imprisoned in the county jail until the fine is satisfied. Ore. Rev. Stat. Sec. 137.150 (1963).

Rate of credit: $5 per day. *Id.*

Indigents imprisoned for nonpayment of fine may be discharged after serving thirty days solely for such nonpayment if in the opinion of a magistrate or court it appears that the prisoner is unable to pay the fine. Ore. Rev. Stat. Sec. 169.160 (1967).

Pennsylvania

Persons may be imprisoned in an action for fines or penalties. Pa. Stat. Ann. Tit. 12, Sec. 257 (1953). A person confined for nonpayment of a fine may be discharged if he conforms to the provisions for insolvent debtors, but no application is allowed until the prisoner has served at least three months. *Id.* Tit. 39, Sec. 323 (1954).

The sentencing authority may allow payment of a fine by installments, but upon default the defendant may be committed. *Id.* Tit. 19, Secs. 953 and 956 (1964).

Rhode Island

Persons may be committed to the adult correctional institutions for the nonpayment of fines. R. I. Gen. Laws Ann. Sec. 13–2–36 (1957).

Rate of credit: $5 per day. *Id.*

The director of social welfare may recommend the release of persons so confined, but no guidelines are set out in the statute. *Id.*

South Carolina

Offenders may be committed to jail, if they are unable to pay forfeitures, until the amount is satisfied. S. C. Code Ann. Sec. 17–574 (1962).

Offenders so committed are entitled to the privilege of insolvent debtors. *Id.*

Installment payments as a condition of probation. *Id.* Sec. 55–593.

South Dakota

A judgment that the offender pay a fine may also direct that he be imprisoned until the fine is satisfied. S. D. Comp. Laws Ann. Sec. 23–48–23 (1969).

Rate of credit: $2 per day. *Id.*

Tennessee

If a fine is not paid, the defendant shall be imprisoned until it is paid. Tenn. Code Ann. Sec. 40–3203 (1955).

Rate of credit: $5 per day. *Id.* Sec. 41–1223 (1956).

Texas

When a defendant convicted of a misdemeanor is unable to pay the fine adjudged against him, he may be put to work or imprisoned for a sufficient length of time to discharge the amount. Tex. Code Crim. Proc. Art. 43.09 (1966).

Utah

A judgment that a defendant pay a fine may also direct that he be imprisoned until the fine is satisfied. Utah Code Ann. Sec. 77–35–15 (1953).

Rate of credit: $2 per day. *Id.*

Vermont

When a person is sentenced to imprisonment and also to pay a fine, the court may order him imprisoned for failure to pay the fine, the term of imprisonment to begin at the end of the term in the original sentence. Vt. Stat. Ann. Tit. 13, Sec. 7222 (Supp. 1969).

When a person is sentenced only to pay a fine, the court shall order that if the sentence is not complied with within twenty-four hours the person may be imprisoned. *Id.* Sec. 7223.

Rate of credit: $1 per day. *Id.* Secs. 7222 and 7223.

Virginia

The circuit or corporation court in which any judgment for a fine is rendered may commit the defendant to jail until the fine is paid. Va. Code Ann. Sec. 19.1–339 (Supp. 1968).

In any misdemeanor case tried before a court not of record in which a fine is imposed on a defendant, if no security is given, the defendant may be committed to jail until the fine is paid. *Id.* Sec. 19.1–338.

Washington

If a person does not pay the fine adjudged against him within five days, that person may be imprisoned in the county jail until the fine is paid. Wash. Rev. Code Ann. Sec. 10.82.030 (Supp. 1969).

Installment payments permitted. *Id.* (1961).

West Virginia

When a judgment for a fine is rendered by a court of record having jurisdiction in criminal cases, the court may also provide, as a part of the judgment, that the defendant be imprisoned until the fine is paid. W. Va. Code Ann. Sec. 62–4–9 (1966).

Rate of credit: $1.50 per day. *Id.* Sec. 62–4–10.

Confinement for failure to pay a fine shall not exceed the term of six months. *Id.*

Wisconsin

When a fine is imposed, the court shall also sentence the defendant to be committed to the county jail until the fine and costs are paid or discharged. Wis. Stat. Ann. Sec. 959.055 (Supp. 1969).

The court may grant a reasonable time not exceeding one stay of 30 days based on the defendant's circumstances in which to make payment before committing him to the county jail. *Id.*

The time of imprisonment, in addition to any other imprisonment, shall not exceed six months. *Id.*

Installment payments permitted. *Id.* Sec. 57.04.

Wyoming

Any court shall have power, in cases of conviction where a fine is inflicted, to order as part of its judgment that the offender shall be committed to jail until the fine is paid or otherwise legally discharged. Wyo. Stat. Ann. Sec. 7–280 (1959).

Rate of credit: $1 per day. *Id.* Sec. 6–8.

MR. JUSTICE HARLAN, concurring in the result.

I concur in today's judgment, but in doing so wish to dissociate myself from the "equal protection" rationale employed by the Court to justify its conclusions.

The "equal protection" analysis of the Court is, I submit, a "wolf in sheep's clothing," for that rationale is no more than a masquerade of a supposedly objective standard for *subjective* judicial judgment as to what state legislation offends notions of "fundamental fairness." Under the rubric of "equal protection" this Court has in recent times effectively substituted its own "enlightened" social philosophy for that of the legislature no less than did in the older days the judicial adherents of the now discredited doctrine of "substantive" due process. I, for one, would prefer to judge the legislation before us in this case in terms of due process, that is to determine whether it arbitrarily infringes a constitutionally protected interest of this appellant. Due process, as I noted in my dissenting opinion in *Poe* v. *Ullman,* 367 U. S. 497, 541 (1961), is more than merely a procedural safeguard; it is also a " 'bulwark . . . against arbitrary legislation.' *Hurtado* v. *California,* 110 U. S. 516, at 532." See *Flemming* v. *Nestor,* 363 U. S. 603 (1960), and my dissenting opinion in *Shapiro* v. *Thompson,* 394 U. S. 618, 655 (1969).

The matrix of recent "equal protection" analysis is that the "rule that statutory classifications which either are based upon certain 'suspect' criteria or affect 'fundamental rights' will be held to deny equal protection unless justified by a 'compelling' governmental interest," *Shapiro* v. *Thompson, supra,* at 658 (HARLAN, J., dissenting). In *Shapiro, Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 680 (1966), and *Williams* v. *Rhodes,* 393 U. S. 23, 41 (1968), I attempted to expose the weakness in the precedential and jurisprudential foundation upon which the current doctrine of "equal protection" sits. See also *Griffin* v. *Illinois,* 351 U. S. 12, 34–36 (1956) (dissenting opinion); *Douglas* v. *California,* 372 U. S. 353, 360 (1963) (dissenting opinion). I need not retrace the views expressed in these cases, except to object once again to this rhetorical preoccupation with "equalizing" rather than analyzing the *rationality* of the legislative distinction in relation to legislative purpose.

An analysis under due process standards, correctly understood, is, in my view, more conducive to judicial restraint than an approach couched in slogans and ringing phrases, such as "suspect" classification or "invidious" distinctions, or "compelling" state interest, that blur analysis by shifting the focus away from the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen. Accordingly, I turn to the case at hand.

I

The State of Illinois has made the unquestionably legitimate determination that the crime of petty larceny

should be punished by a jail term of days, up to one year, in combination with a fine of a dollar amount. Anyone who, in the judgment of the trial judge, should receive the stiffest penalty known to Illinois law for this crime may, if he possesses funds, satisfy the demands of the criminal law by paying the fine superimposed on the jail term. If he cannot pay his debt to society, it is surely not unequal, but, to the contrary, most equal, that some substitute sanction be imposed lest the individual of means be subjected to a harsher penalty than one who is impoverished. If equal protection implications of the Court's opinion were to be fully realized, it would require that the consequence of punishment be comparable for all individuals; the State would be forced to embark on the impossible task of developing a system of individualized fines, so that the total disutility of the entire fine, or the marginal disutility of the last dollar taken, would be the same for all individuals. Cf. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969). Today's holding, and those in the other so-called "equal protection" decisions, *e. g., Douglas* v. *California, supra; Anders* v. *California,* 386 U. S. 738 (1967), offer no pretense to actually providing such equal treatment. It cannot be argued that the requirement of counsel on appeal is the right to the most skilled advocate who is theoretically at the call of the defendant of means. However desirable and enlightened a theory of social and economic equality may be, it is not a theory that has the blessing of the Fourteenth Amendment. Not "every major social ill in this country can find its cure in some constitutional 'principle,' and . . . this Court [is not equipped to] 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a

judicial body, be thought of as a general haven for reform movements." *Reynolds* v. *Sims*, 377 U. S. 533, 624–625 (1964) (dissenting opinion).

II

The reluctance of the Court to carry its "equal protection" approach to its most logical consequences accents what I deem to be the true considerations involved in this case, namely, whether the legislature has impermissibly affected an individual right or has done so in an arbitrary fashion. Cf. Michelman, *supra*. While legislation usually will not be deemed arbitrary if its means can arguably be supposed to be related to a legitimate purpose (see my dissenting opinion in *Shapiro* v. *Thompson*, *supra*) and generally the burden of demonstrating the existence of a rational connection between means and ends is not borne by the State) see *Flemming* v. *Nestor*, *supra*, and my dissenting opinion in *Swann* v. *Adams*, 385 U. S. 440, 447 (1967)), the presumption of regularity that comes with legislative judgment is one that is not equally acceptable in all instances, nor is it blind to the nature of the interests affected.

Thus, as a due process matter I have subscribed to the admonition of *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942), where the Court cautioned that there are limits to the extent to which the presumption of constitutionality can be pressed where a "basic liberty" is concerned. See my dissenting opinion in *Poe* v. *Ullman*, *supra*, at 543. The same viewpoint was implicit in *Flemming* v. *Nestor*, *supra*, where the Court noted the breadth of latitude to be accorded to a legislative judgment when the interest was that of a "noncontractual benefit under a social welfare program." 363 U. S., at 611. Thus while that "interest . . . is of sufficient substance to fall within the protection from arbitrary governmental action

afforded by the Due Process Clause," when that interest is the "withholding of a noncontractual benefit under a social welfare program . . . , we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Ibid.*

The implication of *Flemming* is, however, that the deference owed to legislative judgment is not the same in all cases. Thus legislation that regulates conduct but incidentally affects freedom of expression may, although it is a rational choice to effectuate a legitimate legislative purpose, be invalid because it imposes a burden on that right, or because other means, entailing less imposition, may exist. See *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938); *Garner* v. *Louisiana,* 368 U. S. 157, 185 (1961) (concurring in the judgment); *United States* v. *O'Brien,* 391 U. S. 367, 388 (1968) (concurring opinion).

These decisions, by no means dispositive of the case before us, unquestionably show that this Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free. Cf. my dissenting opinion in *Poe* v. *Ullman, supra.* While the interest of the State, that of punishing one convicted of crime is no less substantial, cf. concurring opinion of MR. JUSTICE BRENNAN in *Illinois* v. *Allen,* 397 U. S. 337, 347 (1970), the "balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society," *Poe* v. *Ullman, supra,* at 542, "having regard to what history teaches" is not such that the State's interest here outweighs that of the individual so as to bring into full play the application of the usual salutary presumption of rationality.

III

The State by this statute, or any other statute fixing a penalty of a fine, has declared its penological interest—deterrence, retribution, and rehabilitation—satisfied by a monetary payment, and disclaimed, as serving any penological purpose in such cases, a term in jail. While there can be no question that the State has a legitimate concern with punishing an individual who cannot pay the fine, there is serious question in my mind whether, having declared itself indifferent as between fine and jail, it can consistently with due process refrain from offering some alternative such as payment on the installment plan.

There are two conceivable justifications for not doing so. The most obvious and likely justification for the present statute is administrative convenience. Given the interest of the individual affected, I do not think a State may, after declaring itself indifferent between a fine and jail, rely on the convenience of the latter as a constitutionally acceptable means for enforcing its interest, given the existence of less restrictive alternatives. Cf. *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1950).

The second conceivable justification is that the jail alternative serves a penological purpose that cannot be served by collection of a fine over time. It is clear that having declared itself satisfied by a fine, the alternative of jail to a fine serves neither a rehabilitative nor a retributive interest. The question is, then, whether the requirement of a lump-sum payment can be sustained as a rational legislative determination that deterrence is effective only when a fine is exacted at once after sentence and by lump sum, rather than over a term. This is a highly doubtful proposition, since, apart from the mere fact of conviction and the humiliation associated with it and the token of punishment evidenced by the for-

feiture, the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment.

That the Illinois statute represents a considered judgment, evincing the belief that jail is a rational and necessary trade-off to punish the individual who possesses no accumulated assets seems most unlikely, since the substitute sentence provision, phrased in terms of a judgment collection statute, does not impose a discretionary jail term as an alternative sentence, but rather equates days in jail with a fixed sum. Thus, given that the only conceivable justification for this statute that would satisfy due process—that a lump-sum fine is a better deterrent than one payable over a period of time—is the one that is least likely to represent a considered legislative judgment, I would hold this statute invalid.

The conclusion I reach is only that when a State declares its penal interest may be satisfied by a fine or a forfeiture in combination with a jail term the administrative inconvenience in a judgment collection procedure does not, as a matter of due process, justify sending to jail, or extending the jail term of, individuals who possess no accumulated assets.* I would reserve the question as to whether a considered legislative judgment that a lump-sum fine is the only effective kind of forfeiture for deterrence and that the alternative must be jail, would be constitutional. It follows, *a fortiori,* that no conclusion reached herein casts any doubt on the conventional "$30 or 30 days" if the legislature decides that should be the *penalty* for the crime. Note, Discriminations Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435 (1967). Such a statute

*In this regard, unlike the Court, I see no distinction between circumstances where the State through its judicial agent determines that effective punishment requires less than the maximum prison term plus a fine, or a fine alone, and the circumstances of this case.

evinces the perfectly rational determination that some individuals will be adequately punished by a money fine, and others, indifferent to money—whether by virtue of indigency or other reasons—can be punished only by a jail term. Still more patently nothing said herein precludes the State from punishing ultimately by jail individuals who fail to pay fines or imprisoning immediately individuals who, in the judgment of a court, will not undertake to pay their fines.

On these premises I join the Court's judgment vacating appellant's sentence and remanding to the Supreme Court of Illinois to afford it an opportunity to instruct the sentencing judge as to any permissible alternatives under Illinois law. It may be that Illinois courts have the power to fashion a procedure pending further consideration of this problem by the state legislature. Cf. *Rosado* v. *Wyman,* 397 U. S. 397, 421–422 (1970), and my opinion concurring in the result in *Welsh* v. *United States,* 398 U. S. 333, 344 (1970).

Syllabus

UNITED STATES *v.* SISSON

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

No. 305. Argued January 20–21, 1970—Decided June 29, 1970

Appellee was indicted for wilfully failing to report for induction as ordered by his local draft board. He moved to dismiss the indictment because (1) the involvement in Vietnam violated international law, (2) he "reasonably believed the government's involvement in Vietnam to be illegal," (3) the Selective Service Act and its regulations were unconstitutional, as the local boards' procedures lacked due process, and (4) compulsory conscription in peacetime was unnecessary and stifled fundamental liberties. The District Judge dismissed the motion and the case proceeded to trial. The instructions to the jury made no reference to a conscientious objector claim, or to whether the appellee was "sincere" in his beliefs, but advised the jury that the crux of the case was whether appellee's refusal was "unlawful, knowingly, and wilfully" done. The jury returned a verdict of guilty. Thereafter, appellee made a motion under Fed. Rule Crim. Proc. 34 to arrest the judgment on the ground that the District Court lacked jurisdiction. The District Court in granting what it termed a motion in arrest of judgment, ruled, not on the jurisdictional contention, but on appellee's "older contention" that the indictment could not charge an offense based on the Establishment, Free Exercise, and Due Process Clause arguments relating to conscientious objections to the Vietnam conflict. The court stated the facts of the case, and described how appellee's demeanor on the stand convinced the judge of his sincerity. The court held that the Free Exercise and Due Process Clauses prohibited application of the Draft Act to appellee to require him to fight in Vietnam because as a "sincerely conscientious man," his interest in not killing in Vietnam outweighed "the country's present need for him to be so employed." The court also ruled that § 6 (j) of the Selective Service Act violates the Establishment Clause. The Government bases its claim that this Court has jurisdiction to review the case on the "arresting judgment" provision of 18 U. S. C. § 3731, which provides that an appeal may be taken to the Supreme Court from a decision (1) arresting a judgment of conviction, (2) for insufficiency of the indictment or information, (3) where such decision

is based upon the invalidity or construction of the statute upon which the indictment or information is founded. *Held:*

1. The decision below was not one "arresting a judgment of conviction." Pp. 280–287.

(a) In granting a motion in arrest of judgment under Fed. Rule Crim. Proc. 34, which preserves the common-law requirement, a district court must not look beyond the face of the record, and thus a decision based on evidence adduced at trial cannot be one arresting judgment. Pp. 280–282.

(b) The District Court clearly went beyond the "face of the record" in reaching its decision, as the court's factual findings concerning appellee's sincerity and opposition to fighting in Vietnam are essential to its disposition of the case. Pp. 283–284.

(c) Even assuming, *arguendo*, that the parties could secure review under the motion-in-arrest provisions of § 3731 on the basis of a stipulation, there certainly was no formal stipulation here, and the most that can be said is that *after* the lower court's decision the Government chose to accept the opinion's findings of fact. Pp. 284–287.

2. The indictment here was not insufficient, as it recited the necessary elements of an offense, and did not allege facts that themselves demonstrate the availability of a constitutional privilege. Pp. 287–288.

3. Since the disposition below was based on factual conclusions not found in the indictment but resulting from evidence adduced at trial, the decision was in fact an acquittal rendered after the jury's verdict of guilty, and not, as characterized by the trial judge, an arrest of judgment. Pp. 288–290.

4. The legislative history of the Criminal Appeals Act, rather than manifesting a broad congressional directive to this Court to review important legal issues, shows a legislative policy to provide review in only certain cases and to restrict it to those instances. A primary concern of the Act is that no appeal be taken by the Government from an acquittal, no matter how erroneous the underlying legal theory. Pp. 291–299.

5. This Court does not have jurisdiction in this case under the "motion in bar" provision of § 3731. Pp. 299–307.

(a) A motion in bar cannot be granted on the basis of facts that would necessarily be tried with the general issue in the case, and here the District Judge based his findings on evidence presented in the trial of the general issue. Pp. 301–302.

(b) An appeal from a motion in bar cannot be granted after jeopardy attaches, and in light of the compromise origins of the Criminal Appeals Act, the concern of some Senators over retrial of a defendant whose trial ended after the jury was impaneled, and the long-time consistent interpretation by the Government, jeopardy attaches when the jury is sworn. Pp. 302–307.

297 F. Supp. 902, dismissed.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson, Francis X. Beytagh, Jr., Beatrice Rosenberg,* and *Roger A. Pauley.*

John G. S. Flym argued the cause and filed a brief for appellee.

Briefs of *amici curiae* were filed by *William G. Smith* for the Los Angeles Selective Service Law Panel; by *Norman Leonard* for the Lawyers' Selective Service Panel of San Francisco; by *Joseph B. Robison* for the American Jewish Congress; by *Samuel Rabinove* and *George Berlstein* for the American Jewish Committee; by *Herman Schwartz, Marvin M. Karpatkin,* and *Melvin L. Wulf* for the American Humanist Assn. et al.; by *Leo Rosen, Edward S. Greenbaum,* and *Nancy F. Wechsler* for the American Ethical Union, and by Frank P. Slaninger, *pro se.*

MR. JUSTICE HARLAN delivered the opinion of the Court.*

The Government seeks to appeal to this Court a decision by a District Court in Massachusetts holding that appellee Sisson could not be criminally convicted for refusing induction into the Armed Forces. The District Court's opinion was bottomed on what that court under-

*MR. JUSTICE BLACK joins only Part II C of this opinion. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join the entire opinion.

stood to be Sisson's rights of conscience as a nonreligious objector to the Vietnam war, but not wars in general, under the Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The District Court's primary conclusion, reached after a full trial, was that the Constitution prohibited "the application of the 1967 draft act to Sisson to require him to render combat service in Vietnam" because as a "sincerely conscientious man," Sisson's interest in not killing in the Vietnam conflict outweighed "the country's present need for him to be so employed," 297 F. Supp. 902, 910 (1969).

The District Court characterized its own decision as an arrest of judgment, and the Government seeks review here pursuant to the "arresting judgment" provision of the Criminal Appeals Act, 18 U. S. C. § 3731, an Act that narrowly limits the Government's right to appeal in criminal cases to certain types of decisions. On October 13, 1969, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits, 396 U. S. 812 (1969). For reasons that we elaborate in what follows, we conclude that the decision below, depending as it does on facts developed at Sisson's trial, is not an arrest of judgment but instead is a directed acquittal. As such, it is not a decision that the Government can appeal. Consequently, this appeal must be dismissed for lack of jurisdiction without our considering the merits of this case. We, of course, intimate no view concerning the correctness of the legal theory by which the District Court evaluated the facts developed at the trial.[1]

[1] We have today granted certiorari in *Gillette* v. *United States* (No. 1170), and *Negre* v. *Larsen* (No. 1669, Misc.), in order to consider the "selective" conscientious objector issue that underlies the case now before us but which we cannot reach because of our conclusion that we have no jurisdiction to entertain this direct appeal.

As a predicate for our conclusion that we have no jurisdiction to entertain the Government's appeal, a full statement of the proceedings below is desirable.

I

A single-count indictment charged that Sisson "did unlawfully, knowingly and wilfully fail and neglect and refuse to perform a duty" imposed by the Military Selective Service Act of 1967 and its regulations, in violation of § 12 of the Act, 81 Stat. 105, 50 U. S. C. App. § 462 (a) (1964 ed., Supp. IV), because he failed to obey an order by his local draft board to submit to induction.

Prior to trial, Sisson's attorney moved to dismiss the indictment on three grounds. It was claimed that Sisson's refusal to submit to induction was justified first, because "the government's military involvement in Vietnam violates international law"; and, second, because Sisson "reasonably believed the government's military involvement in Vietnam to be illegal." As a third ground, Sisson claimed that the Selective Service Act and its regulations were unconstitutional (a) because the procedures followed by local boards lacked due process; and (b) because compulsory conscription during peacetime was unnecessary and stifled fundamental personal liberties. In support of the motion to dismiss, appellee stated:

> "At the time I refused to submit to induction into the armed forces I believed, as I believe today, that the United States military involvement in Vietnam is illegal under international law as well as under the Constitution and treaties of the United States. I believed then, and still believe, that my participation in that war would violate the spirit and the letter of the Nuremberg Charter. On the basis of my knowledge of that war, I could not participate in it without doing violence to the dictates of my conscience."

At the hearing on appellee's motion to dismiss, the District Judge said that he had "an open mind" concerning appellee's first and third grounds. However, the court said there was "nothing to" the second ground, noting that what "the defendant reasonably believes . . . cannot be raised in the way that you propose . . . because that does not appear on the face of the indictment." (App. 49.) The District Court later amplified this conclusion by saying:

> "Point 2 is plainly premature because nobody can test the issue as to whether defendant reasonably believes the government's military involvement in Vietnam is illegal without knowing what he reasonably believed, *and what he believed is a question of evidence and not a question which appears on the face of the indictment.*" (App. 52.) (Emphasis supplied.)

Defense counsel did not dispute the District Court's analysis, and noted that he had raised the issue in his motion to dismiss only "in the interest of economy," because "[i]t was not clear at the time I filed the motion that the government would challenge this fact." (App. 52.) The court expressed doubts concerning the Government's willingness to concede this fact, and, when asked by the court, the government counsel specifically stated his opposition to the motion to dismiss. The court thereupon found the "second ground" of the motion to dismiss without merit.

A short time after this hearing, the District Court issued two written opinions, 294 F. Supp. 511 and 515 (1968), that denied the other grounds of the motion to dismiss. After determining that appellee had the requisite standing to raise the issues involved, the court held that the political question doctrine foreclosed consideration of whether Congress could constitutionally draft for

an undeclared war, or could order Sisson to fight in the allegedly "genocidal war."

An order accompanying the second pretrial opinion also dealt with various offers of proof that defense counsel had made in an informal letter to the court, not part of the record. From the order it appears that appellee's counsel stated he would "offer evidence to show that [Sisson] properly refused to be inducted on the basis of his right of conscience, both statutory and constitutional." Not understanding the scope of this rather ambiguous offer of proof, the District Court in its order ruled that if Sisson wished to make a conscientious objector claim based on religious objections not to wars in general but to the Vietnam war in particular, Sisson should make his offer of proof initially to the judge

> "to elicit a ruling whether the First Amendment precludes the Congress from requiring one who has religious conscientious objections to the Vietnam war to respond to the induction order he received. If the Court rules favorably to defendant on the Constitutional issue of law, then both defense and prosecution are entitled to submit to the trier of fact evidence relevant to the question whether defendant indeed is a religious conscientious objector to the Vietnam war." 294 F. Supp., at 519.

At the trial, however, it appears that defense counsel did not try to prove that Sisson should have received a conscientious objector exemption, nor did he request a ruling on the First Amendment issues referred to by the trial court. Instead it seems that the defense strategy was to prove that Sisson believed the Vietnam war to be illegal under domestic and international law, and that this belief was reasonable. If unable to get a direct adjudication of the legality of the war, the defense at least

hoped to convince the jury that Sisson lacked the requisite intent to "wilfully" refuse induction.[2]

There was evidence submitted at the trial that did bear on the conscientious objector issue, however. When asked why he had refused induction, Sisson emphasized that he thought the war illegal. He also said that he felt the Vietnam war was "immoral," "illegal," and "unjust," and went against "my principles and my best sense of what was right." The court asked Sisson what the basis for his conclusions was, particularly what Sisson meant when he said the war was immoral. Sisson said that the war violated his feelings about (1) respect for human life, (2) value of man's freedom, and (3) the scale of destruction and killing consonant with the stated purposes of American intervention. Sisson also stated, in response to the trial judge's question, that his "moral values come from the same sources [the trial court had] mentioned, religious writings, philosophical beliefs."

The prosecution did not allow Sisson's testimony to stand without cross-examination. In apparent reliance

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[2] Not only did the defense itself avoid advancing any theory or proof that Sisson deserved conscientious objector status, but there are even indications that the defense purposely attempted to keep the issue out of the case. For example, at one point in the trial the Marine officer who called Sisson for induction stated that Sisson had told him at the time that he was refusing induction because of religious belief, and his "conscientious objector status." (App. 143.) Later, when questioned by his own counsel, Sisson not only denied having the conversation with the officer but also stated that he had never applied for C. O. status (1) because he could not honestly claim "conscientious objection to war in any form as it is put on the Form 150"; and (2) because he believed "the system of exemptions and deferments [to be] unequal and [to discriminate] against those who do not have education . . . or money." Sisson stated flatly that he therefore "could not accept such deferment." (App. 147–150.)

on the court's pretrial ruling that Sisson's beliefs concerning the war were irrelevant to the question of whether his refusal to submit to induction was wilful,[3] the government counsel concentrated on showing that Sisson had refused induction deliberately, of his own free will, and knowing the consequences. The prosecution also brought out that Sisson had failed to appeal his I–A classification when it had been issued, and that he had accepted, as an undergraduate, a II–S student classification.

In the final arguments to the jury, just as in the opening statements, neither counsel mentioned a religious or nonreligious conscientious objector issue. The defense argued that the key to the case was whether Sisson had "wilfully" refused to submit to induction, and tried to suggest his beliefs about the war were relevant to this. The government lawyer simply pointed out the operative facts of Sisson's refusal. He also attacked Sisson's sincerity by pointing out the inconsistency between Sissons' broad statements that he opposed deferments because they discriminated against the poor,

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[3] Among the various offers of proof made by Sisson's attorney before the trial was one to show that Sisson "reasonably believed the Vietnam war to be illegal," and that he therefore lacked the requisite intent to "wilfully" refuse induction. In the pretrial order, the trial judge ruled that:

" 'Wilfully' as used in the indictment means intentionally, deliberately, voluntarily. If the Government proves defendant intentionally refused to comply with an order of his draft board, in accordance with the statute, to submit to induction, it is not open to defendant to offer as an excuse that he regarded the war as illegal, that is, contrary to either domestic Constitutional law or international law . . . . [I]n a prosecution for wilfully refusing to obey an induction order, evidence with respect to belief is admissible only to the extent it bears upon the issue of intent, as distinguished from motive or good faith." 294 F. Supp., at 519.

see n. 2, *supra,* and his willingness to accept a II–S deferment while he was at Harvard College. (See App. 187–188.)

The instructions to the jury made no reference to a conscientious objector claim, and the jury was not asked to find whether Sisson was "sincere" in his moral beliefs concerning the war. Instead the trial court told the jury that the crux of the case was whether Sisson's refusal to submit to induction was "unlawfully, knowingly and wilfully" done.[4] The jury, after deliberating about 20 minutes, brought in a verdict of guilty.

After the trial, the defendant made a timely motion under Fed. Rule Crim. Proc. 34 to arrest the judgment on the ground that the District Court lacked jurisdiction.[5] Pointing to the fact that the District Court had ruled before the trial that the political question doctrine prevented its consideration of defenses requiring an adjudication of the legality of the Vietnam war, the defense

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[4] The key instruction was given as follows:

"The only question which as a matter of law a Jury has a right to consider is whether the defendant if he failed to perform an act required under the statute and regulations was acting knowingly in the sense of with mental awareness, [and] wilfully in the sense of intentionally and with free choice.

"He may have all the views he likes of a political, ethical, religious or legal nature. They may be as reasonable as sometimes dissents of the Supreme Court are reasonable and sometimes the majority Opinions are reasonable, but as long as the law stands as it now stands his motivation, his good faith and the like are not in the least relevant to the question whether he is guilty or not." (App. 193.)

[5] Defendant first submitted a motion in arrest of judgment March 26—five days after the trial. Two days later he substituted an amended motion in arrest "in lieu of" his original motion. This first amended motion differed only in detail from the original. Both were based on the jurisdictional argument described in the text and neither made any claim based on the Establishment or Free Exercise Clause.

argued that the court therefore lacked jurisdiction under Article III and the Due Process Clause to try the defendant for an offense to which the illegality of the war might provide a defense.

The District Court, in granting what it termed a motion in arrest of judgment, did not rule on the jurisdictional argument raised in the defense motion. Instead, the court ruled on what it termed defendant's "older contention" [6] that the indictment did not charge an offense based on defendant's "never-abandoned" Establishment, Free Exercise, and Due Process Clause arguments relating to conscientious objections to the Vietnam war.

The court first stated the facts of the case, in effect making findings essential to its decision. The opinion

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[6] The District Court was apparently referring to Sisson's pretrial "offer [of] evidence" with reference to Sisson's "right of conscience." See *supra,* at 273; 294 F. Supp., at 519. It does not appear that any contention based on Sisson's right of conscience was raised at trial, or made in the motion to arrest judgment, see *supra,* n. 5. Possibly in recognition of this, the District Court noted in its opinion that "[i]t would have been better practice" for Sisson's attorney to have made "a more detailed reference" in his motion in arrest to his "earlier" arguments. The court stated that "[n]o doubt, defendant will seasonably make his motion in arrest even clearer." On April 3—two days after the District Court's decision—Sisson's attorney moved to amend his motion in arrest to make the requested grounds conform with those already stated in the opinion. The District Court granted this motion to amend *nunc pro tunc* as of April 1—the date of its opinion.

Because we conclude that the District Court's decision was not in fact one arresting judgment, see *infra,* we have no occasion to decide whether the District Court incorrectly characterized these issues as having been raised by the defendant, and if so, whether the 1966 amendment to Fed. Rule Crim. Proc. 34, requiring that a motion in arrest of judgment be granted "on motion of a defendant," precludes a district court from granting such a motion on an issue not raised by the defendant's motion.

describes how Sisson's demeanor on the stand convinced the court of his sincerity. The court stated that "Sisson's table of ultimate values is moral and ethical . . . [and] reflects quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion." The critical finding for what followed was that:

> "What another derives from the discipline of a church, Sisson derives from the discipline of conscience.
>
> ". . . Sisson bore the burden of proving by objective evidence that he was sincere. He was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." 297 F. Supp., at 905.

Building on these findings, the court first held that the Free Exercise and Due Process Clauses "prohibit the application of the 1967 draft act to Sisson to require him to render combat service in Vietnam" because as a "sincerely conscientious man," Sisson's interest in not killing in the Vietnam conflict outweighed "the country's present need for him to be so employed." The District Court also ruled that § 6 (j) of the Selective Service Act, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. IV), offends the Establishment Clause because it "unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings." 297 F. Supp., at 911.

II

The Government bases its claim that this Court has jurisdiction to review the District Court's decision exclusively on the "arresting judgment" provision of the

Criminal Appeals Act, 18 U. S. C. § 3731.[7] The relevant statutory language provides:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> . . . . . .
>
> "From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

Thus, three requirements must be met for this Court to have jurisdiction under this provision. First, the decision of the District Court must be one "arresting a judgment of conviction." Second, the arrest of judg-

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[7] For the text, see n. 20, *infra*.

It should be noted that at the conclusion of his opinion, the District Judge stated that he was granting the motion in arrest because "[i]n the words of Rule 34, the indictment of Sisson 'does not charge an offense.' " He then stated in conclusory terms that his decision was one " 'arresting a judgment of conviction for insufficiency of the indictment . . . [which] is based upon the invalidity . . . of the statute upon which the indictment . . . is founded' " for purposes of 18 U. S. C. § 3731, and that the Government could therefore take a direct appeal to this Court.

The label attached by the District Court to its own opinion does not, of course, decide for us the jurisdictional issue, however. "We must be guided in determining the question of appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was," *United States* v. *Waters*, 84 U. S. App. D. C. 127, 128, 175 F. 2d 340, 341, appeal dismissed on Government's motion, 335 U. S. 869 (1948); *United States* v. *Zisblatt*, 172 F. 2d 740, 742 (C. A. 2d Cir.), appeal dismissed on Government's motion, 336 U. S. 934 (1949); see *United States* v. *Hark*, 320 U. S. 531, 536 (1944); *United States* v. *Blue*, 384 U. S. 251, 254 (1966).

ment must be for the "insufficiency of the indictment or information." And third, the decision must be "based upon the invalidity or construction of the statute upon which the indictment or information is founded." [8]

Because the District Court's decision rests on facts not alleged in the indictment but instead inferred by the court from the evidence adduced at trial, we conclude that neither the first nor second requirement is met.[9]

A

We begin with the first requirement: was the decision below one "arresting a judgment of conviction"? In using that phrase in the Criminal Appeals Act, Congress did not, of course, invent a new procedural classification. Instead, Congress acted against a common-law background that gave the statutory phrase a well-defined and limited meaning. An arrest of judgment was the technical term describing the act of a trial judge refusing to enter judgment on the verdict because of an error appearing on the face of the record that rendered the judgment

[8] Although all three conditions must be met for the Government to appeal a case directly to this Court, as long as the first requirement is met the Government can appeal to a Court of Appeals under a separate provision of § 3731 allowing an appeal "[f]rom a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided . . . ."

[9] It is arguable that the third requirement is not met since the District Court's decision was not "based upon the invalidity or construction" of 50 U. S. C. App. § 462 (a) (1964 ed., Supp. IV)—the statutory provision "upon which the indictment . . . is founded." As a matter of sound construction, however, "statute upon which the indictment . . . is founded" should be read to include the entire statute, and not simply the penalty provisions. See *United States* v. *Socony Mobil Oil Co.*, 252 F. 2d 420 (C. A. 1st Cir.), appeal dismissed per stipulation, 356 U. S. 925 (1958); cf. *United States* v. *Mersky*, 361 U. S. 431 (1960); see also Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 75 (1959).

invalid. 3 W. Blackstone, Commentaries *393; 3 H. Stephen, New Commentaries on the Laws of England 628 (1st Am. ed. 1845); 2 J. Bishop, New Criminal Procedure § 1285 (2d ed. 1913).

For the purpose of this case the critical requirement is that a judgment can be arrested only on the basis of error appearing on the "face of the record," and not on the basis of proof offered at trial.[10] This requirement can be found in early English common-law cases. In *Sutton* v. *Bishop,* 4 Burr. 2283, 2287, 98 Eng. Rep. 191, 193 (K. B. 1769), it was stated: "[T]he Court ought not to arrest judgments upon matters not appearing upon the face of the record; but are to judge upon the record itself." Once transported to the United States,[11] this essential limitation of arrests of judgment was explicitly acknowledged by this Court. In *United States* v. *Klintock,* 5 Wheat. 144, 149 (1820), the Court stated that "judgment can be arrested only for errors apparent on the record." And later in *Bond* v. *Dustin,* 112 U. S. 604 (1884), the Court said, "[A] motion in arrest of judgment can only be maintained for a defect apparent upon the face of the record, and the evidence is no part of the record for this purpose," *id.,* at 608. See *Carter* v. *Bennett,* 15 How. 354, 356–357 (1854); *United States* v. *Norris,* 281 U. S. 619 (1930).

This venerable requirement of the common law has been preserved under the Federal Rules of Criminal Procedure, for the courts have uniformly held that in grant-

[10] In early days the "face of the record" simply included the material found on the "judgment roll." See *United States* v. *Zisblatt,* 172 F. 2d, at 742. In a criminal case today it has been thought to include "no more than the indictment, the plea, the verdict . . . and the sentence." *United States* v. *Bradford,* 194 F. 2d 197, 201 (C. A. 2d Cir.), cert. denied, 343 U. S. 979 (1952).

[11] This Court first recognized the existence of motions in arrest of judgment in *United States* v. *Cantril,* 4 Cranch 167 (1807).

ing a motion in arrest of judgment under Rule 34,[12] a district court must not look beyond the face of the record. *E. g., United States* v. *Zisblatt,* 172 F. 2d 740 (C. A. 2d Cir.), appeal dismissed on Government's motion, 336 U. S. 934 (1949); *United States* v. *Lias,* 173 F. 2d 685 (C. A. 4th Cir. 1949); *United States* v. *Bradford,* 194 F. 2d 197 (C. A. 2d Cir. 1952). See 2 C. Wright, Federal Practice and Procedure § 571 (1969); 5 L. Orfield, Criminal Procedure Under the Federal Rules § 34:7 (1967). Therefore, whether we interpret the statutory phrase "decision arresting a judgment" as speaking "to the law, as it then was [in 1907] . . . as it had come down from the past,"[13] or do no more than interpret it as simply imposing the standards of Fed. Rule Crim. Proc. 34,[14] a decision based on evidence adduced at trial cannot be one arresting judgment.[15]

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[12] Fed. Rule Crim. Proc. 34 provides:

"The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere,* or within such further time as the court may fix during the 7-day period."

[13] *United States* v. *Zisblatt, supra,* at 742.

[14] *United States* v. *Lias, supra,* at 687.

[15] None of the cases relied on by the Government even hints that evidence presented at the trial can be the basis for a motion in arrest of judgment. In *United States* v. *Green,* 350 U. S. 415 (1956), there was no disagreement between the majority and dissenters on the rule that direct review is impossible if the decision below is based upon facts arising from the trial. Instead the majority and dissent simply disagreed as to whether the District Court's decision *had* relied on evidence at the trial. Compare the majority opinion, 350 U. S., at 418 and 421, with the dissent, 350 U. S., at 421. In *United States* v. *Bramblett,* 348 U. S. 503 (1955), also cited by the Government, the indictment specified that the appellee had made a fraudulent claim against the Disbursing Office

The court below clearly went beyond the "face of the record" in reaching its decision. As noted earlier, the opinion explicitly relies upon the evidence adduced at the trial, including demeanor evidence, for its findings that Sisson was "sincere" and that he was "as genuinely and profoundly governed by his conscience" as a religious conscientious objector.

To avoid the inescapable conclusion that the District Court's opinion was not an arrest of judgment, the Government makes two arguments. First, the Government suggests that these factual findings of the District Court, based on the evidence presented at trial, were not essential to its constitutional rulings, but instead only part of "the circumstantial framework" of the opinion below. (Jurisdictional Statement 9; see Brief 8.) This

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of the House of Representatives in violation of 18 U. S. C. § 1001 which forbids the willful falsification of any material statement "in any matter within the jurisdiction of any department or agency of the United States." The District Court arrested judgment on the ground that the House Disbursing Office was not a "department or agency" for purposes of the statute, and on appeal this Court reversed. Neither the District Court nor this Court relied in any way upon the evidence submitted at the trial in determining the scope of the statutory phrase "department or agency" found in 18 U. S. C. § 1001. Finally, the Government refers to *United States* v. *Waters,* 84 U. S. App. D. C. 127, 175 F. 2d 340 (1948). In that case the District Court held an indictment did not charge an offense because it alleged only that the appellee was carrying a gun, and not that he was carrying a gun without a license. However, the District Court called its opinion the grant of a motion of acquittal. The United States appealed to the Court of Appeals which held that the decision was a motion in arrest, stating that the "question of appealability" turned not on "the name the [district] court gave [the decision] but by what in legal effect it actually was." The Court of Appeals then certified the case to this Court, since it felt the motion in arrest involved an "interpretation" of the underlying statute, but the appeal was dismissed on the motion of the United States, 335 U. S. 869 (1948).

cannot withstand analysis, however, for the factual findings were absolutely essential, under the District Court's own legal theory, to its disposition of the case. Without a finding that Sisson was sincerely and fundamentally opposed to participation in the Vietnam conflict, the District Court could not have ruled that under the Due Process and Free Exercise Clauses Sisson's interest in not serving in Vietnam outweighed the Government's need to draft him for such service.[16]

Second, the Government argues that even though the District Court made findings on evidence adduced at trial, the facts relied on were "undisputed." Adopting the language used by the court below, the Government claims that "in substance the case arises upon an agreed statement of facts." 297 F. Supp., at 904. The Government then goes on to argue that decisions of this Court have "recognized that a stipulation of facts by the parties in a criminal case" can be relied on by the District Court without affecting the jurisdiction for an appeal, citing *United States* v. *Halseth,* 342 U. S. 277 (1952), and *United States* v. *Fruehauf,* 365 U. S.

[16] The factual determinations would also appear essential for the District Court's alternative ground of decision based on the Establishment Clause. That holding rests necessarily upon the finding that Sisson, though nonreligious, "was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." Without this finding, Sisson would have no standing to assert the underinclusiveness of § 6 (j) of the Act as a defense to his prosecution. Whether factual determinations made only for purposes of deciding questions of standing, particularly if made before trial, would offend the requirements that motions in arrest must be based on errors on the face of the record is an issue inappropriate for decision in this case. Because of our determination that the District Court's free exercise holding was in effect an acquittal, there is no need to decide whether the alternative Establishment Clause ruling would be appealable if it stood alone.

146 (1961). The Government then concludes that it would be exalting form over substance to hold there was no appeal in a case where the Government has not contested the facts, and yet allow an appeal to lie from a motion to dismiss resting upon a stipulation of the parties.

Preliminarily, it should be noted that this Court has never held that an appeal lies from a decision which depends, not upon the sufficiency of the indictment alone, but also on a stipulation of the parties. In *Halseth* the parties did enter into a stipulation for purposes of a motion to dismiss. But the facts in the stipulation were irrelevant to the legal issue of whether the federal anti-lottery statute reached a game not yet in existence. Therefore, neither the District Court in dismissing the indictment, nor this Court in affirming its decision, had to rely on the stipulation. And, for purposes of deciding whether jurisdiction for an appeal under § 3731 existed, the Court obviously did not have to decide—and it did not discuss—whether reliance on a stipulation would make any difference. Insofar as *United States* v. *Fruehauf, supra,* the other case cited by the Government, is relevant at all it seems to point away from the Government's contention. In *Fruehauf* this Court refused to consider the merits of an appeal under § 3731 from a District Court decision dismissing an indictment on the basis of a " 'judicial admission' culled from a pretrial memorandum" of the Government by the District Judge. Rather than penalizing the Government by dismissing the appeal, however, the Court simply exercised its discretion under 28 U. S. C. § 2106 by setting aside the ruling below, and remanding the case for a new trial on the existing indictment.

Not only do the cases cited by the Government fail to establish its contention, but other authority points strongly in the opposite direction. In *United States* v. *Norris,* 281 U. S. 619 (1930), this Court said that a "stip-

ulation was ineffective to import an issue as to the sufficiency of the indictment, or an issue of fact upon the question of guilt or innocence," because of "the rule that nothing can be added to an indictment without the concurrence of the grand jury," *id.*, at 622. While it is true that *Norris* is complicated by the fact that the defendant had entered a guilty plea, the Court said that even "[i]f [the stipulation had been] filed before plea and [had been] given effect, such a stipulation would oust the jurisdiction of the court," *id.*, at 622–623. *Norris*, together with the policy, often expressed by this Court, that the Criminal Appeals Act should be strictly construed against the Government's right to appeal, see, *e. g.*, *United States* v. *Borden Co.*, 308 U. S. 188, 192 (1939), makes it at least very doubtful whether the parties should, on the basis of a stipulation, be able to secure review under the motion-in-arrest provisions of § 3731.

We do not decide that issue, however, for there was nothing even approaching a stipulation here. Before the court's final ruling below, the parties did not in any way, formally or informally, agree on the factual findings made in its opinion. It is relevant to recall that before the trial the government attorney specifically refused to stipulate whether Sisson sincerely believed the war to be illegal, and, if so, whether such a belief was reasonable. Moreover, given that the government attorney cross-examined Sisson, and later pointed out the inconsistency between Sisson's acceptance of a II–S student deferment and his claim that he disapproved of deferments as unfair, it hardly seems the Government accepted Sisson's sincerity insofar as it was an issue in the case. Therefore, far from being like a case with a formal stipulation between the parties, the most that can be said is that *after* the District Court's decision the Government chose to accept the opinion's findings of fact. Even assuming reliance on a formal stipulation were per-

missible, it would still be intolerable to allow direct review whenever the District Court labels its decision a motion in arrest, and the Government merely accepts the lower court's factual findings made after a trial—for this would mean the parties and the lower court simply could foist jurisdiction upon this Court.

B

The second statutory requirement, that the decision arresting judgment be "for insufficiency of the indictment," is also not met in this case. Senator Nelson, one of the sponsors of the Criminal Appeals Act, made it plain during the debates that this second element was an important limitation. He said:

> "The arrest of judgment . . . on which an appeal lies, is not a general motion covering all the grounds on which a judgment may be arrested. It is simply for arrest of judgment because of the insufficiency of the indictment—*that is, the failure of the indictment to charge a criminal offense.*" 41 Cong. Rec. 2756. (Emphasis supplied.)

See also 40 Cong. Rec. 9033. Although the District Court's opinion recites as a conclusion that the indictment in this case did "not charge an offense" for purposes of Rule 34, surely the indictment alleged the necessary elements of an offense.[17] The deci-

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[17] Compare 50 U. S. C. App. § 462 (a) (1964 ed., Supp. IV) with the allegations of the indictment:

"That on or about April 17, 1968, at Boston, in the District of Massachusetts, JOHN HEFFRON SISSON, JR., of Lincoln, in the District of Massachusetts did unlawfully, knowingly and wilfully fail and neglect and refuse to perform a duty required of him under and in the execution of the Military Selective Service Act of 1967 and the rules, regulations and directions duly made pursuant thereto, particularly 32 Code of Federal Regulations 1632.14, in that he did fail and neglect and refuse to comply with an order of his local

sion below rests on affirmative defenses which the court thought Sisson could claim because of *his* beliefs. It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses, *United States* v. *Fargas*, 267 F. Supp. 452, 455 (D. C. S. D. N. Y. 1967) ("Any questions as to the validity of the local board's refusal to grant conscientious objector exemption are matters of defense . . . [that] [t]here is no necessity for the indictment to negate . . ."). Moreover, even assuming, *arguendo*, the correctness of the District Court's constitutional theory that sincere nonreligious objectors to particular wars have a constitutional privilege that bars conviction, the facts essential to Sisson's claim of this privilege do not appear from any recitals in the indictment. As the District Court itself said before trial, "[W]hat [Sisson] believed is a question of evidence and not a question which appears on the face of the indictment." (App. 52.) In short, this indictment cannot be taken as insufficient for, on the one hand, it recites the necessary elements of an offense, and on the other hand, it does not allege facts that themselves demonstrate the availability of a constitutional privilege.

C

The same reason underlying our conclusion that this was not a decision arresting judgment—*i.e.*, that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty.

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draft board to submit to induction into the armed forces of the United States; in violation of Title 50, Appendix, United States Code, Section 462."

For purposes of analysis it is helpful to compare this case to one in which a jury was instructed as follows:

> "If you find defendant Sisson to be sincere, and if you find that he was as genuinely and profoundly governed by conscience as a martyr obedient to an orthodox religion, you must acquit him because the government's interest in having him serve in Vietnam is outweighed by his interest in obeying the dictates of his conscience. On the other hand, if you do not so find, you must convict if you find that petitioner did wilfully refuse induction."

If a jury had been so instructed, there can be no doubt that its verdict of acquittal could not be appealed under § 3731 *no matter how erroneous the constitutional theory underlying the instructions.* As Senator Knox said of the bill that was to become the Criminal Appeals Act:

> "Mark this: It is not proposed to give the Government any appeal under any circumstances when the defendant is acquitted *for any error whatever committed by the court.*
>
> . . . . . .
>
> "The Government takes the risks of all the mistakes of its prosecuting officers *and of the trial judge in the trial,* and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial.
>
> "The defendant gets the benefit of all errors in the trial which are in his favor, and can challenge all errors in the trial which are against him." 41 Cong. Rec. 2752.

Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by

any judgment, is a bar to a subsequent prosecution for the same offence," *United States* v. *Ball,* 163 U. S. 662, 671 (1896).[18]

There are three differences between the hypothetical case just suggested and the case at hand. First, in this case it was the judge—not the jury—who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29. Second, the judge in this case made his decision *after* the jury had brought in a verdict of guilty. Rules 29 (b) and (c) of the Federal Rules of Criminal Procedure, however, expressly allow a federal judge to acquit a criminal defendant after the jury "returns a verdict of guilty." And third, in this case the District Judge labeled his post-verdict opinion an arrest of judgment, not an acquittal. This characterization alone, however, neither confers jurisdiction on this Court, see n. 7, *supra,* nor makes the opinion any less dependent upon evidence adduced at the trial. In short, we see no distinction between what the court below did, and a post-verdict directed acquittal.[19]

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[18] This principle would dictate that after this jurisdictional dismissal, Sisson may not be retried.

[19] Our conclusion does not, as suggested in dissent, *post,* at 327 (dissenting opinion of MR. JUSTICE WHITE), rest on the fact the District Court "might have" sent the case to the jury on the instruction referred to in the text, but instead on what it did do—*i. e.,* render a legal determination on the basis of facts adduced at the trial relating to the general issue of the case, see, *infra,* at 301. Neither dissenting opinion explains what "large and critical" difference, *post,* at 329, exists between its expansive notion of what constitutes a decision arresting judgment and a post-verdict acquittal entered by the judge after the jury has returned a verdict of guilty pursuant to Fed. Rule Crim. Proc. 29.

We think untenable the view of MR. JUSTICE WHITE that under the principles of this opinion today the "Court should not have had jurisdiction in *United States* v. *Covington,*" 395 U. S. 57 (1969),

III

The dissenting opinions of both THE CHIEF JUSTICE and MR. JUSTICE WHITE suggest that we are too niggardly in our interpretation of the Criminal Appeals Act, and each contends that the Act should be more broadly construed to give effect to an underlying policy that is said to favor review. This Court has frequently stated that the "exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified," *United States* v. *Borden Co.*, 308 U. S. 188, 192 (1939), and that such appeals "are something unusual, exceptional, not favored," *Carroll* v. *United States*, 354 U. S. 394, 400 (1957); see *United States* v. *Keitel*, 211 U. S. 370, 399 (1908); *United States* v. *Dickinson*, 213 U. S. 92, 103 (1909); cf. *Will* v. *United States*, 389 U. S. 90, 96 (1967). The approach suggested by our Brothers seems inconsistent with these notions. Moreover, the background and legislative history of the Criminal Appeals Act demonstrate the compromise origins of the Act that justify the principle of strict construction this Court has always said should be placed on its provisions. Because the Criminal Appeals Act,

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on the ground that the pretrial dismissal in that case "would amount to an acquittal because the judge *might have* given the case to the jury under instructions that it should acquit if it found the facts necessary to sustain the defendant's privilege—*e. g.*, that he was not one of the registered marihuana dealers whose conduct was legal under state law," *post*, at 327 (emphasis in original). As we note, *infra*, n. 56, what the District Court did do in *Covington* was to dismiss an indictment *before trial without any evidentiary hearing*. Moreover, in disposing of the Government's contentions on the merits, this Court held that there was no need in that case for a pretrial evidentiary hearing on the defendant's motion to dismiss (much less a need to submit any factual issue to a jury) because (1) "there is no possibility of any factual dispute with regard to the hazard of incrimination"; and (2) "the Government [had] never alleged the existence of a factual controversy" concerning appellee's nonwaiver of his privilege against self-incrimination, 395 U. S., at 61.

now 18 U. S. C. § 3731 (1964 ed., Supp. IV),[20] has descended unchanged in substance from the original Criminal Appeals Act, which was enacted on March 2, 1907, 34 Stat. 1246,[21] the crucial focus for this inquiry must be the legislative history of the 1907 Act.[22]

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[20] The statute provides, in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The statute goes on to provide for (1) Government appeals to the courts of appeals for all other decisions (a) setting aside or dismissing indictments, or (b) arresting judgments; (c) granting a pretrial suppression motion; (2) release on bail; (3) transfer of cases from this Court to a court of appeals or vice versa when an appeal has erroneously been taken to the wrong court.

[21] 34 Stat. 1246 provided in pertinent part:

". . . That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

[22] Between 1907 and the present day, Congress has amended the Act several times. These include a 1948 amendment that brought

A

Beginning in 1892—15 years before the enactment of the Criminal Appeals Act—the Attorneys General of the United States regularly recommended passage of legislation allowing the Government to appeal in criminal cases.[23] Their primary purpose was perhaps best expressed by Attorney General Miller in his 1892 report: "As the law now stands . . . it is in the power of a single district judge, by quashing an indictment, to defeat any criminal prosecution instituted by the Government." [24] There was no progress, however, until President Theodore Roosevelt, outraged by a decision of

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the procedural vocabulary of the statute into formal conformity with the Federal Rules of Criminal Procedure, 62 Stat. 844. Although "special plea in bar" thus became "motion in bar," and "decision . . . quashing . . . or sustaining a demurrer to, any indictment" became "decision . . . dismissing any indictment," the Reviser's Notes plainly show that this amendment was not meant to change the Act's coverage, H. R. Rep. No. 304, 80th Cong., 1st Sess., A177; see *United States* v. *Apex Distributing Co.*, 270 F. 2d 747, 755 (C. A. 9th Cir. 1959).

A 1942 amendment did increase this Court's jurisdiction under the Act by including cases involving informations as well as indictments, 56 Stat. 271. Other amendments have (1) abolished review by writ of error and substituted the right of appeal, 45 Stat. 54 (1928); (2) given the courts of appeals jurisdiction for appeals from decisions in the same common-law categories as those originally provided, but which do not involve the construction or validity of the underlying statute, 56 Stat. 271.

[23] See the Attorney General's Annual Reports for 1892, pp. xxiv–xxv; for 1893, p. xxvi; for 1894, p. xxix; for 1899, p. 33; for 1900, p. 40; for 1903, p. vi; for 1905, p. 10; for 1906, p. 4. See generally Kurland, The *Mersky* Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute, 28 U. Chi. L. Rev. 419, 446–449 (1961); F. Frankfurter & J. Landis, The Business of the Supreme Court 114–117 (1928).

[24] 1892 Rep. Atty. Gen. xxiv.

Judge Humphrey preventing the prosecution of the Beef Trust,[25] made this proposed reform into a "major political issue," [26] and demanded the enactment of legislation in his 1906 annual message to Congress.[27]

The House, as one commentator has written, "was obedient to the presidential command." [28] It passed, without debate,[29] a very broad bill giving the Government the same right to appeal legal issues decided adversely to it as had earlier been accorded a criminal defendant.[30] The Senate would not accept any such sweeping change of the traditional common-law rule giving the Government no appeal at all. The substitute bill that the Senate Judiciary Committee reported out [31] narrowed the House bill substantially, and limited the Government's right to appeal to writs of error from decisions (1) quashing an indictment or sustaining a demurrer to an indictment; (2) arresting judgment of conviction because of the insufficiency of the indictment; and (3) sustaining special pleas in bar when the defendant had not been put in jeopardy. Even as narrowed,

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[25] *United States* v. *Armour & Co.*, 142 F. 808 (D. C. N. D. Ill. 1906).

[26] See Frankfurter & Landis, *supra*, n. 23, at 117; Kurland, *supra*, n. 23, at 449.

[27] 41 Cong. Rec. 22.

[28] Kurland, *supra*, n. 23, at 450.

[29] 40 Cong. Rec. 5408.

[30] The text of the House bill appears at 40 Cong. Rec. 5408. It gave the United States the same right of review by writ of error as was then accorded a criminal defendant, but further provided that if on appeal any error were found, the defendant should retain the advantage of any verdict in his favor. With neither debate nor a division, the bill passed the House on April 17, 1906. *Ibid.*

[31] See S. Rep. No. 3922, 59th Cong., 1st Sess. (1906).

the bill met opposition on the floor,[32] and the session closed without Senate action.[33]

The next session, after the bill was again reported out of the Senate Judiciary Committee,[34] it was debated for three days on the floor and again met strong opposition.[35] Reflecting the deep concern that the legislation not jeopardize interests of defendants whose cases were appealed by the Government, amendments were adopted requiring the Government to appeal within 30 days and to prosecute its cases with diligence; [36] and allowing defendants whose cases were appealed to be released on their own recognizance in the discretion of the presiding judge.[37] Various Senators were particularly concerned lest there be any possibility that a defendant who had already been through one trial be subjected to another trial after a successful appeal by the Government.[38] In response to this concern, an amendment was then adopted requiring that a verdict in favor of the defendant not be set aside on appeal [39] no matter how erroneous the legal theory upon which it might be based.[40] For these purposes, it was made plain that it made no difference whether the verdict be the result of the jury's decision or that of the judge.[41] Moreover, as we explore in more detail later,

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[32] See 40 Cong. Rec. 9033.

[33] *Id.*, at 9122.

[34] 41 Cong. Rec. 1865; S. Rep. No. 5650, 59th Cong., 2d Sess. (1907).

[35] 41 Cong. Rec. 2190–2197; 2744–2763; 2818–2825.

[36] *Id.*, at 2194.

[37] *Id.*, at 2195–2197.

[38] See *id.*, at 2749–2762.

[39] See *id.*, at 2819.

[40] See *id.*, at 2752.

[41] When asked whether the substance of his amendment was that there was to be no appeal and retrial after the defendant had been

the debates suggest that apart from decisions arresting judgment, there were to be no appeals taken in any case in which jeopardy had attached by the impaneling of the jury.[42] Finally, to limit further the scope of the Act to cases of public importance, the Government's right to appeal (under all but the special plea in bar provision) was confined to cases in which the ground of the District Court's decision was the "invalidity or construction of the statute upon which the indictment is founded."[43]

With all these amendments the Senate passed the bill without division on February 13, 1907,[44] but the House, after referring the Senate's version to its Judiciary Committee,[45] disagreed with the Senate bill and proposed a conference.[46] The conference committee, apart from divesting the courts of appeals of jurisdiction to hear any government appeals, adopted the Senate version of the bill with merely formal changes.[47] Both the Senate and the House approved the bill reported out by the committee [48] and with the President's signature the Criminal Appeals Act became law.

B

With this perspective, we now examine the arguments made in opposition to our conclusion. It is argued in

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"acquitted by the verdict of a jury," the sponsor of the amendment, Senator Rayner, stated: "I have in the amendment no such words as 'acquitted by the jury.' I have nothing to do with the jury. He may be acquitted by a magistrate . . . . I do not care by what tribunal he is acquitted . . . ." *Id.*, at 2749.

[42] See *infra*, at 302–307.

[43] See 41 Cong. Rec., at 2822, 2823.

[44] *Id.*, at 2834.

[45] *Id.*, at 3044–3047.

[46] *Id.*, at 3647.

[47] See H. R. Rep. No. 8113, 59th Cong., 2d Sess.

[48] 41 Cong. Rec. 3994, 4128.

dissent that § 3731 "contemplates that an arrest of judgment is appropriate in other than a closed category of cases defined by legal history," and concludes that "evidence adduced at trial can be considered by a district court as the basis for a motion in arrest of judgment when that evidence is used solely for the purpose of testing the constitutionality of the charging statute as applied," *post,* at 314 (dissenting opinion of THE CHIEF JUSTICE).

The dissenters propose in effect to create a new procedure—label it a decision arresting judgment—in order to conclude that this Court has jurisdiction to hear this appeal by the Government. The statutory phrase "decision arresting a judgment" is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes. As we have shown, Congress defined our jurisdiction in the Criminal Appeals Act in terms of procedures existing in 1907. As a matter of interpretation, this Court has no right to give the statutory language a meaning inconsistent with its common-law antecedents, and alien to the limitations that today govern motions in arrest of judgment under Rule 34.[49]

Radical reinterpretations of the statutory phrase "decision arresting a judgment" are said to be necessary in order to effectuate a broad policy, found to be underlying the Criminal Appeals Act, that this Court review important legal issues. The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that

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[49] It appears that the dissenters have not only "outgrown" the statutory limitations of a "decision arresting a judgment" for purposes of § 3731, but also the limitations of Rule 34.

guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed. Care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy, especially when the boundaries of a statute are drawn as a compromise resulting from the countervailing pressures of other policies. Our disagreeing Brothers, in seeking to energize the congressional commitment to review, ignore the subtlety of the compromise that limited our jurisdiction, thereby garnering the votes necessary to enact the Criminal Appeals Act.[50]

In this regard, the legislative history reveals a strong current of congressional solicitude for the plight of a criminal defendant exposed to additional expense and anxiety by a government appeal and the incumbent possibility of multiple trials. Criminal appeals by the Government "always threaten to offend the policies behind the double-jeopardy prohibition," *Will* v. *United States, supra,* at 96, even in circumstances where the Constitution itself does not bar retrial. Out of a collision between this policy concern, and the competing policy favoring review, Congress enacted a bill that fully satisfied neither the Government nor the bill's opponents.[51] For the Criminal Appeals Act, thus born of compromise, manifested a congressional policy to provide review

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[50] Professor Kurland characterized the statute as "a compromise among several divergent forces. The division in the Senate was primarily between those who wanted limited review and those who wanted none. The division between the House and Senate was between those who wanted complete review and those who wanted limited review." Kurland, *supra,* n. 23, at 454.

[51] See, *e. g.,* 1907 Rep. Atty. Gen. 4. See *infra,* at 306.

in certain instances but no less a congressional policy to restrict it to the enumerated circumstances.

Were we to throw overboard the ballast provided by the statute's language and legislative history, we would cast ourselves adrift, blind to the risks of collision with other policies that are the buoys marking the safely navigable zone of our jurisdiction. As we have shown, what the District Court did in this case cannot be distinguished from a post-verdict acquittal entered on the ground that the Government did not present evidence sufficient to prove that Sisson was insincere. A primary concern of the bill that emerged into law was that no appeal be taken by the Government from an acquittal no matter how erroneous the legal theory underlying the decision. Moreover, going beyond the present case, the theory of those in disagreement would allow a trial judge to reserve to himself the resolution of disputes concerning *facts* underlying a claim that in particular circumstances a speech or protest march were privileged under the First Amendment, a practice plainly inconsistent with a criminal defendant's jury trial rights.

C

Quite apart from the arresting judgment provision, it is also argued that we have jurisdiction under the "motion in bar" provision of the Criminal Appeals Act. We think it appropriate to address ourselves to this contention, particularly in light of the fact that we asked the parties to brief that issue,[52] even though our holding that the decision below was an acquittal is sufficient to dispose of the case.

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[52] See 396 U. S. 812 (1969).

The case law under the motion-in-bar provision is very confused,[53] and this Court has not settled on a general approach to be taken in interpreting this provision.[54]

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[53] At common law, a special plea in bar was ordinarily used to raise three defenses—*autrefois acquit, autrefois convict,* and pardon—and there is language in some of our cases that indicates that, apart from these defenses, a plea in bar was not appropriate "to single out for determination in advance of trial matters of defense either on questions of law or fact," *United States* v. *Murdock,* 284 U. S. 141, 151 (1931). There are cases consistent with the narrow common-law definition that indicate, for example, that a defense based upon the statute of limitations could not be raised by a "special plea in bar," *United States* v. *Kissel,* 218 U. S. 601, 610 (1910); *United States* v. *Barber,* 219 U. S. 72, 78–79 (1911). On the other hand, it appears the Court accepted jurisdiction under § 3731, in appeals from decisions granting special pleas in bar based on a statute of limitations defense, with no explanation of the apparent inconsistency. See *United States* v. *Goldman,* 277 U. S. 229, 236–237 (1928); see also *United States* v. *Rabinowich,* 238 U. S. 78 (1915). And, in *United States* v. *Mersky,* 361 U. S. 431 (1960), there was no decision of the Court on what was a motion in bar, and the concurring opinion of MR. JUSTICE BRENNAN and the dissenting opinion of MR. JUSTICE STEWART indicated disagreement on this issue. Compare 361 U. S., at 441–443 with *id.,* at 455–458. To add to the uncertainty, arguably in *United States* v. *Murdock, supra,* and certainly in *United States* v. *Blue,* 384 U. S. 251, 253–254 (1966), and *United States* v. *Covington,* 395 U. S. 57, 59 n. 2 (1969), the Court took jurisdiction and considered the merits of appeals from district court dismissals based on self-incrimination defenses on the ground that the decisions below had sustained motions in bar for purposes of the Criminal Appeals Act—even though *Murdock* itself stated that this defense is not appropriately raised by a special plea in bar. 284 U. S., at 151.

[54] In *United States* v. *Mersky,* 361 U. S. 431 (1960), there was no decision of the Court concerning what approach should be taken. MR. JUSTICE BRENNAN suggested that the category include any decision that barred reprosecution if upheld, *id.,* at 441–443, while MR. JUSTICE STEWART thought the provision should be confined to those decisions that would fall within the compass of the common law "special plea in bar," *id.,* at 455–458. See generally Kurland, *supra,* n. 23.

Even under the most expansive view, however, a motion in bar cannot be granted on the basis of facts that would necessarily be tried with the general issue in the case.[55] In this case, there can be no doubt that the District Court based its findings on evidence presented in the trial of the general issue. As we have shown earlier, the court's findings were based on Sisson's testimony and demeanor at the trial itself. Moreover, a defense based on Sisson's asserted constitutional privilege not to be required to fight in a particular war would, we think, necessarily be part of the "general issue" of a suit over a registrant's refusal to submit to induction. As THE CHIEF JUSTICE says in his dissenting opinion, "establishing the appropriate classification is actually an element of the Government's case," *post,* at 324, once a defendant raises a defense challenging it. We think a defense to a pre-induction suit based on conscientious objections that require factual determinations is so intertwined with the general issue that it must be tried with the general issue, *United States* v. *Fargas,* 267 F. Supp. 452, 455 (1967) (pretrial motion to dismiss under Rule 12 (b)(1) on the basis of an affidavit, denied because "the validity of the [conscientious objector] defense which Fargas now raises . . . will require the consideration of factual questions which are embraced in the general issue"); see *United States* v. *Ramos,* 413 F. 2d 743, 744 n. 1 (C. A. 1st Cir. 1969) (evidentiary hearing for pretrial motion to dismiss indictment not appropriate means to consider validity of defense based on conscientious objection because "[q]uestions regarding the validity of

[55] The dismissal provision of Fed. Rule Crim. Proc. 12, which MR. JUSTICE BRENNAN in his *Mersky* concurrence saw as having "swept away the old pleas," 361 U. S., at 442, itself limits a dismissal to those defenses "capable of determination without the trial of the general issue," Fed. Rule Crim. Proc. 12 (b)(1).

appellant's classification should have been raised as a defense at the trial," citing *Fargas* with approval).[56]

There is, in our view, still another reason no appeal can lie in this case under the motion-in-bar provision. We construe the Criminal Appeals Act as confining the

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[56] Nowhere does *United States* v. *Covington, supra,* suggest, as argued in dissent, that there might be jurisdiction under the motion-in-bar provision of § 3731 in circumstances where the parties "tr[ied] facts to the judge that were relevant to the motion in bar, and separate from the general issue," *post,* at 332 (dissenting opinion of MR. JUSTICE WHITE). Our Brother WHITE reaches this conclusion by taking a quotation from *Covington* out of context, and confusing that opinion's disposition of the merits of the Government's appeal with the Court's jurisdictional holding.

In *Covington,* the District Court, *before trial without any evidentiary hearing,* dismissed an indictment bottomed on the Marihuana Tax Act, 26 U. S. C. § 4744 (a)(1), on the ground that the "privilege against self-incrimination necessarily would provide a complete defense to the prosecution," *id.,* at 58. The Government appealed, claiming the Court had jurisdiction under both the dismissal and the motion-in-bar provisions of § 3731. The Court found jurisdiction in the alternative under either provision. The only discussion of the motion-in-bar jurisdictional issue, found in a footnote, was as follows: "If the dismissal rested on the ground that the Fifth Amendment privilege would be a defense, then the decision was one 'sustaining a motion in bar.' See *United States* v. *Murdock,* 284 U. S. 141 (1931)," 395 U. S., at 59 n. 2.

Having thus disposed of the jurisdictional issue, the Court proceeded to the merits of the Government's appeal and, *inter alia,* considered "whether such a plea of the privilege [against self-incrimination] may ever justify dismissal of an indictment, and if so whether this is such an instance," *id.,* at 60. In this context the Court said:

"Federal Rule of Criminal Procedure 12 (b)(1) states that: 'Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.' A defense is thus 'capable of determination' if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. Rule 12 (b)(4) allows the District Court in its discretion to postpone determination of the motion to trial, and permits factual hearings prior to trial

Government's right to appeal—except for motions in arrest of judgment—to situations in which a jury has not been impaneled, even though there are cases in which a defendant might constitutionally be retried if appeals were allowed after jeopardy had attached. Because the court below rendered its decision here after the trial began, and because that decision was not, as we have shown, an arrest of judgment, we therefore conclude there can be no appeal under the other provisions of § 3731.

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if necessary to resolve issues of fact peculiar to the motion." *Id.*, at 60.

Taken in full context, the quotation used by MR. JUSTICE WHITE, *post*, at 332, plainly had reference to a district court's power under Fed. Rule Crim. Proc. 12 to dismiss an indictment, and nothing whatsoever to do with the quite distinct issue of the scope of the jurisdictional provisions of § 3731.

That the Court was there concerned with only the merits of appeal is clear from what follows. After suggesting that in most circumstances a motion to dismiss an indictment brought under 26 U. S. C. § 4744 would not require any factual inquiry, the Court stated that once a defendant asserted his privilege a trial court should dismiss the indictment without an evidentiary hearing "unless the Government can rebut the presumption [of nonwaiver of the privilege] by showing a need for further factual inquiries." *Id.*, at 61. In applying that principle to the merits of the case before it, the Court affirmed the District Court's action below because: (1) "there [was] no possibility of any factual dispute with regard to the hazard of incrimination"; and (2) "the Government has never alleged the existence of a factual controversy" concerning the issue of whether "appellee [had] waived his privilege." *Ibid.*

The Court in *Covington* did not say that a defense based on the privilege against self-incrimination where there were facts in dispute could, in all cases, be decided without consideration of the general issue. And, more importantly for present purposes, nowhere does the opinion in *Covington* even hint that a dismissal requiring a pretrial evidentiary hearing, or a dismissal motion properly deferred to the trial of the general issue would be appealable under the motion-in-bar provision of the Criminal Appeals Act. The Court in *Covington* had no such jurisdictional issues before it, and the opinion does not discuss such issues.

We reach this conclusion for several reasons. First, although the legislative history is far from clear, we think it was the congressional expectation that except for motions in arrest—which as we have shown could never be based on evidence adduced at trial—the rulings to which the bill related would occur before the trial began.[57] The language of the motion-in-bar provision

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[57] See 40 Cong. Rec. 9033. In this exchange, Senator Spooner said: "I understand this [bill] applies only to questions which arise before the impaneling of the jury." Senator Nelson agreed that the bill was so limited, and obviously thinking he was saying the same thing, said the bill applied only "[w]here the party has not been put in jeopardy." After being reminded of the arrest-of-judgment provision, Senator Nelson acknowledged that this was an exception, but obviously trying to minimize the scope of the exception he pointed out that the only motions in arrest of judgment that could be appealed were those granted "for insufficiency of indictment; not for any other ground." *Ibid.*

See 41 Cong. Rec. 2191 (Sen. Nelson) ("I wish to say further that where a jury has been impaneled and where the defendant has been tried an appeal does not lie"), *id.*, at 2748 (Sen. Patterson) ("[A] motion in arrest of judgment . . . is the only one of the three cases in which there can have been a trial . . . . [I]n the other two cases . . . the motions must ex necessitati be made before jeopardy attaches"); *id.*, at 2752 (Sen. Patterson) ("These proceedings are all defendant's acts *before a verdict* to prevent a trial, except the motion in arrest of judgment, which is defendant's act after a verdict against him to defeat a judgment on the verdict") (emphasis supplied).

Without explaining his inconsistency, Senator Patterson later expressed the view that under the proposed bill the Government would have been able to appeal the decision in the famed Chicago *Beef Trust Case* because the jury's verdict was based on the "special plea in bar filed" in that case, not on the defendants' guilt or innocence, *id.*, at 2753. Underlying this conclusion—later disputed by Senator Nelson, see *id.*, at 2757—was Patterson's expectation that "in the case of a special plea in bar that went against the Government the defendant had not been in jeopardy *on the merits of the case*," *id.*, at 2753 (emphasis supplied). Unlike the defendants in the *Beef*

itself limits appeals to those granted "when the defendant has not been put in jeopardy." We read that limitation to mean exactly what it says—*i. e.*, no appeal from a motion in bar is to be granted after jeopardy attaches. Although the legislative history shows much disagreement and confusion concerning the meaning of the constitutional prohibition against subjecting a defendant to double jeopardy [58] there was little dispute over the then-settled notion that a defendant was put into jeopardy once the jury was sworn.[59] To read this limitation as no more than a restatement of the constitutional prohibition, as suggested by MR. JUSTICE WHITE, renders it completely superfluous. No Senator thought that Congress had the power under the Constitution to provide for an appeal in circumstances in which that would violate the Constitution.[60]

Our conclusion draws strength from the fact that the Government itself has placed exactly this same interpre-

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Trust Case—who Patterson understood not to have been tried on the general issue of their guilt or innocence—plainly Sisson has been put "in jeopardy on the merits of the case." Our Brother WHITE admits as much, by suggesting he could not be retried. Therefore, even under Patterson's broader reading of the statute, an appeal would not lie in this case.

[58] See, *e. g.*, 41 Cong. Rec. 2745–2763.

[59] See, *e. g.*, 40 Cong. Rec. 9033; 41 Cong. Rec. 2192; *id.*, at 2751.

[60] See 41 Cong. Rec. 2751 (Sen. Knox) ("[I]f I thought there was a single line, or a sentence, or a clause contained in this bill which by any court would be construed to place a man twice in jeopardy, I would vote to cut it out, not because there would be any necessity for cutting it out, as it would be invalid under the Constitution of the United States, but I would vote to cut it out upon the ground that it would not be an artistic and intelligent bill with such a provision within its borders.")

The provision granting an appeal from a decision dismissing or setting aside an indictment does not contain a similar phrase limiting appeals to cases where the defendant has not yet been put in jeopardy, but we agree with the conclusion reached by the Government that the same limitation applies. See n. 57, *supra*.

tation on the Act. The Department of Justice, the agency for whose benefit the original bill was enacted, first placed this construction on the statute shortly after the bill was enacted, and has consistently abided by it in the more than 60 years that have since passed. As the Solicitor General stated in his brief:

> "The Department of Justice has consistently taken the view that the plea in bar section limits the government's right of appeal to the granting of such pleas before a jury has been sworn. Soon after passage of the original Act, the 1907 Report of the Attorney General urged that the omission in the Act of a governmental right to appeal from post-jeopardy rulings be remedied by revising the Act so as to require counsel for the defendant to raise and argue questions of law prior to the time when jeopardy attached," Brief 17.

Later, after describing the opinion in *Zisblatt, supra,* in which the Second Circuit certified an appeal to this Court to determine whether the phrase "not been put in jeopardy" merely incorporated the constitutional limitation, or instead should be taken literally, the Government's brief states:

> "The then Solicitor General, being of the view that the statute barred appeals from the granting of motions in bar after jeopardy had attached, moved to dismiss the appeal, and the appeal was dismissed (336 U. S. 934). The Department of Justice has thereafter adhered to that position, and the government has never sought to appeal in these circumstances." [61]

This interpretation in our view deserves great weight.

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[61] Brief 19. It should be noted that at the Government's request a proposed amendment to § 3731 has been introduced in

In light of (1) the compromise origins of the statute, (2) the concern with which some Senators viewed the retrial of any defendant whose trial terminated after the jury was impaneled, and (3) the interpretation placed on the Act shortly after its passage [62] that has been consistently followed for more than 60 years by the Government, we think that the correct course is to construe the statute to provide a clear, easily administered test: except for decisions arresting judgment, there can be no government appeals from decisions rendered after the trial begins.

IV

Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case. When judged in these terms, the Criminal Appeals Act is a failure. Born of compromise, and reflecting no coherent allocation of appellate responsibility,[63] the Criminal Appeals Act proved a most unruly child that has not improved with age. The statute's roots are grounded in pleading distinctions that existed at common law but

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Congress to remove this limitation. The proposed statute, which avoids common-law terminology, would allow an appeal from a decision made after the jury was sworn in all cases where the Double Jeopardy Clause would permit it. See H. R. 14588, 91st Cong., 1st Sess., 115 Cong. Rec. H10274 (daily ed. Oct. 29, 1969).

[62] See 1907 Rep. Atty. Gen. 4; see also Hearing on Granting Appeals by the United States from Decisions Sustaining Motions to Suppress Evidence, before Subcommittee No. 2 of the House Committee on the Judiciary, 83 Cong., 2d Sess., ser. 15, p. 11 (1954).

[63] Motions in bar, for example, can only be appealed to this Court irrespective of whether the case involves the validity or construction of a statute.

which, in most instances, fail to coincide with the procedural categories of the Federal Rules of Criminal Procedure. Not only does the statute create uncertainty by its requirement that one analyze the nature of the decision of the District Court in order to determine whether it falls within the class of common-law distinctions for which an appeal is authorized,[64] but it has also engendered confusion over the court to which an appealable decision should be brought.[65]

The Solicitor General, at oral argument in this case, forthrightly stated that "there are few problems which occur so frequently or present such extreme technical difficulty in the Solicitor General's office [as] in the proper construction of the Criminal Appeals Act." [66] We share his dissatisfaction with this statute. Nevertheless, until such time as Congress decides to amend the statute, this Court must abide by the limitations imposed by this awkward and ancient Act.

We conclude that the appeal in this case must be dismissed for lack of jurisdiction. *It is so ordered.*

MR. JUSTICE BLACK concurs in the judgment of the Court and Part II C of the opinion.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE join, dissenting.

Both the Government and Sisson have argued that this Court has jurisdiction to review the District Court's

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[64] See *supra*, nn. 53–54.

[65] See, *e. g.*, *United States* v. *Zisblatt*, *supra*; *United States* v. *Brodson*, 234 F. 2d 97 (C. A. 7th Cir. 1956). See generally Friedenthal, *supra*, n. 9, at 83–88.

[66] Tr. of Oral Arg. 11.

action by virtue of the "arrest of judgment" clause in the Criminal Appeals Act, 18 U. S. C. § 3731, which provides for a direct appeal to this Court

> "[f]rom a decision [1] arresting a judgment of conviction [2] for insufficiency of the indictment or information, [3] where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

In rejecting the arguments of the parties the Court holds that we have no jurisdiction to hear this appeal, opting for the view that the "arrest of judgment" clause carries with it all of its common-law antecedents and that the present case does not meet the criteria required by the common law. My disagreement with the Court's result and rationale is prompted by a fundamental disagreement with the Court's mode of analysis and its excessive reliance on ancient practices of common-law England long superseded by Acts of Congress.

Section 3731 appears to set three requirements for jurisdiction in this Court: (1) the decision from which the appeal is taken must be one "arresting a judgment of conviction"; (2) the decision must be engendered by the "insufficiency of the indictment or information"; and (3) it must be "based upon the invalidity or construction of the statute upon which the indictment or information is founded."

I

The first requirement, that the decision from which the appeal is taken must be one "arresting a judgment of conviction," can without undue violence to its language be construed as being encrusted with the lore of centuries of common-law jurisprudence, and the Court has so construed it. The form of an "arrest of judgment" was well established at an early date in the common law's development; Blackstone was able to describe a clearly defined motion in arrest as a device that was proce-

durally appropriate after the guilty verdict had been rendered but before the judge had imposed sentence. The court, in an early form of permitting allocution, traditionally asked the prisoner if he had "anything to offer why judgment should not be awarded against him." 4 W. Blackstone, Commentaries *375. The prisoner could then respond by offering exceptions to the indictment, "as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence." *Ibid.* If the prisoner was successful, the court entered an arrest or stay of the judgment. Also, under the common law, it was settled that "the Court ought not to arrest judgments upon matters not appearing upon the face of the record; *but are to judge upon the record itself,* that their successors may know the grounds of their judgment." *Sutton* v. *Bishop,* 4 Burr. 2283, 2287, 98 Eng. Rep. 191, 193 (K. B. 1769) (emphasis added). The record included "nothing more than the judgment roll; and indeed, the common-law knew nothing of the evidence taken at a trial until the Statute of Westminster allowed exceptions to be sealed and a bill of exceptions to be brought up with the roll on writ of error." *United States* v. *Zisblatt,* 172 F. 2d 740, 741–742 (C. A. 2d Cir.) (L. Hand, C. J.), appeal dismissed on Government's motion, 336 U. S. 934 (1949).

Much, if not all, of the common-law learning was transplanted to the United States. As early as 1807, the Court recognized the existence of the motion in *United States* v. *Cantril,* 4 Cranch 167 (1807). And, in 1820, Chief Justice Marshall stated for the Court that "judgment can be arrested only for errors apparent on the record . . . ." *United States* v. *Klintock,* 5 Wheat. 144, 149 (1820). See also *Carter* v. *Bennett,* 15 How. 354 (1854); *Bond* v. *Dustin,* 112 U. S. 604 (1884).

Whether § 3731's requirement of an arrest of judgment incorporates the common-law jurisprudence, or

whether it is viewed as simply looking to the standards of Rule 34, Fed. Rules Crim. Proc.,[1] the Court has indicated that it believes that the decision of the District Court here was not one "arresting a judgment" because it was based on evidence adduced at the trial, notwithstanding the precise—and I suggest, purposeful, delineations of an astute District Judge quite as familiar with history and the background of this statute as are we.

The Solicitor General also has conceded that § 3731 uses the term "arrest of judgment" in its common-law sense. However, he has sought to avoid the inescapable implications of this concession by arguing that the District Court, "in granting appellee's motion, did not base its action wholly on the allegations of the indictment, but used as a partial predicate for its constitutional rulings the undisputed fact, which appeared from the evidence at trial, that appellee is a non-religious conscientious objector to participation in the Vietnam conflict." [2] The Solicitor General's argument in favor of jurisdiction seeks to avoid the District Court's reliance on evidence by pointing out that the District Court's decision did not purport to be a judgment on the merits, *i. e.*, that the evidence was not sufficient to show that appellee committed the offense charged, and thus was not a directed acquittal. He submits that the District Court used Sisson's sincere, nonreligious form of conscientious

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[1] *United States* v. *Lias*, 173 F. 2d 685 (C. A. 4th Cir. 1949), supports the view that the standards are the same for Rule 34 and § 3731.

Rule 34 provides: "The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period."

[2] Brief 30.

objection to a particular war as the basis for its ruling that the indictment was constitutionally infirm *as applied to Sisson.* Since the evidence of conscientious objection was undisputed at trial [3] and is undisputed now, the Solicitor General argues that the use of the facts here was akin to a stipulation of facts by parties in a criminal case, and that this Court has recognized that such a stipulation may be treated by the District Court as supplementing the indictment (like a bill of particulars). He relies on *United States* v. *Halseth,* 342 U. S. 277 (1952), and *United States* v. *Fruehauf,* 365 U. S. 146 (1961).[4]

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[3] As the Court's opinion indicates, see *ante,* at 274–276, the evidence of conscientious objection that was admitted at trial was subject to cross-examination and was discussed during the closing arguments, but solely in the context of Sisson's "wilfulness" in refusing induction, not respecting whether Sisson was or was not in fact a sincere conscientious objector.

[4] Both the *Halseth* and *Fruehauf* cases involved dismissals of indictments *before* trial. In *Halseth* the parties had entered into a stipulation *for purposes of a motion to dismiss.* The indictment charged in the words of the statute an unlawful use of the mails to deliver "a lottery or scheme." It was stipulated that the particular lottery involved would come into existence only if the addressee put the paraphernalia into operation. The District Court granted a motion to dismiss on the ground that the statute did not apply to lotteries such as defendant's that were not yet in existence. This Court affirmed, necessarily relying on the particular facts about the particular mailing under attack. See 342 U. S., at 280–281. In *United States* v. *Fruehauf,* 365 U. S. 146 (1961), the indictment charged the appellant, again in the words of the statute, with unlawfully delivering money to a union representative. The District Court ruled that a trial memorandum filed by the Government constituted a judicial admission that a transaction at issue was a loan and concluded that the statute did not cover a loan. The Government appealed that construction of the statute. The Court refused to consider that the "admission" had clearly foreclosed the Government from proving at trial that the loan was a sham or otherwise constituted a transfer of something of

My disagreement with the Court is based upon much more fundamental grounds than those which the Solicitor General would use to avoid the strictures of the common-law concept of an arrest of judgment. In my view the Criminal Appeals Act contemplates that an arrest of judgment is appropriate in other than a closed category of cases defined by legal history. Specifically, there is no reason for the Court today to read into that

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value apart from an ordinary loan, thus violating the statute. Accordingly, it refused to pass on the merits of the appeal and remanded the case for a trial on the existing indictment.

Halseth and *Fruehauf* are inconclusive authorities on the issue of whether a stipulation can supplement an indictment and generate a basis for review under § 3731. While the majority recognizes that the issue has not been resolved, and although it purports not to resolve it here, it does rely on *United States* v. *Norris*, 281 U. S. 619 (1930), and a policy of construing the Criminal Appeals Act narrowly to express doubt that the Solicitor General's argument should be accepted.

Norris, however, is not a persuasive precedent. There the defendant was permitted to enter a plea of *nolo contendere* to the charge contained in the indictment. When he appeared for sentencing, a stipulation of facts was filed, and he then submitted a motion for arrest of judgment which relied on the stipulation. The District Court denied the motion but the Court of Appeals reversed, concluding that the indictment was insufficient in light of the stipulation. This Court in turn reversed the Court of Appeals, holding that after pleading guilty, a defendant may not then stipulate facts to test the constitutionality of his conviction. There was no suggestion that an appeal would not lie where a statute was held unconstitutional as applied to stipulated facts. Indeed, the Court's opinion seems at one point to suggest that if the defendant had withdrawn his plea, and then questioned the constitutionality of his conviction on stipulated facts, the question would have been open to consideration. 281 U. S., at 623.

Further, the majority's ultimate conclusions about the Act necessarily lead it into uncomfortable distinctions. For if the Government or the parties want a constitutional ruling about the applicability of a statute to a particular set of facts, it is only necessary to set out those facts as a part of the indictment or information.

class of cases all of the niceties of what might or might not have been included in the "judgment roll" at common law. We have outgrown those formalisms.

I conclude that evidence adduced at trial can be considered by a district court as the basis for a motion in arrest of judgment when that evidence is used solely for the purpose of testing the constitutionality of the charging statute as applied. I do so because the legislative history surrounding the passage of the Criminal Appeals Act abundantly shows Congress contemplated review by this Court in such a case. The reasons for the Court's face-of-the-record limitation, in the technical common-law form of an arrest of judgment, have long since disappeared, and the Court's reliance on a policy disfavoring appeals under the Criminal Appeals Act is misplaced.

The Court's reasoning pays scant attention to the purpose of the Criminal Appeals Act and to the problem that Congress was attempting to solve in 1907 when the Act was passed. The legislative history of the Criminal Appeals Act reflects the strong desire by a number of Attorneys General of the United States for an appellate remedy in selected criminal cases.[5] Such a remedy had been provided in England and in some States, but the lack of such a remedy for the Federal Government had "left all federal criminal legislation at the mercy of single judges in the district and circuit courts. This defect became all the more serious because it became operative just at the beginning of the movement for increasing social control through criminal machinery." [6] Congress, however, was not stirred to complete its action on the

[5] See Kurland, The *Mersky* Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute, 28 U. Chi. L. Rev. 419, 446–449 (1961).

[6] F. Frankfurter & J. Landis, The Business of the Supreme Court 114 (1928).

proposals until a federal district court rendered its decision in *United States* v. *Armour & Co.,* 142 F. 808 (D. C. N. D. Ill. 1906), sustaining a motion to dismiss and ending a Sherman Act prosecution in which President Theodore Roosevelt had a great interest.

The House passed, without debate, a bill that gave the United States in all criminal prosecutions "the same right of review by writ of error that is given to the defendant," provided that the defendant not twice be put in jeopardy for the same offense. 40 Cong. Rec. 5408 (1906). The Senate, however, refused to accept the House bill. Rather, its Judiciary Committee offered as a substitute a more complicated bill which ultimately was refined to become the Criminal Appeals Act. In relevant part, the substitute would have allowed a writ of error by the United States "[f]rom the decision arresting a judgment of conviction for insufficiency of the indictment." S. Rep. No. 3922, 59th Cong., 1st Sess. (1906). When the substitute came to the floor of the Senate, the floor leader for the bill, Senator Knute Nelson of Minnesota, explained the need for the legislation in constitutional terms: "[S]ometimes an indictment is set aside on the ground that the law under which the indictment was found is held to be unconstitutional. *The object* [of this bill] *is to allow the Government to take the case up and get a ruling of the Supreme Court.*" 40 Cong. Rec. 8695 (1906) (emphasis added). The bill was then put over in the absence of unanimous consent for consideration. When the bill returned to the floor, questions were raised with respect to the arrest of judgment provision regarding the prohibition against double jeopardy. Unanimous consent to proceed again was withdrawn and the bill was again put over. 40 Cong. Rec. 9033 (1906).

An amended bill was reported out of committee in January of 1907. When this bill reached the floor, a

spirited three-day debate took place respecting its impact on an accused. Indeed, among the questions discussed was whether a defendant who succeeded on a motion in arrest of judgment could again be prosecuted. See 41 Cong. Rec. 2192–2193 (1907). But almost none of the debate concerned the scope of an "arrest of judgment." Senator Knox, who had been the Attorney General before going to the Senate, did say that "this legislation is along the line of the law as it is understood in England under the common law." 41 Cong. Rec. 2751 (1907). However, this statement apparently referred to the right of the Government to appeal, for it was immediately followed by the observation: "In England the Crown always had the right to an appeal in a criminal case. In my own State since its foundation the right has been conceded." *Ibid.* The manifest, overriding concern of the Senate was with enacting legislation that would permit appeals as to important *legal* questions always subject to the bar against double jeopardy,[7] and this concern carried over to the arrest of judgment provision.[8] Indeed, the major limiting amendment adopted by the Senate restricted the right of review by the Government in criminal cases to constitutional issues and questions of construction of the statute under which the charge was brought. See 41 Cong. Rec. 2819–2820 (1907).

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[7] "The Government takes the risks of all the mistakes of its prosecuting officers and of the trial judge in the trial, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial." 41 Cong. Rec. 2752 (1907) (remarks of Senator Knox).

[8] "[A motion in arrest of judgment] is a case in which the defendant has been tried, in which he has been found guilty on the merits of the case, and by reason of some technicality, if I may use the term in its broad sense, the hand of the court is arrested from imposing the penalty upon him." 41 Cong. Rec. 2753 (1907) (remarks of Senator Patterson).

Another illustration of what the Senate thought it was doing in describing this category of appeals comes from the emphasis on distinguishing a "motion in arrest" from an "acquittal." See 41 Cong. Rec. 2748 (1907). From the latter, to be sure, there was to be no appeal—no matter how many errors the trial judge had committed along the way to the acquittal in the form of erroneous rulings or other trial errors. As the majority has noted, an amendment was adopted which required that *verdicts* in favor of the defendant could not be set aside on appeal. 41 Cong. Rec. 2819 (1907). The text of the amendment as adopted read: *"Provided,* That if upon appeal or writ of error it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside." *Ibid.* The proponent of the amendment, Senator Rayner, expressed the view that the amendment was directed toward a *"verdict of not guilty,* whether by the court or the jury . . . ." 41 Cong. Rec. 2747 (1907) (emphasis added). Here, of course, Sisson was not acquitted but was found guilty by the jury. Further, the Court's use of the Rayner amendment to support a narrow reading of the "arrest of judgment" provision is incongruous in the extreme in light of the fact that the amendment had no substantive effect and was later deleted from the Act. See MR. JUSTICE WHITE'S opinion, *post,* at 344 n. 11.

"Trial errors" respecting the fact-finding function—which affect only the particular trial—were distinguished from errors of law that had been separated from the trial on the merits, and that involved constitutional rulings that could affect future attempts of the Government to prosecute under the same statute:

> "The defendant gets the benefit of all errors in the trial which are in his favor, and can challenge all errors in the trial which are against him. It is

> certainly not too much when he attacks the trial itself or the law under which it is conducted to give the people the right to a decision of their highest courts upon the validity of statutes made for their protection against crime." 41 Cong. Rec. 2752 (1907) (remarks of Senator Knox).
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> "The motion in arrest of judgment can only be made—it is wholly inapplicable to any other condition than that of conviction—to a verdict of guilty. It is interposed after a verdict of guilty and before judgment for an alleged legal reason that will arrest the court in pronouncing judgment upon the verdict." 41 Cong. Rec. 2753 (1907) (remarks of Senator Patterson).

The Senate passed the bill with the acquired floor amendments on February 13, 1907. 41 Cong. Rec. 2825 (1907). The House insisted on a conference, but the conference committee adopted the Senate version. The resulting conference committee bill was ultimately adopted. 41 Cong. Rec. 3994, 4128 (1907).

Notably, the debates on the Senate bill which formed the basis of the Act demonstrate a total lack of concern with the technical niceties of ancient common-law forms of pleading. And, far from distinguishing cases where a congressional act was invalidated on its face from cases where it was invalidated as applied to a situation that Congress clearly intended to reach, the debates appear to contemplate both cases as appropriate for appeal to this Court—certainly the evil aimed at—and the rationale of the Act is broad enough to encompass both situations. Appeal was to be for the purpose of deciding "constitutional questions," "questions of law" which, if the district judge's decision were permitted to stand, could lead to conflict and different treatment under the same

criminal statutes in different parts of the country, with no opportunity under existing law for resolution in this Court. The Government was to have a chance to "settle the law as to future cases *of like character.*" 41 Cong. Rec. 2194 (1907) (emphasis added).

It is difficult to imagine a case more closely fitting into this rationale than that now before us. The class of nonreligious conscientious objectors is not likely to be a small one. Indeed under the impetus of this holding it is likely to grow. Yet whether or not a member of that class can constitutionally be punished for refusing to submit to induction now depends on where that person is tried and by whom. That one district judge may entertain a different view of the Constitution than does another is an extraordinary reason for differing results in cases that rationally ought to be decided the same way—and with appellate review available to insure that end. The conclusion that this is not a "motion in arrest," insulates the judge's constitutional decision from review anywhere—here or in the Court of Appeals. That, I submit, is precisely the situation Congress thought it was correcting with the Criminal Appeals Act. It is remarkable that the Court finds it so easy to ignore the explicit and meaningful legislative history which refutes its strained reading of the statute and history.

The common-law rule that an arrest of judgment could be based on nothing more than the judgment roll seems to have been required by the existence of the very limited record of that day which did not include the evidence adduced at trial. Evidentiary matters were not before the appellate courts, and it would have been impossible for the arresting court's "successors [to] know the grounds of their judgment," *Sutton* v. *Bishop, supra,* if the arresting court considered the evidence at trial. This

Court in this case obviously has no such problem in providing appellate review. The records before us contain complete transcripts of the trial proceedings as a matter of course.

Accordingly, while the District Court admittedly looked to evidence, including demeanor evidence, for its findings that Sisson was "sincere" and was "genuinely and profoundly governed by his conscience," this use for that purpose should not now bar this Court from considering the District Court's action as an arrest of judgment. As long as the evidence was used to test the constitutionality of the charging statute as applied to the defendant, *and not to test the sufficiency of the proof against the allegations in the indictment,* the use of the evidence was consistent with the purposes of an arrest of judgment.

In this case, there has been no finding that Sisson did not commit the acts charged; there has been only a holding by the trial judge that his acts were constitutionally protected—a holding that stands as the sole impediment to imposing a jury verdict of guilty; no verdict of acquittal was ever returned. Even our present Federal Rules of Criminal Procedure make a similar distinction between a "Motion for Judgment of Acquittal," Rule 29, and an "Arrest of Judgment," Rule 34. The former is entered "if the evidence is insufficient to sustain a conviction" of the offense charged, while the latter is granted where the indictment "does not charge an offense" at all. Rule 29 allows a judge to reserve his decision on a motion for judgment of acquittal until after the jury has returned a verdict. If he then grants the motion, the defendant stands acquitted, but again only because *the evidence* has been found insufficient to support the charge. Where the grounds for granting an "acquittal" are based on an independent legal deci-

sion about the interpretation or construction of the statute, the judge's action will be an "arrest of judgment" even though he labels it an "acquittal." *United States* v. *Waters,* 84 U. S. App. D. C. 127, 175 F. 2d 340 (1948).

I cannot believe that Congress, fully aware that no appeal was available for a directed verdict or judgment *n. o. v.,* contemplated that this form of judicial action should be accorded the same nonappealable status. Moreover, the sophisticated District Judge could have entered a judgment *n. o. v.* if he wanted to *avoid* review or if he thought that he was indeed passing on the sufficiency of the evidence to meet the allegations of the indictment. Of course, his views are not controlling, but I am comforted by his appraisal and quite satisfied he knew precisely what he was doing—or thought he did on the assumption that his action was reviewable under well-established principles the Court now ignores.

The Court also inveighs against a "broad" construction of the Act, noting that this Court has denominated an appeal by the Government in a criminal case as an "exceptional right," and as "something unusual, exceptional, not favored." *Ante,* at 291. This is an odd characterization; the right is precisely as "exceptional" or "unusual" as Congress makes it. This Court has no power to define the scope of its own appellate review in this context and a subjective distaste for review at the instance of government has no proper place in adjudication. The tendency to be miserly with our jurisdiction did not prevent our construing the three-judge court acts to include cases where statutes were held unconstitutional as applied, *Query* v. *United States,* 316 U. S. 486 (1942); C. Wright, Federal Courts 190 (2d ed. 1970), and it should not carry any more weight in assessing our responsibility to decide the constitutional issues in this

case,[9] the more so when it is a constitutional holding of great moment.

II

The second requirement, that the decision of the District Court must rest upon the "insufficiency of the indictment," also presents a difficult question here. The Court emphasizes, wrongly, in my view, that both grounds upon which the District Court's decision rests are defenses that Sisson successfully asserted. In an ordinary case, an indictment, to be sufficient, need not anticipate affirmative defenses. This, however, is not the ordinary case. The indictments in cases of this nature typically charge only that the Selective Service registrant

> "did unlawfully, knowingly and wilfully fail and neglect and refuse to perform a duty required of him under and in the execution of the Military

[9] The one case in which this Court has even tangentially considered whether evidence adduced at trial can ever be considered as the basis of a motion in arrest of judgment was *United States* v. *Green,* 350 U. S. 415 (1956). There the majority of the Court was impelled to explain the basis for its decision by explicitly pointing out that "the record does not contain the evidence upon which the [district] court acted. . . . We rule only on the allegations of the indictment . . . ." 350 U. S., at 421. MR. JUSTICE DOUGLAS, with whom Chief Justice Warren and MR. JUSTICE BLACK joined, dissented on the ground that the District Court's "order granting the motions in arrest of judgment rested at least in part upon the insufficiency of the evidence to support the conviction." *Ibid.* But neither the position adopted by the majority nor that taken by the dissenters in *Green* is remotely dispositive of the present case. Here, in contradistinction to the dissenters' view of the circumstances in *Green,* evidence adduced at trial was used by the District Court solely for the purpose of testing the constitutionality of a statute as applied; the District Court's opinion concedes the sufficiency of the evidence to sustain the verdict *if the constitutional views expressed in the opinion are not sustained.*

> Selective Service Act of 1967 and the rules, regulations and directions duly made pursuant thereto, particularly 32 Code of Federal Regulations 1632.14, in that he did fail and neglect and refuse to comply with an order of his local draft board to submit to induction into the armed forces of the United States; in violation of Title 50, Appendix, United States Code, Section 462." [10]

Yet this allegation subsumes in its terse language a myriad of elements that the Government may be called upon to prove if the defense makes an appropriate challenge. Prosecutions for refusing to submit to induction are unusual because they incorporate into the judicial proceeding much that has occurred in the administrative processes of the Selective Service System. All of the courts of appeals have compensated for the administrative proceedings by holding that the Government need not plead and prove many elements that would normally be a part of its case-in-chief. The courts of appeals have devised a presumption of regularity which attaches to the official acts of the local boards that, standing alone, is sufficient to preclude reversal of a conviction when a given element is not raised at trial. See particularly *Yates* v. *United States,* 404 F. 2d 462 (C. A. 1st Cir. 1968) (presumption of regularity attaches to the order-of-call requirement). However, if the defendant succeeds in making a *prima facie* case against the presumption, the Government is put to its proof on the particular element of the offense. See *United States* v. *Baker,* 416 F. 2d 202 (C. A. 9th Cir. 1969).

By analogy, the Government is not required to plead and prove that the defendant was properly classified in category I–A as available for induction. Rather, the

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[10] App. 6.

defendant can challenge the classification at trial if he has preserved his claim, and force the Government to prove that there was indeed a "basis in fact" for the classification. Thus, establishing the appropriate classification is actually an element of the Government's case, but because of the deference given to the administrative process that preceded the criminal proceedings, the Government has been excused from pleading and proving it in the indictment. Since the general allegations in the indictment actually do subsume the element that the District Court held was based on an invalid statute as applied to Sisson, that court's decision was based on the "insufficiency of the indictment" within the meaning of § 3731.

The Court also appears to assume that an indictment may be "insufficient" because the acts charged cannot constitutionally be made an offense, *e. g.*, where they show the existence of a constitutional privilege that bars conviction. But, the Court concludes that "this indictment . . . does not allege facts that themselves demonstrate the availability of a constitutional privilege." *Ante,* at 288.

In my view, the Court's suggestion is simply the same argument, differently approached, as the argument that a motion in arrest can be based only on facts appearing on the face of the record. In both cases, the single question, as I see it, is whether Congress drew a distinction for purposes of appeal by the Government, between cases in which the district court found the entire statute unconstitutional, and cases in which the court found the statute unconstitutional as applied.

The view has been expressed that the Criminal Appeals Act is badly drawn and gives rise to a multitude of problems. We can all agree as to the infirmities of the statute but this is hardly an excuse to take liberties with its plain purposes reasonably articulated in its terms. Prior

urgings addressed to the Congress to correct this situation have gone unheeded. But the Court's holding today is a powerful argument to spur corrective action by Congress.

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

I

I agree with THE CHIEF JUSTICE that this case can be appealed by the Government under the "motion in arrest" provision of the Criminal Appeals Act. In contrast to the rather clear remedial purpose of the Act, not a single passage in the legislative history indicates awareness by Congress that the words it was using had the effect of distinguishing cases where a congressional Act was held invalid on its face from cases where it was invalidated as applied to a sub-class within the Act's intended reach. In both cases, the indictment is "insufficient" to state a valid offense.[1] In both cases, any "factual findings" necessary to give the particular defendant the benefit of the constitutional ruling are little more than findings as to the defendant's standing to raise the constitutional issue—they are not findings as to the sufficiency of the evidence to prove the offense alleged in the indictment.[2] Thus, if Judge Wyzanski, without making any findings as to Sisson's sincerity, had held

[1] Failure to set out the elements of a *valid* offense against the named defendant is the only way an indictment could ever be "insufficient" because of the unconstitutionality (as opposed to the construction) of the underlying statute.

[2] The majority, as THE CHIEF JUSTICE's opinion makes clear and as I discuss in more detail later, *infra,* at 331–332 and n. 6, 332–334, repeatedly ignores this difference between the facts necessary to secure relief for Sisson on his constitutional claim, and the facts relevant to the offense of wilfully refusing induction.

the Selective Service Act unconstitutionally overbroad because it purported to subject to the draft in violation of the Free Exercise Clause sincere, nonreligious objectors, this Court would clearly have jurisdiction and would face the question whether Sisson could raise the claim without showing that he was a member of the allegedly protected class. Cf. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940). If such a showing had to be made, as the judge here held it did, the question of standing and the facts relevant to that question are surely distinct from the question of whether the defendant committed the offense, or the question of the validity *vel non* of the statute.[3] Cf. *Association of Data Processing Service Organizations* v. *Camp,* 397 U. S. 150 (1970); *Barlow* v. *Collins,* 397 U. S. 159 (1970).

II

We asked the parties in this case to consider whether 18 U. S. C. § 3731 confers jurisdiction on the ground that the lower court had sustained "a motion in bar, when the defendant has not been put in jeopardy." The majority, after a lengthy discussion of the "motion in arrest" provision, condescends to address a few remarks to this question, with the suggestion that it really need not discuss the issue at all, since it has concluded that Judge Wyzanski's action amounted to "an acquittal." As MR.

[3] The majority seems to recognize that it would have difficulty justifying a refusal to hear an appeal challenging Judge Wyzanski's ruling on the Establishment Clause, simply because findings had to be made as to the defendant's standing to raise the issue. See *ante,* at 284 n. 16. But there is no real difference in this respect between Judge Wyzanski's free exercise and establishment rulings: both—as the majority concedes, *ibid.*—require factual determinations that Sisson belongs to the class that is entitled to raise the constitutional claim that is being asserted. If the ruling on the first is "an acquittal," so is the ruling on the second, since the judge *might have* sent the establishment issue to the jury too. See *infra,* at 327–328.

JUSTICE BLACK's concurrence indicates, the lengthy discussion of the "motion in arrest" provision is equally superfluous if indeed it is so clear that Sisson has been "acquitted." In reality, the bald assertion that Sisson has been "acquitted" simply begs the matter at issue: until one knows what a "motion in bar" is, as well as a "motion in arrest," and how the granting of such motions differs from granting a judgment of acquittal, one cannot confidently attach any label to Judge Wyzanski's action.

The only reason the majority gives for concluding that Sisson has been acquitted is based, not on what actually happened, but on what *might have* happened. Since Judge Wyzanski *could have* submitted the case to the jury on instructions reflecting his view of the law, and since the jury so instructed *could have* returned a verdict of "not guilty," therefore we must pretend that that is what has actually happened. That suggestion is nonsense. One does not determine "what in legal effect [Judge Wyzanski's decision] actually was," *ante,* at 279 n. 7, by asking "what in legal effect the decision might have been." If that were the key question, then this Court should not have had jurisdiction in *United States* v. *Covington,* 395 U. S. 57 (1969) (HARLAN, J.). There the trial judge accepted the defendant's argument that the Fifth Amendment prevented the Marihuana Tax Act from constitutionally being applied to him. Under the majority's view, that action would amount to an acquittal because the judge *might have* given the case to the jury under instructions that it should acquit if it found the facts necessary to sustain the defendant's privilege—*e. g.,* that he was not one of the registered marihuana dealers whose conduct was legal under state law. Indeed, if applied consistently the majority's theory would mean that there is no case that could be appealed to this Court under the

"motion in bar" provision of the Criminal Appeals Act. For it will always be true that a judge *might have* sent the case to the jury under instructions reflecting his view that the motion in bar was good, so that if the jury found the facts relied on in the motion, it should acquit.[4]

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[4] Consistently applied, the majority's theory would make no criminal case appealable to this Court. For even where a judge dismisses an indictment or grants a motion in arrest because of defects "on the face of the record," it is always true that he *might have* sent the case to the jury, instructing it to acquit if it found the facts alleged in the indictment, thus insulating the case from review because of the intervening jury acquittal.

The majority's protest that its conclusion does not rest on "what might have happened," *ante*, at 290 n. 19, simply serves to highlight the *ipse dixit* nature of its opinion. For the plain fact is that no other reason is ever given to explain why Judge Wyzanski's action amounted to a post-verdict directed acquittal. The question in this case is whether an affirmative defense, relying on facts developed at trial and sustained by the trial judge after a jury verdict of guilty, can amount to an appealable "motion in bar." It is no answer to this question simply to repeat that this is a case in which Judge Wyzanski after a verdict of guilty sustained Sisson's defense on facts developed at the trial—a clearer case of question-begging can hardly be imagined. Such a simple restatement only poses the question that is to be decided: does such action amount to a nonappealable "acquittal" and, if so, why?

One answer to this question is suggested by the majority in its citation to *United States* v. *Ball*, *ante*, at 289–290. An acquittal is the type of judgment that cannot be reviewed without putting the defendant twice in jeopardy for the same offense in violation of the Constitution. Indeed, the legislative history shows that Congress was well aware of the *Ball* decision, and strongly suggests that Congress thought that nonappealable "acquittals" were only those in which review was incompatible with the double jeopardy provisions of the Fifth Amendment. See, *e. g.*, 41 Cong. Rec. 2193. But despite the citation, I cannot believe that the majority really means to suggest that Congress could not constitutionally authorize an appeal in a case precisely parallel to this one in accordance with currently sought legislation. That would indeed be throwing the

The difference between "what might have been" and what actually happened in this case is large and critical. Where the jury actually "acquits" under an erroneous instruction, a successful appeal leading to reversal and a new trial would raise serious constitutional problems by placing the defendant through the hazards of another trial for the same offense. In this case, however, there is no possibility of subjecting Sisson to another trial, or of overturning a factfinder's decision that, whatever the law, Sisson should go free. If Judge Wyzanski's legal theory is incorrect, the jury's verdict of guilty—with judgment no longer "arrested"—simply remains in effect.

It was precisely this distinction that Senator Knox was referring to in the passage quoted in the majority opinion, *ante,* at 289: the defendant retains the benefit of any error whatever committed by the court *"in the trial";* but the Government gets an appeal "upon ques-

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baby out with the bathwater in order to declare this case an "acquittal" and thus avoid being forced to reach the merits now.

What other reason is there for deciding that this is a case of "acquittal"? One obvious suggestion is that the question of whether a judge's action amounts to an "acquittal" admits of no single answer, but depends on the reasons for making the inquiry in the first place. Here the inquiry is whether Congress meant to allow an appeal where a statute had been held invalid as applied to a class within its reach and where the defendant's constitutional jeopardy interests are in no way threatened by the appeal. The majority's absolute refusal to discuss or respond to the legislative history on this question, set out below, see *infra,* at 335–346, indicates that this approach would also lead to the conclusion that Judge Wyzanski granted an appealable "motion in bar" rather than an "acquittal."

The only other noncircular answer that I can find in the majority's opinion is that this is an acquittal because the judge "might have" sent the case to the jury under his novel instructions, resulting in a verdict of not guilty, from which an appeal would indeed jeopardize the defendant's constitutional interests. That answer, as the majority's discomfiture indicates, is not a very good one.

tions of law raised by the defendant to defeat the trial." The distinction is also reflected in the majority's quotation from *United States* v. *Ball, ante,* at 289–290, where the question of what constitutes an "acquittal" is tied to the question of whether the defendant would be put "twice in jeopardy" by an appeal.

I suspect that the Court's reluctance to discuss the "motion in bar" provision and to distinguish the granting of such motions from an acquittal stems from the fact that, unlike the "motion in arrest," there is no doubt that a "motion in bar" properly sets forth an affirmative defense, which necessarily requires resort to facts not found in the indictment or on the face of the "record." Thus most of the majority's argument that this case is not appealable as a "motion in arrest" because "[t]he decision below rests on affirmative defenses," *ante,* at 287–288, is simply irrelevant as far as the "motion in bar" is concerned.

In fact, as the majority seems to concede by its reluctance to reject square precedent on the issue, see *ante,* at 300 n. 53, our cases make clear that the phrase "motion in bar" would include a plea like Sisson's that the selective service laws are unconstitutional as applied to him. The Court has never adopted the view that a "motion in bar" encompasses only the common-law defenses of *autrefois acquit, autrefois convict,* and pardon.[5] Neither did Congress when it passed the Act. The debates show that the plea in bar was thought to embrace such a variety of defenses as the statute of limitations, *e. g.,* 41 Cong Rec. 2749, and a plea of Fifth Amendment

[5] One will search the majority's opinion in vain for an explanation as to why "motion in arrest" must be pinned to its common-law meaning, while "motion in bar"—which the majority also concedes had a unique meaning at common law, see *ante,* at 300 n. 53—has never been so confined. See *United States* v. *Covington,* 395 U. S. 57 (1969) (HARLAN, J.); *United States* v. *Blue,* 384 U. S. 251 (1966) (HARLAN, J.).

immunity, see 41 Cong. Rec. 2753. The most thorough discussion of the "motion in bar" in this Court occurs in the concurring and dissenting opinions in *United States* v. *Mersky,* 361 U. S. 431 (1960). MR. JUSTICE BRENNAN argued that a motion in bar would encompass every possible affirmative defense that would prevent retrial. MR. JUSTICE STEWART argued for a narrower interpretation, similar to the concept of a plea in confession and avoidance, *i. e.,* a plea that "did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect." *Id.,* at 457.

Even under the narrower interpretation of MR. JUSTICE STEWART, Sisson's plea qualifies as a "motion in bar." For as the majority's opinion makes clear, the crux of the case against Sisson was simply whether or not he had wilfully refused to submit to induction; the question of his sincerity was "new matter" relied on to deprive the fact of his wilfull refusal of its ordinary legal effect. See majority opinion, *ante,* at 276; *United States* v. *Blue,* 384 U. S. 251, 254 (1966) (HARLAN, J.). Just as our cases have permitted the "motion in bar" to embrace limitations pleas, see, *e. g., United States* v. *Goldman,* 277 U. S. 229 (1928), and pleas of constitutional privilege, see *United States* v. *Murdock,* 284 U. S. 141 (1931), so too they permit the "motion in bar" to reach cases of this sort, attacking the validity of the statute as applied to the defendant. See *United States* v. *Covington,* 395 U. S. 57 (1969) (HARLAN, J.); *United States* v. *Blue, supra,* at 254 (HARLAN, J.).

Procedurally, the fact that the plea is sustained only after a jury verdict of conviction—and the fact that the judge labeled his action as something other than a "motion in bar"—does not prevent finding a "motion in bar." *United States* v. *Zisblatt,* 172 F. 2d 740, 742 (C. A. 2d Cir.), appeal dismissed, 336 U. S. 934 (1949). Even

the legislative history recognizes that such pleas could be sustained after the trial had begun. 41 Cong. Rec. 2749 (remarks of Senator Rayner). Nor is there any doubt—unlike the case of a motion in arrest—that a proper motion in bar results even though factual issues relevant to the motion have to be tried. See 41 Cong. Rec. 2194 (remarks of Senator Whyte); *id.*, at 2753 (remarks of Senator Patterson); *United States* v. *Zisblatt, supra.* Indeed, MR. JUSTICE HARLAN recently referred to the possibility of trying facts to the judge that were relevant to the motion in bar, and separate from the general issue. See *United States* v. *Covington, supra,* at 60. In his words, "[a] defense is thus 'capable of determination' [without trial of the general issue] if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *Ibid.* That description fits this case precisely since, as already noted, the majority itself takes careful pains to point out that the "general issue"—whether Sisson wilfully refused induction—was at all times separate from the issue raised by Sisson's constitutional claim.[6]

[6] The majority concedes that the judge's instructions to the jury excluded the question of Sisson's sincerity from the question of Sisson's guilt under the Act. See *ante,* at 276. Indeed, Sisson's sincerity could not possibly bear on whether Sisson had wilfully refused induction: since Sisson did not seek a I–O classification, he could not even argue his "sincerity" to show "no basis in fact" for his I–A classification. Moreover, as the majority again points out, *ante,* at 274 n. 2, even Sisson recognized that his "selective" objection to war foreclosed him from obtaining C. O. status under the Act. Sisson's sincerity was thus relevant only to his constitutional defense and was as distinct from the issue on the merits as would have been a claim that the prosecution was time barred. In that sense, the factual questions relevant to Sisson's motion were not part of "the general issue." I do not read THE CHIEF JUSTICE's opinion, which discusses Sisson's defense in a wholly different context, as suggesting anything different. The majority's suggestion, *ante,* at 299,

This case, then, is indistinguishable as far as the "motion in bar" provision is concerned from *United States* v. *Zisblatt, supra,* which the majority cites with approval throughout its opinion. There, as here, the de-

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that a defense of privilege in a speech case may involve facts inextricably intertwined with the general issue, and the majority's reference to *United States* v. *Fargas, ante,* at 301, are perfect examples of repeated refusal to come to grips with the facts of this particular case where the issues were not and could not have been intertwined. Whether Sisson might have demanded a jury trial on the facts relevant to his motion is also a question not presented here, anymore than it was in *United States* v. *Covington,* 395 U. S. 57 (1969) (HARLAN, J.).

The legislative history makes clear that trying facts that go to the plea, as opposed to facts that go to the "general issue" in the sense just described (whether the defendant committed the act) results in an appealable motion in bar as long as the defendant has not been "put in jeopardy." Compare 41 Cong. Rec. 2750 (remarks of Senator Nelson), with *id.,* at 2753 (remarks of Senator Patterson). See text, *infra,* at 340–341. The reason for the distinction appears to be the wholly sensible one of not permitting appeals that might involve overturning the findings of the trier of fact—whether it be judge or jury. Nobody suggests in this case that Judge Wyzanski's findings as to Sisson's sincerity are reviewable; the only question is whether those findings are legally relevant. While I can sympathize with the majority's concern to distinguish *Covington,* I do not see the relevance of the purported distinction, see *ante,* at 302–303, n. 56. There, as here, the trial judge explicitly refused to declare the relevant Act unconstitutional on its face and necessarily rested his action on factual findings concerning the particular defendant, see 282 F. Supp. 886, 889–890. In fact, under the majority's reasoning, it would have been even easier to argue in *Covington* that the facts needed to prove the constitutional defense were part of the "general issue," since proof at a trial on the merits would necessarily have involved developing such things as defendant's status as a marihuana dealer. The majority suggests that there the Government conceded the relevant facts, whereas here they were contested. While that suggestion is itself highly dubious, see THE CHIEF JUSTICE's opinion, *ante,* at 312, until the majority explains how that distinction is at all rele-

fendant moved for dismissal of the indictment on the basis of an affirmative defense—in that case the statute of limitations. There, as here, the judge reserved ruling on the motion until after the jury had returned a verdict of guilty. There, as here, the judge then granted the defendant's motion, relying on matters "outside the record." The Government appealed to the Court of Appeals, where the question became whether or not the appeal should have been taken directly to this Court under the Criminal Appeals Act. Judge Learned Hand, in deciding that the trial court's action amounted to sustaining a motion in bar, made short shrift of the argument that the case was indistinguishable from the case of a directed verdict of acquittal.

> "Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be 'double jeopardy,' but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed, were the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed." 172 F. 2d, at 743.

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vant, reiterating the distinction again only begs the issue posed by this case. See n. 5, *supra*. For whether the issue was conceded or contested it remains true under the majority's analysis that *Covington* cannot be distinguished from a directed acquittal "entered on the ground that the Government did not present evidence sufficient to prove that [Covington] was [not faced with a substantial possibility of incrimination]." Majority opinion, *ante*, at 299.

The sole question, then, in this case as in *Zisblatt,* is whether the defendant has been "put in jeopardy" as that phrase is used in the Criminal Appeals Act. That question in turn centers on whether the phrase is to be read literally, in which case a defendant would be in jeopardy as soon as a jury was impaneled, or whether the phrase is to mean "constitutional" or "legal" jeopardy, in the sense that even if the Government were to succeed on appeal, it would be unable to take advantage of its success in new proceedings against the defendant. Although the Government has chosen to read the statute in the former, literal sense, this Court has never resolved the issue. Judge Learned Hand thought there was a "more than plausible argument" for the latter, "legal jeopardy" view, but the Government dismissed its appeal to this Court before the question could be decided. *United States* v. *Zisblatt, supra,* at 742.

The legislative history of the 1907 Act unmistakably shows that Congress meant to allow the Government an appeal from a decision sustaining a motion in bar in every case except where the defendant was entitled to the protection of the constitutional guarantee against double jeopardy. I find the debates so convincing on that point that I am at a loss to understand why the Government has so readily conceded the issue unless it be to maintain the appearance of consistency, and to protect its interests in securing new criminal appeals legislation before Congress.[7] Certainly that concession

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[7] See majority opinion, *ante,* at 306–307, n. 61. Of course, the legislation that the Government sought shortly after the Act was passed—requiring a defendant to raise his defenses before trial—does not necessarily mean that the then-Attorney General interpreted "jeopardy" to mean literal jeopardy. The legislation would have been equally needed to prevent defendants from waiting until "constitutional jeopardy" had attached, before securing relief on a motion

does not bind this Court; [8] even more certainly it is no excuse for the majority's failure to conduct its own examination of the relevant debates.

Out of three full days of debate in the Senate, covering more than 30 pages of the Congressional Record, see 41 Cong. Rec. 2190–2197, 2744–2763, 2818–2825, the majority finds a total of three passages to cite in a footnote as support for its interpretation, see *ante,* at 304–305, n. 57. In each case, the statements placed in context prove just the opposite of the majority's conclusion. The first reference, to a passage before debate even began, 40 Cong. Rec. 9033, is to Senator Spooner's

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in bar. Indeed, it is because it was thought that "constitutional jeopardy" had attached in the *Beef Trust Case* (*United States* v. *Armour & Co.*), 142 F. 808 (D. C. N. D. Ill. 1906) that no appeal was thought to lie. See *infra,* at 341–342. Since the *Beef Trust Case* was the motivating force behind the Criminal Appeals Act, it would be natural for the Attorney General to seek legislation that would force a similar defendant to raise and get a decision on his plea in bar before trial began, thus avoiding any possibility that the defendant would escape by being placed in legal jeopardy.

[8] To argue that the statute was enacted for the benefit of the Department of Justice hardly justifies relying on the Government's concession as additional authority for the proper interpretation of the Act. The relationship of the Department of Justice to the Criminal Appeals Act is not that of an agency to the statute creating the agency and charging it with enforcement of the Act's provisions. Indeed when it comes to the question of this Court's jurisdiction, no institution has special authority for exploring and determining that question other than this Court. The Solicitor General in this case is simply one of the litigants; to give special weight to his strategy in arguing this case at the very least does a disservice to Sisson, who—seemingly contrary to his own interests—has also made a concession: namely, that this Court does have jurisdiction under both the "motion in bar" and "motion in arrest" provisions. The views of the Justice Department on the "motion in bar" provision are entitled to precisely the same weight as the majority extends to Sisson's views and to the Justice Department's views on the "motion in arrest" provision.

question whether the bill applied only to questions arising before the impaneling of the jury. As the majority acknowledges, Senator Nelson immediately corrected Senator Spooner, pointing out that the key question was "jeopardy," not the impaneling of the jury. The entire brief exchange occurred before the bill was debated, further consideration having immediately been postponed by the objection of other Senators to pursuing the matter at that time. See F. Frankfurter & J. Landis, The Business of the Supreme Court 117 n. 68 (1928). When debate was resumed at the next session of Congress, Senator Spooner unmistakably indicated that jeopardy was being used in the constitutional, legal sense, in direct opposition to the views the majority now tries to ascribe to him:

> "The question is whether it subjects a man under any aspect of it to the danger of double jeopardy.
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> . . . . . .
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> I am content to leave it, under the bill, if it shall become a law, to the Supreme Court of the United States. It is their function to determine what is jeopardy. It is their function to protect the citizens of the United States against any invasion of the constitutional guaranty as to double jeopardy. I think we can rely upon the court to protect as far as the Constitution requires it all defendants . . . ." 41 Cong. Rec. 2762–2763 (remarks of Sen. Spooner).

In the second passage, 41 Cong. Rec. 2191, the majority quotes Senator Nelson for the proposition that no appeal would lie where a jury had been impaneled. The actual quotation is that no appeal would lie "where a jury has been impaneled *and where the defendant has been tried* . . . ." 41 Cong. Rec. 2191 (emphasis added). In context, it is clear that Senator Nelson is venturing an interpretation of "jeopardy" in the legal sense. The whole dispute at this point in the debate is

primarily between Senator Rayner who opposed the bill, and Senators Bacon and Nelson, who supported the bill. The proponents were at pains to show that a person could not be "put twice in jeopardy" under any of the provisions of the bill, 41 Cong. Rec. 2193 (remarks of Sen. McCumber; remarks of Sen. Bacon). Senator Rayner was intent on showing how difficult it was for anyone to give an adequate definition of just what "legal jeopardy" is—he supported a return to the House suggestion, which would have given the defendant the benefit of his favorable decision whether or not he had been "put in jeopardy." But not a single passage can be cited to show that either side had the slightest inkling that "jeopardy" was being used in any but its technical, legal sense as interpreted by this Court and state courts. That was the whole point of Senator Rayner's objection: "jeopardy" was too vague a term, because nobody could decide exactly when constitutional jeopardy had attached. How the majority can rely on Senator Nelson for the conclusion that "jeopardy" means "literal" jeopardy is particularly difficult to understand, given the Senator's own unambiguous explanation that as author of the bill, what he meant was "constitutional" jeopardy:

> "I aimed to put the bill in such a form that it would cover exactly those cases in which the defendant had not been *put in jeopardy under the Constitution of the United States.* I believe that the bill is limited strictly to that matter." 41 Cong. Rec. 2757 (emphasis added).

Senator Bacon during this same exchange noted that the "jeopardy" provisions had been put in "out of abundance of caution," 41 Cong. Rec. 2191. He proceeded to explain by his remarks that he meant precisely what the majority today declares he could not have meant—namely, that Congress was simply emphasizing that it was not attempting to subject a defendant to constitu-

tional double jeopardy by a successful government appeal. In fact, when one of the Senators asked whether "jeopardy" was to be taken in a possibly literal sense, Senator Bacon hastened to reply:

> "That is not *what the law means by being put in jeopardy* at all. The words 'being in jeopardy' are entirely a technical phrase, which does not relate to the fact that a man is in danger as soon as an indictment is preferred against him." 41 Cong. Rec. 2191 (emphasis added).

It is hardly "superfluous" for Congress to guard against a construction of an Act that might render the Act unconstitutional. And the fact that the majority would have written the statute differently to avoid what it calls a "superfluous" reading, is no excuse for ignoring the explicit indication that that is exactly the reading that Congress meant the phrase to bear.[9]

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[9] This interpretation is reinforced at other points in the debate in a manner that also explains why the "jeopardy" language occurs in the motion-in-bar provision, and not in the other provisions. The Senators thought that indictments would normally be dismissed before trial began, so there would be no "jeopardy" problems in allowing appeals in such cases. Similarly, a motion in arrest after judgment was thought to involve no jeopardy problems, because the defendant made the motion himself in an attempt to overturn a verdict of guilty. See 41 Cong. Rec. 2753. But it was recognized that the motion in bar could be granted after trial had started, see 41 Cong. Rec. 2749; and it was not obvious whether in such a case "jeopardy" would have attached in the constitutional sense to prevent retrial. Hence, the "jeopardy" language was added "out of abundance of caution" to make clear that Congress was simply bringing that provision into line with the other provisions: *i. e.*, appeals were to lie only where "constitutional jeopardy" had not attached; but jeopardy, not the impaneling of the jury, was to be the test of appealability in the case of the motion in bar just as in the case of the motion in arrest. See 41 Cong. Rec. 2191 (remarks of Senator Bacon); 41 Cong. Rec. 2756 (remarks of Senator Nelson) ("out of extreme

The majority's final passage refers to a remark by Senator Patterson suggesting that a motion in arrest was the only provision under the bill that could be raised after a trial had begun. As the majority concedes, one need only read on a bit further to discover that Senator Patterson immediately retracted that suggestion when challenged, insisting that a "motion in bar" could also be granted after trial had begun and that an appeal would lie as long as no problem of "constitutional jeopardy" was presented. Indeed, Senator Patterson argued vigorously that there would have been jurisdiction in the *Beef Trust Case*—a case in which the motion in bar was not only granted after trial had begun, but was also reflected in the judge's instructions to the jury. Senator Patterson's remarks are particularly interesting because, apart from whether he is right on the question of constitutional jeopardy, he makes clear the distinction between a motion in bar and an acquittal which the majority blithely ignores:

> "A special plea in bar . . . is a plea that does not relate to the guilt or innocence of the defendant in the sense as to whether he did or not commit the act for which he was indicted. A special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged; it is for some outside matter; yet it may have been connected with the case. The special plea in bar that was filed by the indicted Chicago packers is a very good illustration of that. Their plea in bar set forth the fact of their having been induced or led, whatever it may have been, to make communications to the

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caution and to put it exactly in harmony and in line with the provisions of the three preceding paragraphs, we have expressly provided that where the defendant has been put in jeopardy he can not be reindicted").

> law officers of the Government with reference to their business that gave the district attorney information which enabled him to bring about the indictments and to help in their prosecution. That had no reference to the guilt or innocence of the accused. It was a pleading of fact that was independent of the crime for which those packers had been indicted.
>
> "Therefore, Mr. President, there could be no jeopardy in a case of that kind where there was a decision upon the special plea in bar, because it is not under a plea of guilty or not guilty that the insufficiency of a special plea in bar is determined; it is non obstante whether the defendant is guilty or not guilty." 41 Cong. Rec. 2753.

It is obvious from these remarks that Senator Patterson did not think that the question of "jeopardy" under the motion-in-bar provision was simply a question of whether the jury had been impaneled.[10]

This interpretation is made doubly clear by the remarks of Senator Nelson, the leading proponent of the bill. He also addressed himself to the *Beef Trust Case* and, unlike Senator Patterson, he suggested that that case could not have been appealed under the Act. But the reason he gave for that conclusion was not that the jury had been impaneled, but that the jury had been impaneled *and had returned a verdict of not guilty* under the judge's instructions, thus placing the defendants in "legal jeopardy":

> "In that case a jury was impaneled, and the question whether the defendants were entitled to im-

[10] The majority's apparent willingness to accept Senator Patterson's suggestion that the *Beef Trust Case* could have been appealed, *ante*, at 304 n. 57, virtually concedes the issue. For the whole point is that in distinguishing between the plea and the issue on the merits, the Senator was plainly giving his views as to what constitutes "legal jeopardy."

> munity under the immunity law because they had furnished Mr. Garfield and the officials of his Bureau information was submitted to the jury, and the jury under instructions of the court found for the defendants. In that case the defendants *under the Constitution had been in jeopardy* and in that beef-trust case no appeal could lie." 41 Cong. Rec. 2757 (emphasis added).

See 41 Cong. Rec. 2750 (remarks of Senator Nelson).

Senator Nelson was thus talking about the majority's "might have been case"—the case where the judge gives the motion in bar issue to the jury under his novel view of the law, so that a successful government appeal would require retrying the defendant. In the immediately following passage, Senator Nelson makes clear that if the facts pleaded in the special issue are not submitted to the jury, but tried to the judge, there would be no bar to taking an appeal. But in both cases, Senator Nelson, like Senator Patterson, is quite obviously giving his views as to what "constitutional jeopardy" means.

While the debates are replete with other indications that Congress' concern was with "double jeopardy," not "literal jeopardy," the clearest such indication occurs in this very exchange between Senator Rayner, who announced his opposition to the bill in any form, 41 Cong. Rec. 2745, and Senators Spooner, Patterson, and Nelson—proponents of the bill. The exchange occupied most of the second day of the three days of debate in the Senate and centered almost entirely on Senator Rayner's proposed amendment. The example that Senator Rayner used to illustrate the difficulties he saw in the bill was a hypothetical case in which a plea in bar—a limitations plea—was sustained halfway through the trial. See 41 Cong. Rec. 2749. In that case, Senator Rayner argued, no one could say with certainty whether the de-

fendant had been put in jeopardy, and hence whether he could constitutionally be retried if the Government's appeal were successful. Senator Rayner did not want to leave the defendant's fate to depend on "this howling wilderness of confusion upon the subject of what constitutes *legal jeopardy*." 41 Cong. Rec. 2750 (emphasis added). His amendment would thus have guaranteed that a defendant could never be retried—whatever the ultimate resolution of the "legal jeopardy" question. Those who opposed the amendment argued that if it had any substantive effect, it would make the question on any appeal "moot"; that it was enough to make sure that the Government was not allowed to secure a reversal and proceed again where the result would place the defendant in "double jeopardy"; and that the bill would leave to the Supreme Court the question of what is "jeopardy," and hence protection "against any invasion of the constitutional guaranty as to double jeopardy." 41 Cong. Rec. 2761–2763; see also 41 Cong. Rec. 2193. But it is clear—indeed it was again crucial to Senator Rayner's argument—that the Senators assumed that "jeopardy" was being used in the legal sense:

> "The question is whether it subjects a man under any aspect of it to the danger of double jeopardy.
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> . . . . .
>
> "The Senator [Rayner] says he does not care whether it is double jeopardy or not. Even if a man under the Constitution may properly and lawfully be put on trial again, if he has been tried once, even though it were a mistrial, if he had been for a moment in jeopardy, he insists that we shall provide by law, no matter what the case may be, that he shall not be tried again; that he shall go acquit.
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> . . . . .
>
> "The matter has been thoroughly argued. I am content to leave it, under the bill, if it shall be-

> come a law, to the Supreme Court of the United States. It is their function to determine what is jeopardy. It is their function to protect the citizens of the United States against any invasion of the constitutional guaranty as to double jeopardy. I think we can rely upon the court to protect as far as the Constitution requires it all defendants, without supplementing the Constitution by the Senator's amendment to this bill." 41 Cong. Rec. 2762–2763 (remarks of Senator Spooner).[11]

Senator Rayner's hypothetical example of a plea in bar sustained after trial had begun—an example accepted without question by Senators Patterson, Nelson, and

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[11] It should be noted that even Senator Rayner's amendment did not purport to narrow the scope of cases in which the Government could appeal; it only sought to remove any "double jeopardy" problem by declaring that the defendant should retain a favorable decision, whatever the result on appeal.

On the third day of debate, the amendment was agreed to, modified to read:

"*Provided,* That if upon appeal or writ of error it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside." 41 Cong. Rec. 2819.

Senator Rayner's earlier opponents continued to insist that no material change had been made by the amendment, since as they had argued, there would be no appeal in any event where the defendant had received a "verdict" in his favor, see opinion of THE CHIEF JUSTICE, *ante,* p. 308, as opposed to securing a favorable "judgment" by the trial court's action in sustaining his plea or arresting judgment. See 41 Cong. Rec. 2820. Without explanation, the Conference Committee changed the amendment to read:

"*Provided,* That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

Subsequent amendments to the Act omitted the proviso altogether (which no longer appears in the current version) thus vindicating the arguments of Senator Rayner's opponents that the amendment had no substantive effect.

Spooner, and every other Senator participating in the debate—completely undercuts the majority's assertion that Congress thought there could be no appeal once the jury had been impaneled. Indeed, in the face of the arguments over the meaning of "jeopardy" and Senator Rayner's vigorous attack on the vagueness of that term, it is nothing short of incredible for the majority to suggest that Congress left that language in the Act, intending it to be interpreted as providing "a clear, easily administered test," *ante,* at 307. If Congress had intended the majority's interpretation it would have been both simple and logical to explicitly limit appeals to cases "where the jury has not yet been impaneled," thus avoiding the possibility of confusion which had been the very topic of discussion for three full days of debate.

The plain fact of the matter is that the majority's *post hoc* rationalization of the Act simply was not that of Congress. While the debates show considerable disagreement about the meaning of "jeopardy" in the legal sense, there is not the slightest suggestion anywhere in the legislative history that "jeopardy" is being used in any other sense. Even where references occur to the impaneling of the jury as the moment when jeopardy attaches, it is clear that jeopardy is still being used in its legal sense—after all, as the majority itself notes, *ante,* at 305, the impaneling of the jury does in fact often become the constitutionally relevant point in determining that "legal jeopardy" has attached to prevent a reprosecution. But the one point on which there was unanimous agreement—even from Senator Rayner, see, *e. g.,* 41 Cong. Rec. 2748—about the meaning of "jeopardy," was that where a convicted defendant on his own motion had secured the arrest of a jury's verdict of guilty, he had not been placed in "jeopardy." "[T]he defendant could not complain, either if the judgment of the court shall be entered upon the verdict or a new trial

shall be ordered, because it is giving to the defendant a new opportunity to go acquit when, under the trial that was had, he had been convicted." 41 Cong. Rec. 2753.

For this Court to hold that Sisson has been placed in jeopardy under the motion-in-bar provisions, thus defeating jurisdiction, the Court must be prepared to hold that a successful appeal by the Government, resulting in an order that judgment be entered on the verdict, would violate Sisson's double jeopardy protection. Judge Learned Hand refused even to consider such a suggestion in *Zisblatt:* "So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it [does] not trench upon the constitutional prohibition." 172 F. 2d, at 743.

III

I find extremely peculiar the path that the Court follows in reaching its conclusion that we cannot hear this case. The "motion in arrest" provision is confined to its early common-law sense, although there is absolutely no indication that Congress was using the phrase in that sense, and we have never similarly limited the "motion in bar" provision to its common-law scope. The alleged trouble with the "motion in arrest" is not any problem of jeopardy, but the fact that Judge Wyzanski relied on facts outside the face of the "record." Conversely, the trouble with the "motion in bar" provision is not the use of outside facts, but solely the fear that Sisson was "put in jeopardy." If this were a motion in arrest, there would be no "jeopardy" problem; and if this were a motion in bar, resort to outside facts would pose no problem. The apparent inconsistency and the refusal to hear the case appear to be due to a dogged determination to fit Judge Wyzanski's action into one "common-law pigeonhole," *United States* v. *Mersky,* 361 U. S. 431, 442 (BRENNAN, J., concurring), or the other

while paying scant attention to the reason for trying to make the fit in the first place, with the result that Judge Wyzanski's action is to be given the no less distorting label of "acquittal."

The question in this case should simply be whether or not a judge who upholds a claim of constitutional privilege, thereby declaring the statute unconstitutional as applied, has entered a judgment that Congress intended this Court to be able to review. Surely in a statute as unclear and ambiguous as the majority says this unhappy Act is, the "words" of the statute are only the first place to start the task of interpretation. The primary guide to interpretation should be the statute's purpose, as indicated by the evil that prompted it, and by the legislative history.

The Act was passed to remedy the situation that gave a single district judge the power to defeat any criminal prosecution instituted by the Government, and to annul as unconstitutional, attempts by Congress to reach a defendant's specified conduct through the use of the criminal machinery. Over and over, this theme is repeated in the debates on the bill, dominating every other topic of discussion except the concern for safeguarding the defendant's privilege against double jeopardy. As THE CHIEF JUSTICE's opinion details, it is difficult to imagine a case more closely fitting the type of case in which Congress intended to allow an appeal than the instant one.

The majority suggests that we must remember that the Act was "a compromise," and that Congress was very concerned about not unduly encroaching on the rights of the defendant. But the "compromise" between the House and the Senate was only over the areas in which to allow appeal—there was complete accord that constitutional cases of this sort constituted one of those areas; they were indeed the Act's *raison d'être*. Simi-

larly while Congress was concerned to protect the defendant's rights, it had no doubt that those rights were not invaded where a defendant had been found guilty, and the Government appealed the judge's decision that for legal reasons the verdict could not stand. The majority, in short, pays lip service to the policies of the Act without ever applying those policies to the question presented in the case before it. Judge Wyzanski, anxious to do his duty as he saw it, and yet aware that ultimate resolution of the constitutional issue properly belongs in this Court, had two means of passing on the issue while still protecting Sisson's rights: he could have granted Sisson's motion after a pretrial hearing, see *United States* v. *Covington,* 395 U. S. 57, 60; Fed. Rules Crim. Proc. 12 (b)(1), 12 (b)(4), or he could, as here, grant the motion only after the jury's verdict of guilty forced him to reach the constitutional question. In either case, none of the interests reflected in the jeopardy provisions of the Constitution—protecting defendants from repeated and harassing trials for the same offense—is in any way endangered. In fact, Sisson's interests if anything are less in jeopardy in the second case than the first where the Government's appeal would force a long delay in beginning the trial itself.

The conclusion that Congress intended judgments of this kind to be reviewed seems to me so clear, that I suspect the majority's neglect of this aspect of the statute amounts to a tacit admission that policy and purpose point overwhelmingly toward finding jurisdiction. If that is the case, then to hang Congress on the technical meaning of the obscure legal terms it happened to use is not only inappropriate, but is strangely out of line with decisions that leap over the plain meaning of words in other contexts to reach conclusions claimed to be consistent with an Act's broader purposes. See *Welsh* v. *United States,* 398 U. S. 333 (1970); *Boys*

Markets, Inc. v. *Retail Clerks Union,* 398 U. S. 235 (1970); *Toussie* v. *United States,* 397 U. S. 112 (1970); *United States* v. *Seeger,* 380 U. S. 163 (1965). Compared to some of these examples of "statutory construction," it is child's play to conclude that Congress did not really mean to limit "motion in arrest" to its old common-law meaning, or that at least if it did, it thought decisions such as Judge Wyzanski's would have been appealable under some other provision, such as the "motion in bar" as long as there was no danger of encroaching on the defendant's jeopardy interests.

Admittedly, the issues raised by Sisson are difficult and far-reaching ones, but they should be faced and decided. It is, to be sure, much more comfortable to be able to control the decision whether or not to hear a difficult issue by the use of our discretion to grant certiorari. But that is no excuse for ignoring Congress' clear intent that the Court was to have no choice in deciding whether to hear the issue in a case such as this. The fear expressed in the prevailing opinion that if we accept jurisdiction we shall be "cast adrift" to flounder helplessly, see *ante,* at 299, has a flavor of nothing so much as the long-discarded philosophy that inspired the old forms of action and that led to the solemn admonition in 1725 that "[w]e must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." *Reynolds* v. *Clarke,* 93 Eng. Rep. 747, 748 (K. B. 1725). I cannot agree. I would find jurisdiction.

UNITED STATES *v.* PHILLIPSBURG NATIONAL BANK & TRUST CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 1093. Argued April 28, 1970—Decided June 29, 1970

Phillipsburg National Bank (PNB) and Second National Bank (SNB) are the two largest of the three commercial banks in Phillipsburg, New Jersey, whose 1960 population (including suburbs) was 28,500. Easton, Pennsylvania, across the river, whose 1960 population (including suburbs) was 60,000, has four commercial banks. The proposed merger of PNB and SNB, direct competitors, would produce a bank with assets of more than $41,100,000, placing it second among the six banks remaining in the Phillipsburg-Easton area, and would give the two largest banks in the area 54.8% of the banking assets, 64.8% of total deposits, 63% of total loans, and 10 of the 16 banking offices. PNB and SNB are oriented toward the needs of small depositors and small borrowers in the Phillipsburg-Easton area, as over 90% of their depositors and about 80% of their borrowers reside there, with the vast majority residing in Phillipsburg. Despite the views of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Attorney General that the proposed merger involved commercial banking in Phillipsburg-Easton and that the merger would significantly harm competition in that area, the Comptroller of the Currency, pursuant to the Bank Merger Act, approved the merger, treating most of the Lehigh Valley as the geographic area, and evaluating competition from finance companies, savings and loan institutions, and the more than 30 commercial banks in that area. The District Court rejected Phillipsburg-Easton as the geographic area and selected an area about four times as large, with a 1960 population of 216,000 and 18 banks. Although in its actual analysis of competitive effect that court looked to commercial banking as the relevant product market, it emphasized competition between PNB–SNB and other types of financial institutions, and stated that PNB–SNB's activities "really make them much more . . . like savings institutions than like so many of the larger commercial banks." The District Court held that the United States had not established that the merger would have any anticompetitive effect, and that even if

there were *de minimis* anticompetitive effect in the Government's narrowly drawn market, such effect would be clearly outweighed by the convenience and needs of the community. *Held:*

1. Commercial banking is the relevant product market. Pp. 359–362.

(a) It is the *cluster* of products and services offered by full-service banks that makes commercial banking a distinct line of commerce. *United States* v. *Philadelphia National Bank,* 374 U. S. 321. Pp. 359–360.

(b) While submarkets such as the District Court defined would be relevant in analyzing the effect on competition between a commercial bank and another type of financial institution, they cannot be the basis for disregarding the broader line of commerce that has economic significance, with respect to small as well as large banks. Pp. 360–362.

2. The Phillipsburg-Easton area is the relevant geographic market. Pp. 362–365.

(a) Commercial realities in the banking industry make clear that banks generally have a very localized business, and such localization is particularly pronounced when small customers are involved. Pp. 362–364.

(b) The area is a geographic market in which the merger's effect would be "direct and immediate," and where the merging banks' customers must, or will, do their banking. Pp. 364–365.

(c) The area, with a 1960 population of nearly 90,000, and with seven competing banks, is a market that is clearly an economically significant section of the country for the purposes of § 7 of the Clayton Act. P. 365.

3. On the record in this case the proposed merger would be "inherently likely to lessen competition substantially." Pp. 365–369.

4. The District Court's errors require re-examination of its conclusion under the Bank Merger Act that any anticompetitive effects of the merger would be outweighed by the merger's contribution to the community's convenience and needs. Such re-examination must be in terms of the Phillipsburg-Easton area as a whole, and should specifically explore alternative methods of serving the convenience and needs of the area, and consider whether the merger will benefit all banking customers, small and large, in the community. Pp. 369–372.

306 F. Supp. 645, reversed and remanded.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General McLaren, Lawrence G. Wallace,* and *Howard E. Shapiro.*

Robert B. Meyner argued the cause for appellees Phillipsburg National Bank & Trust Co. et al. With him on the brief were *Thomas D. Hogan* and *Michael S. Waters. Philip L. Roache, Jr.,* argued the cause for appellee Camp, Comptroller of the Currency. With him on the brief were *Robert Bloom* and *Charles H. McEnerney, Jr.*

Mr. Justice Brennan delivered the opinion of the Court.

This direct appeal under the Expediting Act, 15 U. S. C. § 29, is taken by the United States from a judgment of the District Court for the District of New Jersey dismissing, after full hearing, the Government's complaint seeking to enjoin as a violation of § 7 of the Clayton Act, 15 U. S. C. § 18,[1] the proposed merger of appellees, Phillipsburg National Bank and Trust Co. (PNB) and the Second National Bank of Phillipsburg (SNB), both located in Phillipsburg, New Jersey. The Comptroller of the Currency, also an appellee here, approved the merger in December 1967 and intervened in this action to defend it, as he was authorized to do by the Bank Merger Act of 1966, 12 U. S. C. § 1828 (c)(7)(D)

[1] Section 7, as amended by the 1950 Celler-Kefauver Antimerger Act, 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."

(1964 ed., Supp. V).[2] The Bank Merger Act required that the District Court engage in a two-step process, *United States* v. *First City National Bank of Houston,* 386 U. S. 361 (1967); *United States* v. *Third National Bank in Nashville,* 390 U. S. 171 (1968), the first of which was to decide whether the merger would violate the antitrust prohibitions of § 7 of the Clayton Act. If the court found that § 7 would be violated, then the Bank Merger Act required that the District Court decide whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U. S. C. § 1828 (c)(5)(B). The District Court found that the United States "failed to establish by a preponderance of the evidence that the proposed merger would have any anticompetitive effect and, further, that even if there were *de minimis* anticompetitive effect in the narrowly drawn market proposed by the government, such effect is clearly outweighed by the convenience and needs of the community to be served by the merged bank." 306 F. Supp. 645, 667 (1969). We noted probable jurisdiction. 397 U. S. 933 (1970). We reverse. We have concluded from our examination of the record that the District Court erred in its definitions of the relevant product and geographic markets and that these errors invalidate the court's determination that the merger would have no significant anticompetitive effects.

I

The Factual Setting

Phillipsburg is a small industrial city on the Delaware River in the southwestern corner of Warren County,

[2] The merger was automatically stayed by the filing of this action. 12 U. S. C. § 1828 (c)(7)(A) (1964 ed., Supp. V). The District Court continued the statutory stay pending disposition of the appeal.

New Jersey. Its population was 18,500 in 1960, 28,500 counting the population of its bordering suburbs. Although the population of the suburbs is and has been increasing, Phillipsburg itself has not grown. Easton, Pennsylvania, lies directly across the river. It had a population of 32,000 in 1960, 60,000 counting its bordering suburbs. Its population growth pattern has paralleled that of Phillipsburg. The cities are linked by two bridges and the testimony was that they are "in effect . . . one town."

This "one town" has seven commercial banks, four in Easton and three in Phillipsburg. PNB and SNB are respectively the third and fifth largest in overall banking business. All seven fall within the category of small banks, their assets in 1967 ranging from $13,200,000 to $75,600,000.[3] PNB, with assets then of approximately $23,900,000, and SNB with assets of approximately $17,300,000, are the first and second largest of the three Phillipsburg banks. The merger would produce a bank with assets of over $41,100,000, second in size of the six remaining commercial banks in "one town."

PNB and SNB are direct competitors. Their main offices are opposite one another on the same downtown street. SNB's only branch is across a suburban highway from one of PNB's two branches. Both banks offer the wide range of services and products available at commercial banks, including, for instance, demand deposits,

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[3] See table at 355. The table, in millions of dollars, as of December 30, 1967, shows the relationship of the seven banks to one another in terms of assets, total deposits, demand deposits, and loans. The Nazareth National Bank has one branch in Easton. While the deposit figures are segregated for this branch, the asset and loan figures are not. Thus, the total asset and loan figures for the Nazareth National Bank are used in this table, rather than those attributable to its Easton branch. The table, accordingly, understates the percentages attributable to the other banks, including the appellees.

COMPARISON OF PHILLIPSBURG-EASTON BANKS*

BANK	No. of Offices	ASSETS Amt.	ASSETS % Phill.-East.	ASSETS % Phill. Only	TOTAL DEPOSITS Amt.	TOTAL DEPOSITS % Phill.-East.	TOTAL DEPOSITS % Phill. Only	DEMAND DEPOSITS Amt.	DEMAND DEPOSITS % Phill.-East.	DEMAND DEPOSITS % Phill. Only	LOANS Amt.	LOANS % Phill.-East.	LOANS % Phill. Only
Phillipsburg Nat. Bank	3	$23.9	11.2	44.0	$22.4	13.7	44.3	$6.5	11.3	45	$14.5	15.8	48.9
Second Nat. Bank	2	17.3	8.1	31.8	16.0	9.8	31.7	4.6	7.9	31.3	10.5	11.4	35.2
[Resulting Bank]	5	41.1	19.3	75.8	38.4	23.4	76.1	11.1	19.2	76.4	24.9	27.3	84.1
Phillipsburg Trust Co.	2	13.2	6.2	24.2	12.1	7.4	23.9	3.4	6.0	23.6	4.7	5.2	15.9
Easton Nat. Bank & Trust	5	75.6	35.5	—	67.7	41.4	—	25.4	44.1	—	32.6	35.7	—
Northampton Nat. Bank	1	23.2	10.9	—	19.0	11.6	—	6.4	11.0	—	6.5	7.1	—
Lafayette Trust Bank	2	27.7	13.0	—	24.3	14.8	—	10.8	18.8	—	11.8	12.9	—
Nazareth Nat. Bank	1	32.0	15.0	—	2.3	1.4	—	0.5	0.9	—	10.8	11.9	—
Totals	16	$212.8	100	100	$163.7	100	100	$57.7	100	100	$91.5	100	100

*The figures in this table will not always add to the stated total because of rounding.

savings and time deposits, consumer loans, commercial and industrial loans, real estate mortgages, trust services, safe deposit boxes, and escrow services. As is characteristic of banks of their size operating in small communities, PNB and SNB have less of their assets in commercial and industrial loans than do larger banks. They emphasize real estate loans and mortgages, and they have relatively more time and savings deposits than demand deposits. Similarly, their trust assets are quite small. In short, both banks are oriented toward the needs of small depositors and small borrowers. Thus, in 1967 75% of PNB's number of deposits and 73% of SNB's were $1,000 or less; 98% of PNB's number of deposits and 97% of SNB's were $10,000 or less. Similarly, 75% of PNB's number of loan accounts and 59% of SNB's were $2,500 or less, and 93% and 87% respectively were $10,000 or less.

Both banks serve predominantly Phillipsburg residents. In 1967, although 91.6% of PNB's and 92% of SNB's depositors were residents of "one town," only 5.3% of PNB's and 9% of SNB's depositors lived in Easton. And, although 78.6% of PNB's and 87.2% of SNB's number of loans were made to residents of "one town," only 14.8% and 11.6% respectively went to persons living in Easton. A witness testified that all of the approximately 8,500 Phillipsburg families deal with one or another of the three commercial banks in that city. The town's businessmen prefer to do the same. The preference for local banks was strikingly evidenced by the fact that PNB and SNB substantially increased their savings deposit accounts during 1962–1967, even though their passbook savings rates were lower than those being paid by other readily accessible banks. At a time when Phillipsburg banks were paying 3.5% interest and Easton banks only 3%, other banks within a 13-mile radius were offering 4%.

Phillipsburg-Easton is in the northeastern part of the Lehigh Valley, a region of approximately 1,000 square miles, with a population of 492,000 in 1960 and 38 commercial banks in June 1968. There is considerable mobility among residents of the area for social, shopping, and employment purposes. Customer preference and conservative banking practices, however, have tended to limit the bulk of each commercial bank's business to its immediate geographic area. Neither PNB nor SNB has aggressively sought business outside "one town." Similarly, most other banks in the Lehigh Valley have shown little interest in seeking customers in Phillipsburg-Easton. The District Court found that "[t]here is an attitude of complacency on the part of many banks [in the Valley]. They are content to continue outmoded banking practice and reluctant to risk changes which would improve service and extend services over a greater area to a larger segment of the population." 306 F. Supp., at 661.

The merger would reduce the number of commercial banks in "one town" from seven to six, and from three to two in Phillipsburg. The merged bank would have five of the seven banking offices in Phillipsburg and its environs and would be three times as large as the other Phillipsburg bank; it would have 75.8% of the city's banking assets, 76.1% of its deposits, and 84.1% of its loans. Within Phillipsburg-Easton PNB-SNB would become the second largest commercial bank, having 19.3% of the total assets, 23.4% of total deposits, 19.2% of demand deposits, and 27.3% of total loans. This increased concentration would give the two largest banks 54.8% of the "one town" banking assets, 64.8% of its total deposits, 63.3% of demand deposits, 63% of total loans, and 10 of the 16 banking offices.

We entertain no doubt that this factual pattern requires a determination whether the merger passes muster

under the antitrust standards of *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963), which were preserved in the Bank Merger Act of 1966. *United States* v. *First National Bank of Houston, supra; United States* v. *Third National Bank in Nashville, supra.* Mergers of directly competing small commercial banks in small communities, no less than those of large banks in large communities, are subject to scrutiny under these standards. Indeed, competitive commercial banks, with their cluster of products and services, play a particularly significant role in a small community unable to support a large variety of alternative financial institutions. Thus, if anything, it is even more true in the small town than in the large city that "if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected . . . ." *Philadelphia Bank*, 374 U. S., at 372.

When PNB and SNB sought the Comptroller's approval of their merger, as required by the Bank Merger Act, 12 U. S. C. § 1828 (c), independent reports on the competitive factors involved were obtained, as required by § 1828 (c)(4), from the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Attorney General. All three viewed the problem as involving commercial banking in Phillipsburg-Easton and reported that the merger would have a significantly harmful effect upon competition in that area. The Comptroller nevertheless approved the merger, finding that the agencies had defined the product and geographic markets too narrowly. He treated not Phillipsburg-Easton but most of the Lehigh Valley as the relevant geographic area, and evaluated competition from 34 finance companies and 13

savings and loan institutions, as well as from the more than 30 commercial banks in the area. The Comptroller concluded that the merger would have no significant anticompetitive effect and, further, that it would enable the resultant bank to serve more effectively the convenience and needs of the community.

II

The Product Market

In *Philadelphia Bank* we said 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." 374 U. S., at 356. As indicated, PNB and SNB offer the wide range of products and services customarily provided by commercial banks. The District Court made no contrary finding, and, in its actual evaluation of the effect of the merger upon competition, the court looked only to commercial banking as the relevant product market. See 306 F. Supp., at 655–661.

Earlier in its opinion, however, the District Court appeared to reject commercial banking as the appropriate line of commerce. Rather than focusing its attention upon the effect of the merger in diminishing competition among commercial banks, the court emphasized the competition between PNB–SNB and other types of financial institutions—for example, savings and loan associations, pension funds, mutual funds, insurance, and finance companies. The court expressed its view that "[i]n terms of function the defendant banks are more comparable to savings institutions than to large commercial banks," 306 F. Supp., at 648, and continued: "So, while the term 'commercial banking' may be used to designate the general line of commerce embracing all bank services, attention must be given in analysis of

competition to different groupings within the line of commerce separating those products and services where absence of competition may be significant from those in which competition from many sources is so widespread that no question of significant diminution of competition by the merger could be raised." 306 F. Supp., at 650–651.

The District Court erred. It is true, of course, that the relevant product market is determined by the nature of the commercial entities involved and by the nature of the competition that they face. See, *e. g.*, *United States* v. *Continental Can Co.*, 378 U. S. 441, 456–457 (1964). Submarkets such as the District Court defined would be clearly relevant, for example, in analyzing the effect on competition of a merger between a commercial bank and another type of financial institution. But submarkets are not a basis for the disregard of a broader line of commerce that has economic significance. See, *e. g.*, *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 326 (1962).

Philadelphia Bank emphasized that it is the *cluster* of products and services that full-service banks offer that as a matter of trade reality makes commercial banking a distinct line of commerce. Commercial banks are the only financial institutions in which a wide variety of financial products and services—some unique to commercial banking and others not—are gathered together in one place. The clustering of financial products and services in banks facilitates convenient access to them for all banking customers. For some customers, full-service banking makes possible access to certain products or services that would otherwise be unavailable to them; the customer without significant collateral, for example, who has patronized a particular bank for a variety of financial products and services is more likely to be able to obtain a loan from that bank than from a specialty financial institution to which he turns simply to borrow

money. In short, the cluster of products and services termed commercial banking has economic significance well beyond the various products and services involved.[4]

Customers of small banks need and use this cluster of services and products no less than customers of large banks. A customer who uses one service usually looks to his bank for others as well, and is encouraged by the bank to do so. Thus, as was the case here, customers are likely to maintain checking and savings accounts in the same local bank even when higher savings interest is available elsewhere. See also *Philadelphia Bank, supra,* at 357 n. 34. This is perhaps particularly true of banks patronized principally by small depositors and borrowers for whom the convenience of one-stop banking and the advantages of a good relationship with the local banker—and thus of favorable consideration for loans—are especially important. See *id.,* at 358 n. 35, 369.

Moreover, if commercial banking were rejected as the line of commerce for banks with the same or similar ratios of business as those of the appellee banks, the effect would likely be to deny customers of small banks—and thus residents of many small towns—the antitrust protection to which they are no less entitled than customers

[4] See also our statement in *Philadelphia Bank, supra,* at 356–357, that "[s]ome commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies' rates are invariably much higher than the banks'. . . . Finally, there are banking facilities which, although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits."

of large city banks. Indeed, the need for that protection may be greater in the small town since, as we have already stated, commercial banks offering full-service banking in one institution may be peculiarly significant to the economy of communities whose population is too small to support a large array of differentiated savings and credit businesses.

III

The Relevant Geographic Market

In determining the relevant geographic market, we held in *Philadelphia Bank, supra,* at 357, that "[t]he proper question to be asked . . . is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. . . . This depends upon 'the geographic structure of supplier-customer relations.'" More specifically we stated that "the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies . . . .*'" *Id.,* at 359.

The District Court selected as the relevant geographic market an area approximately four times as large as Phillipsburg-Easton, with a 1960 population of 216,000 and 18 banks. The area included the city of Bethlehem, Pennsylvania. 306 F. Supp., at 652–653, 656–658. The court explicitly rejected the claim of the United States that Phillipsburg-Easton constitutes the relevant market. We hold that the District Court erred.

Commercial realities in the banking industry make clear that banks generally have a very localized business. We observed in *Philadelphia Bank, supra,* at 358, that "[i]n banking, as in most service industries, convenience of location is essential to effective competition. Individ-

uals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance. . . . The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries." In locating "the market area in which the seller operates," it is important to consider the places from which it draws its business, the location of its offices, and where it seeks business. As indicated, the appellee banks' deposit and loan statistics show that in 1967 they drew over 85% of their business from the Phillipsburg-Easton area and, of that, only about 10% from Easton. It has been noted that nearly every family in Phillipsburg deals with one of the city's three banks, and the town's businessmen prefer to do the same. All of PNB and SNB's banking offices are located within Phillipsburg or its immediate suburbs; although the city is sufficiently small that there is easy access to its downtown area where the banks have their main offices, the banks found it necessary to open branches in the suburbs because, as a witness testified, that is "where the customers are." See also *Philadelphia Bank, supra,* at 358 n. 35. The "one town" banks generally compete for deposits within a radius of only a few miles.

The localization of business typical of the banking industry is particularly pronounced when small customers are involved. We stated in *Philadelphia Bank, supra,* at 361, that "in banking the relevant geographical market is a function of each separate customer's economic scale"—that "the smaller the customer, the smaller is his banking market geographically," *id.,* at 359 n. 36. Small depositors have little reason to deal with a bank other than the one most geographically convenient to them. For such persons, geographic convenience can be a more powerful influence than the availability of a higher rate of interest at a more distant, though still nearby,

bank. The small borrower, if he is to have his needs met, must often depend upon his community reputation and upon his relationship with the local banker. PNB, for instance, has made numerous unsecured loans on the basis of character, which are difficult for local borrowers to get elsewhere. And, as we said in *Philadelphia Bank, supra,* at 369, "[s]mall businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs. . . . If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish." Thus, the small borrower frequently cannot "practicably turn for supplies" outside his immediate community; and the small depositor—because of habit, custom, personal relationships, and, above all, convenience—is usually unwilling to do so. See *id.,* at 357 n. 34. The patrons of PNB and SNB, of course, are small customers: almost 75% of the banks' deposits are for amounts less than $1,000, and virtually all of their loans are for less than $10,000, most falling below $2,500.

We observed in *Philadelphia Bank, supra,* at 361, that we were helped to our conclusion regarding geographic market "by the fact that the three federal banking agencies regard the area in which banks have their offices as an 'area of effective competition.'" Here the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Attorney General found that a relevant banking market exists in the Phillipsburg-Easton area and that the proposed merger's competitive effect should be judged within it.[5] We agree. We find that the evidence

[5] The Government initially sought to show that Phillipsburg alone constituted the relevant geographic market. After the District Court rejected that proposal, the Government supported Phillipsburg-Easton and environs as the appropriate market and continues to do so in this Court.

shows that Phillipsburg-Easton constitutes a geographic market in which the proposed merger's effect would be "direct and immediate." It is the market area in which PNB and SNB operate, and, as a practical matter, it is the area in which most of the merging banks' customers must, or will, do their banking. Thus, we hold that the District Court mistakenly rejected the Government's contention that Phillipsburg-Easton is an appropriate "section of the country" under § 7.

Appellee banks argue that Phillipsburg-Easton "cannot conceivably be considered a 'market' for antitrust purposes," on the ground that it is not an "economically significant section of the country." They cite our language in *Brown Shoe, supra,* at 320, that "[t]he deletion of the word 'community' in the original [Clayton] Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant 'section' of the country." In *Brown Shoe,* however, we found "relevant geographic markets" in cities "with a population exceeding 10,000 and their environs." *Id.,* at 339. Phillipsburg-Easton and their immediate environs had a population of almost 90,000 in 1960. Seven banks compete for their business. This market is clearly an economically significant section of the country for the purposes of § 7.

IV

The Anticompetitive Effects of the Merger

We turn now to the ultimate question under § 7: whether the effect of the proposed merger "may be substantially to lessen competition." We pointed out in *Philadelphia Bank, supra,* at 362, that a prediction of anticompetitive effects "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 unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. . . . So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. . . . And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." We stated in *Brown Shoe, supra,* at 315, that "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." In *Philadelphia Bank, supra,* at 363, we held that "[t]his intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects." That principle is applicable to this case.

The commercial banking market in Phillipsburg-Easton is already concentrated. Of its seven banks, the two largest in 1967—Easton National Bank and Lafayette Trust Co.—had 49% of its total banking assets, 56% of its total deposits, 49% of its total loans and seven of its 16 banking offices. Easton National is itself the product of the merger of two smaller banks in 1959. The union of PNB–SNB would, in turn, significantly

increase commercial banking concentration in "one town." The combined bank would become the second largest in the area, with assets of over $41,100,000 (19.3% of the area's assets), total deposits of $38,400,000 (23.4%), and total loans of $24,900,000 (27.3%). The assets held by the two largest banks would then increase from 49% to 55%, the deposits from 56% to 65%, the loans from 49% to 63%, and the banking offices from seven to 10. The assets held by the three largest banks would increase from 60% to 68%, the deposits from 70% to 80%, the loans from 64% to 76%, and the banking offices from 10 to 12. In Phillipsburg alone, of course, the impact would be much greater: banking alternatives would be reduced from three to two; the resultant bank would be three times larger than the only other remaining bank, and all but two of the banking offices in the city would be controlled by one firm. Thus, we find on this record that the proposed merger, if consummated, "is . . . inherently likely to lessen competition substantially." Cf. *Philadelphia Bank, supra; Nashville Bank, supra; United States* v. *Von's Grocery Co.*, 384 U. S. 270 (1966); *United States* v. *Pabst Brewing Co.*, 384 U. S. 546 (1966).

Appellee banks argue that they are presently so small that they lack the personnel and resources to serve their community effectively and to compete vigorously. Thus, they contend that the proposed merger could have procompetitive effects: by enhancing their competitive position, it would stimulate other small banks in the area to become more aggressive in meeting the needs of the area and it would enable PNB–SNB to meet an alleged competitive challenge from large, outside banks. Although such considerations are certainly relevant in determining the "convenience and needs of the community" under the Bank Merger Act, they are not persuasive in the context of the Clayton Act. As we said in *Philadelphia Bank, supra,* at 371, for the purposes of § 7, "a merger the effect

of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."

The District Court stated: "Ease of access to the market is also a factor that deserves consideration in evaluating the anticompetitive effects of a merger. It is not difficult for a small group of business men to raise sufficient capital to establish a new small bank when the banking needs of the community are sufficient to warrant approval of the charter." 306 F. Supp., at 659. Appellees, however, made no attempt to show that a group of businessmen would move to start a new bank in Phillipsburg-Easton, should the proposed merger be approved. The banking laws of New Jersey and Pennsylvania severely restrict the capacity of existing banks to establish operations in "one town." Relying on a recent New Jersey banking statute, N. J. Stat. Ann. § 17:9A–19 (Supp. 1969), appellees contend that "[t]here is no doubt that the three banks in Phillipsburg . . . are fair game for attractive merger proposals by the large banks from Bergen, Passaic, Essex, Hudson and Morris Counties." But, as the District Court pointed out, "Large city banks in Newark and in other well populated cities in the counties mentioned can now establish branch banks in Warren County [only] in any municipality in which no banking institution has its principal office or a branch office and in any municipality which has a population of 7,500 or more where no banking institution has its principal office . . . ." 306 F. Supp., at 660. Thus, mergers under § 17:9A–19 are possible in Phillipsburg only with the three banks now in existence there. Accordingly, mergers under this statute would not bear upon the anticompetitive effects in question, because they could not increase the number of banking alternatives in "one town."

Since the decision below, the Court of Appeals for the Third Circuit has held that a national bank may avoid the New Jersey bar against branching, N. J. Stat. Ann. § 17:9A–19 (B)(3) (Supp. 1969), by moving its headquarters into a protected community, such as Phillipsburg, while simultaneously reopening its former main office as a branch. *Ramapo Bank* v. *Camp,* 425 F. 2d 333 (1970). We intimate no view upon the correctness of that decision. We do observe, however, that the District Court decision in *Ramapo Bank,* affirmed in the recent Court of Appeals ruling, was handed down almost five months before the present District Court decision. Both opinions were written by the same District Judge. Accordingly, had an outside national bank been interested in moving its main office to Phillipsburg, no doubt this fact would have been made known to the District Court or to this Court. Nothing in the present record suggests that any national bank now located outside Phillipsburg will apply to move its main office to that city; therefore, on the record before us, that possibility does not bear on the anticompetitive effects of the merger.

V

Meeting the Convenience and Needs of the Community

The District Court's errors necessarily require reexamination of its conclusion that any anticompetitive effects caused by the proposed merger would be outweighed by the merger's contribution to the community's convenience and needs. The District Court's conclusion, moreover, is undermined by the court's erroneous application of the convenience-and-needs standard. In the balancing of competitive effect against benefit to community convenience and needs, "[t]o weigh ade-

quately one of these factors against the other requires a proper conclusion as to each." *Nashville Bank, supra,* at 183.

The District Court misapplied the convenience-and-needs standard by assessing the competitive effect of the proposed merger in the broad, multi-community area that it adopted as the relevant geographic market, while assessing the merger's contribution to community convenience and needs in Phillipsburg alone. Appellees argue that "[n]owhere does the district court equate 'community' with Phillipsburg." We disagree. In determining convenience and needs, the court stated that "[t]here are two banking services which must be improved in the area to satisfy present and rapidly increasing need. Lending limits of the small banks are not sufficient to satisfy loan requirements for substantial industrial and commercial enterprise. . . . There is a definite lack of competent trust service and . . . servicing of substantial trust accounts must be obtained outside the community . . . . If the merger is approved, the merged bank can establish [loan and trust] departments and staff them with personnel capable of the kind of loan and trust service that patrons must, in large part, now seek outside the community." 306 F. Supp., at 661. The court then cited examples of persons in Phillipsburg who found the existing loan and trust services in that city inadequate. *Id.,* at 662–666. Since several Easton banks already provide appreciable trust services and have legal lending limits greater than those of PNB–SNB combined, it is obvious that the court was primarily concerned with loan and trust possibilities in Phillipsburg. We hold, however, that evaluation must be in terms of the convenience and needs of Phillipsburg-Easton as a whole.

Section 1828 (c)(5)(B) provides that "any . . . proposed merger transaction whose effect in any section of

the country may be substantially to lessen competition . . . [shall not be approved by the responsible banking agency] unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Representative Reuss explained during debate on the Bank Merger Act that "[w]hat is meant by [§ (c)(5)(B)] and what counts is the effect of the transaction in meeting the needs and conveniences of the community which that particular sought-to-be merged bank serves." 112 Cong. Rec. 2457. He indicated that "in a community having say, 10 banks of relatively equal size, and where one of the banks was in difficulty—say with regard to a problem of management succession—the 'convenience and needs of the community' would be best served if that bank were permitted to merge with one of the other 9 banks despite some resulting anticompetitive effects." *Id.*, at 2445.

These comments support our conclusion that the geographic market—the "community which that particular sought-to-be merged bank serves"—is the area in which convenience and needs must be evaluated. Commercial realities, moreover, make clear that the "community to be served" is virtually always as large, or larger, than the geographic market. Although the area in which merging banks compete while they are still separate entities is often smaller than the area in which the resultant bank will compete, it is rare that the community served by a merged bank is smaller than that served by its constituent firms prior to their merger. Further, evaluation of convenience and needs in an area smaller than the geographic market could result in the approval of a merger that, though it has anticompetitive effects throughout the market, has countervailing beneficial impact in only part of the market. Under the approach

taken by the District Court, anticompetitive effects in some parts of a relevant geographic market could be justified by community benefits in other parts of it. Such a result would subvert the clear congressional purpose in the Bank Merger Act that convenience and needs not be assessed in only a part of the community to be served, and such a result would unfairly deny the benefits of the merger to some of those who sustain its direct and immediate anticompetitive effects.[6] Cf. *Philadelphia Bank, supra,* at 370. Accordingly, we hold that the District Court erred in failing to assess the proposed merger's effect in terms of the convenience and needs of the relevant geographic market.

We held in *Nashville Bank, supra,* at 190, that "before a merger injurious to the public interest is approved, a showing [must] be made that the gain expected from the merger cannot reasonably be expected through other means." Thus, before approving such a merger, a district court must "reliably establish the unavailability of alternative solutions to the woes" faced by the merging banks. *Ibid.* Accordingly, on remand, the District Court should consider in concrete detail the adequacy of attempts by PNB and SNB to overcome their loan, trust, and personnel difficulties by methods short of their own merger. Beyond careful consideration of alternative methods of serving the convenience and needs of Phillipsburg-Easton, the court should deal specifically with whether the proposed merger is likely to benefit all seekers of banking services in the community, rather than simply those interested in large loan and trust services.

The judgment of the District Court is reversed and the

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[6] We do not suggest that it would be inappropriate to focus on the convenience and needs of a segment of the geographic market so long as benefits to that segment would accrue to the entire market. We intimate no view of the weight to be attached to benefits that may accrue to areas beyond the relevant market.

case is remanded for further proceedings consistent with this opinion. No costs shall be assessed against appellee banks.

It is so ordered.

MR. JUSTICE STEWART took no part in the decision of this case, and MR. JUSTICE BLACKMUN took no part in its consideration or decision.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

My first reaction to this case, from the vantage point of what is depicted in the record and briefs, was wonderment that the Department of Justice had bothered to sue. How could that agency of government, I asked myself, be efficiently allocating its own scarce resources if it chose to attack a merger between two banks as small as those involved in this case? When compared with any of the 10 prior cases in which a bank merger was contested, the total assets of the bank that would result from this merger are minuscule.[1] Moreover, measured by trust

[1] The Appendix (at 831) contains the following table (somewhat modified herein) showing, *inter alia,* the total assets of the resulting banks in the contested bank merger cases initiated up to the time of suit in this case.

CONTESTED SECTION 7 BANK MERGER CASES: ASSETS

Case	*Assets (in millions)*
1. Manufacturers Hanover	$6,001.8
2. Continental Illinois	3,248.3
3. Crocker-Citizens	3,217.4
4. California Bank—First Western	2,421.2
5. Philadelphia National Bank	1,805.3
6. Provident—Central Penn	1,069.1
7. First City—Southern National (Houston)	1,042.9
8. Mercantile Trust—Security Trust	1,040.4
9. Third National—Nashville Bank & Trust	428.2
10. First National—Cooke Trust Company	389.7
11. Phillipsburg National—Second National	41.1

assets, the Phillipsburg National Bank in 1968 ranked 1346th and the Second National Bank of Phillipsburg 2429th out of the approximately 3100 banks with trust powers in the United States. If the two banks were merged, the resulting bank would have ranked 1323d—only 23 places ahead of the Phillipsburg National alone.[2] With tigers still at large in our competitive jungle, why should the Department be taking aim at such small game?

The Court's disposition of this case provides justification enough *from the Department's point of view.* After today's opinion the legality of every merger of two directly competing banks—no matter how small—is placed in doubt if a court, through what has become an exercise in "antitrust numerology," *United States* v. *First National Bank & Trust Co. of Lexington,* 376 U. S. 665, 673 (1964) (HARLAN, J., dissenting), concludes that the merger "produces a firm controlling an undue percentage share of the relevant market," *ante,* at 366.

I

Under the Bank Merger Act it is now settled that a court must engage in a two-step process in order to decide whether a proposed merger passes muster. First, the effect of the merger upon competition must be evaluated, applying the standards under § 7 of the Clayton Act, *United States* v. *Third National Bank in Nashville,* 390 U. S. 171, 181–183 (1968). If there would be a violation, the court must then proceed to decide whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." [3]

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[2] App. 840.

[3] Bank Merger Act of 1966, amending § 18 (c) (5) (B) of the Federal Deposit Insurance Act, 12 U. S. C. § 1828 (c) (5) (B) (1964 ed., Supp. V). I do not quarrel with the Court's conclusion that

For the first stage of the analysis, the Court appears to decide whether the effect of this proposed merger "may be substantially to lessen competition" by the following process: First, the Court defines the relevant product market as commercial banking. Second, it defines the geographic market as Phillipsburg-Easton.[4] The Court next calculates the percentage share of this market that would be held by the proposed merged bank,[5] and the resulting changes in "concentration," as measured by the percent of market held by the two largest[6] and three largest banks.[7] It appears that from the magnitude of these figures alone, the Court concludes that the proposed merger would "significantly increase commercial banking

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the District Court improperly analyzed "convenience and needs," in the second stage, because of its erroneous choice of Phillipsburg alone as the relevant "community."

[4] I accept the Court's conclusion that the appropriate geographic market here is the Phillipsburg-Easton area, and agree that the geographic market designated by the District Court was too broad, given the small size of the banks involved in this case.

[5] PERCENTAGE OF PHILLIPSBURG-EASTON MARKET HELD BY MERGED BANKS

Bank Assets	19.3
Total Deposits	23.4
Total Loans	27.3

[6] PERCENTAGE OF PHILLIPSBURG-EASTON MARKET HELD BY TWO LARGEST BANKS

	Before	*After*	*Change*
Bank Assets	49	55	6
Total Deposits	56	65	9
Total Loans	49	63	14

[7] PERCENTAGE OF PHILLIPSBURG-EASTON MARKET HELD BY THREE LARGEST BANKS

	Before	*After*	*Change*
Bank Assets	60	68	8
Total Deposits	70	80	10
Total Loans	64	76	12

concentration" in an "already concentrated" market.[8] On the basis of the magnitude of these figures alone the Court concludes that this merger would violate § 7 of the Clayton Act.

I have voiced my disagreement before, particularly in the banking field, with the " 'numbers game' test for determining Clayton Act violations," *United States* v. *Third National Bank, supra,* at 193 (HARLAN, J., concurring in part and dissenting in part); see *United States* v. *First National Bank, supra,* at 673 (HARLAN, J., dissenting). Although I consider myself bound by the Court's

[8] It is significant to note that the percentage figures in this case are themselves *smaller,* on the whole, than those found either in the *Philadelphia Bank* case *supra,* or *Third National Bank* case, *supra.*

PERCENTAGE OF TOTAL ASSETS IN RELEVANT MARKET HELD BY MERGED BANKS

This case		19.3
Third Nat. Bank		38.4
Philadelphia Bank	(at least 30%)	36*

PERCENTAGE OF TOTAL ASSETS IN RELEVANT MARKET HELD BY TWO LARGEST BANKS

	Before	*After*
This case	49	55
Third Nat. Bank	72	77
Philadelphia Bank	44	59

PERCENTAGE OF TOTAL ASSETS IN RELEVANT MARKET HELD BY THREE LARGEST BANKS**

	Before	*After*
This case	60	68
Third Nat. Bank	93	98

*For purposes of its holding in *Philadelphia Bank,* the Court "shade[d]" the 36% figure downward to "at least 30%" to compensate for the approximate nature of certain assumptions implicit in the manner in which it calculated the market shares, see *Philadelphia Bank, supra,* at 364 and n. 40.

**Because *Philadelphia Bank* involved a merger between the second and third largest banks, the percentage held by the three largest was not used in that case.

decision in *Philadelphia Bank,* see *United States* v. *Third National Bank, supra,* at 193, I cannot concur in the simplistic way in which the Court applies the numbers test here.

Philadelphia Bank did not hold that all bank mergers resulting in an "undue percentage share of the relevant market" and "in a significant increase in the concentration of firms in that market," 374 U. S., at 363, *necessarily* violated § 7 of the Clayton Act. Instead that case established a rule by which the percentage figures alone do no more than "raise an inference," *id.,* at 365, that the merger will significantly lessen competition. *Philadelphia Bank* left room, however, for the merging companies to show that the "merger is not likely to have such anticompetitive effects," *id.,* at 363. In short, under the *Philadelphia Bank* test, the percentage figures create a rebuttable presumption of illegality.

In this case there are two aspects of market structure, each largely ignored by the Court, that I think might well rebut the presumption raised by the percentage figures that the merger will have a significant effect on competition. Consequently, I think the appellees should on remand be given an opportunity to show by "clear evidence" that despite the percentage figures, the anticompetitive effects of this merger are not significant.

II

The first of these aspects of the market structure concerns "entry." The percentage figures alone tell nothing about the conditions of entry in a particular market. New entry can, of course, quickly alleviate "undue" concentration. And the possibility of entry can act as a substantial check on the market power of existing competitors.

Entry into banking is not simply governed by free market conditions, of course, for it is also limited by reg-

ulatory laws. When the complaint in this case was filed, entry into the Phillipsburg-Easton market was very much restricted by both the Pennsylvania and New Jersey banking statutes.[9] However, a recent change in the New Jersey statute [10] together with a new opinion of the Court of Appeals for the Third Circuit rendered since the trial in this case,[11] appears to increase considerably the possibility of new entry into Phillipsburg. For the first time it may be possible for any national bank already operating anywhere in the northern region of New Jersey to open, under certain circumstances, a new office in Phillipsburg.[12]

If one assumes the regulatory barriers to entry have been permanently lowered, it would seem that the competitive significance of this merger may well be con-

[9] New Jersey, at the time suit was filed here, (1) prohibited the merger of banks located in different counties; (2) restricted branch banking to the county in which the parent bank was located; (3) precluded branching altogether into cities in which another bank had a "principal office" (*i. e.*, home office), or into communities in which a bank or branch was already located. See N. J. Stat. Ann. § 17:9A–19 (B) (1963).

[10] On July 17, 1969, a new banking statute came into effect that regulates, not on the basis of counties, but instead on the basis of three banking districts, of which Phillipsburg is in the first. District-wide *de novo* branching and mergers are authorized, subject to a "principal office" protection provision, N. J. Stat. Ann. § 17:9A–19 (B)(3) (Supp. 1970).

[11] *Ramapo Bank* v. *Camp*, 425 F. 2d 333 (C. A. 3d Cir. 1970). I intimate, of course, no views concerning the correctness of this decision.

[12] Because Phillipsburg is the location of a home office, the home-office protection proviso might be thought to preclude *de novo* branching there. However, the *Ramapo Bank* decision of the Third Circuit, *supra*, held that a national bank, by moving its main office into a protected community while simultaneously reopening its former main office as a branch, could avoid the operation of the "home-office protection" proviso of the New Jersey law. Under *Ramapo*, therefore, it is possible for any national bank willing to shift its "home office" to Phillipsburg to enter that market.

siderably overstated by the percentage figures alone. Certainly new entry into the market involved in this case would be both easier and of much greater competitive significance than in the *Philadelphia Bank* market. In a market dominated by banks of enormous absolute size, with assets of hundreds of millions and even billions of dollars, it is of course unlikely that a new entrant will quickly become a substantial competitive force. The same is not true, however, of a market in which the largest competitor is, in absolute terms, rather small.

In short, I think the significance of the percentage figures recited in the Court's opinion can only be fully evaluated after consideration of the present entry conditions in the Phillipsburg-Easton area. Because of the new developments in the New Jersey regulation of banking that have occurred since the trial of this case, I think it inexcusable of the majority not to give the appellee banks an opportunity on remand to demonstrate whether there is now a substantial possibility of new entry, and if so, what effect that possibility would have on the market power of the combined bank.[13]

III

Quite apart from entry, there is another aspect of the market structure relevant here that affects the significance of the percentage figures cited by the Court. Relying on *Philadelphia Bank,* the Court concludes that

[13] It is simply untenable for the majority to ignore the bearing of this issue on the "anticompetitive effect" of this merger on the ground that "[n]othing in the present record suggests that any national bank now located outside Phillipsburg will apply to move its main office to that city," *ante,* at 369. At the time the present record was developed, existing law rendered that inquiry irrelevant. Moreover, the District Court found, quite apart from entry, that the proposed merger had no significant anticompetitive effect. It is therefore quite inappropriate for the majority to suggest that the failure of the District Court to reopen the record in light of its *Ramapo* decision is of any significance.

the "cluster of products . . . and services . . . denoted by the term 'commercial banking' . . . composes a distinct line of commerce" for purposes of this case. The Court eschews all analysis of the *composition* of the products and services offered by appellee banks, however. The Court thus manages to ignore completely the extent to which competition from savings and loan companies, mutual savings banks, and other financial institutions that are not commercial banks affects the market power of the appellee banks.

A closer analysis of what the merging banks here do, plainly shows that they have more in common with savings and loan institutions and mutual savings banks than with the big city commercial banks considered in *Philadelphia Bank*. In particular, a much higher percentage of the total deposits of the banks here comes from savings accounts as opposed to demand deposits than is true of big city commercial banks.[14] Moreover, a much larger proportion of the total loans of these small banks is in the form of real estate or personal loans as opposed to commercial loans.[15] Savings and

[14] TIME AND SAVINGS DEPOSITS AND DEMAND DEPOSITS AS PERCENTAGE OF TOTAL DEPOSITS

	Time & Savings	*Demand*
PNB	71	29
SNB	72	28
Large Bank Average*	45	55

*The average for 341 banks with assets over $100 million which submit weekly reports to the Federal Reserve Board.

Calculated from App. 788.

[15] REAL ESTATE LOANS AND PERSONAL LOANS AS PERCENTAGE OF TOTAL LOANS

	Real Estate	*Personal*	*Combined*
PNB	54	28	82
SNB	72	14	86
Large Bank Average**	14	8	22

**See n. 14, *supra*.

Calculated from App. 788.

loan companies, savings banks, credit unions, etc., are of much greater competitive significance in this market than in the market analyzed in *Philadelphia Bank*. For in this market, these nonbank financial institutions offer close substitutes for the products and services that are most important to the appellee banks.

In choosing its product market, the Court largely ignores these subtleties and instead emphasizes the *cluster* of services and products which in the Court's words "makes commercial banking a distinct line of commerce." Because the Court does not explain why that combination has any substantial synergistic effect, cf. *Anderson's-Black Rock, Inc.* v. *Pavement Salvage Co., Inc.*, 396 U. S. 57, 61 (1969), the Court's choice of a product market here can be seriously questioned. Certainly a more discriminating conclusion concerning the antitrust implication of this merger could be made if separate concentration percentages were calculated for each of the important products and services provided by appellee banks, and then an overall appraisal made of the effect of this merger on competition.

In any event, even assuming that for purposes of a preliminary analysis one were to use commercial banking as the line of commerce for the antitrust analysis—if only for the sake of convenience—that does not excuse the majority's failure to consider the competitive realities of the case in appraising the *significance* of the concentration percentages thus calculated, see *United States* v. *First National Bank of Maryland*, 310 F. Supp. 157, 175 (D. C. Md. 1970). The bare percentages *themselves* are not affected by the presence or absence of significant competition for important bank products or services from firms outside commercial banking. By treating these percentages as no different from those found in *Philadelphia Bank*, the Court blithely assumes that percentages of the same order of magnitude represent the same

degree of market power, irrespective of the amount of competition from neighboring markets.

Seen another way, the Court's mode of analysis makes too much turn on the all-or-nothing determination that the relevant product market either includes or does not include products and services of savings and loan companies, and other competition. A far better approach would be to recognize the fact that a product or geographic market is at best an approximation—necessary to calculate some percentage figures. In evaluating such figures, however, the Court should not decide the case simply by the magnitude of the numbers alone—it should give the appellees on remand an opportunity to demonstrate that the numbers here significantly "overstate" the competitive effects of this merger because of the approximate nature of the assumptions underlying the Court's definition of the relevant market.

In short, I think that this case should be remanded to the District Court so that it might re-evaluate whether, in light of the entry conditions and existing competition from savings and loan and similar financial institutions, the merger can fairly be said to threaten a substantial loss of competition in the Phillipsburg-Easton area. Cf. *White Motor Co.* v. *United States,* 372 U. S. 253 (1963). If the District Court concludes that the merger would so threaten competition, it should then, in the manner the Court's opinion suggests, proceed to decide whether there are countervailing public interest advantages.

Syllabus

GUNN, SHERIFF, ET AL. *v.* UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 7. Argued January 13–14, 1969—Reargued April 29–30, 1970—Decided June 29, 1970

Several appellees, who were protesting American participation in the Vietnam conflict at the edge of a crowd attending a speech by President Johnson in Texas, were arrested and charged with disturbing the peace, in violation of Tex. Pen. Code, Art. 474. Nine days later they brought this action against appellant state officials asking that a three-judge district court be convened, that enforcement of Art. 474 be enjoined, and that it be declared unconstitutional. A few days later the state charges were dismissed, on the ground that appellees' conduct had occurred on a military enclave over which Texas had no jurisdiction. The three-judge court thereafter issued a *per curiam* opinion, concluding that Art. 474 "is . . . unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded . . . . However, . . . the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session . . . of the Texas legislature . . . ." Appellants appealed directly to this Court under 28 U. S. C. § 1253. *Held:* Since the District Court has issued neither an injunction nor an order granting or denying one, this Court has no jurisdiction under § 1253, which provides for review of orders granting or denying interlocutory or permanent injunctions. Pp. 386–391.

289 F. Supp. 469, dismissed.

David W. Louisell argued the cause for appellants on the original argument and on the reargument. With him on the brief on the reargument were *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Robert C. Flowers* and *Howard M. Fender,* Assistant Attorneys General, and *Charles Alan Wright.* On the brief on the original argu-

ment were *Messrs. Martin, Flowers,* and *Fender,* and *Miss White.*

Sam Houston Clinton, Jr., argued the cause for appellees on the original argument and on the reargument. With him on the brief were *Morton Stavis, Arthur Kinoy,* and *William M. Kunstler.*

MR. JUSTICE STEWART delivered the opinion of the Court.

On December 12, 1967, President Lyndon Johnson made a speech in Bell County, Texas, to a crowd of some 25,000 people, including many servicemen from nearby Fort Hood. The individual appellees[1] arrived at the edge of the crowd with placards signifying their strong opposition to our country's military presence in Vietnam. Almost immediately after their arrival, they were set upon by members of the crowd, subjected to some physical abuse, promptly removed from the scene by military police, turned over to Bell County officers, and taken to jail. Soon afterwards, they were brought before a justice of the peace on a complaint signed by a deputy sheriff, charging them with "Dist the Peace." They pleaded not guilty, were returned briefly to jail, and were soon released on $500 bond.

Nine days later they brought this action in a federal district court against Bell County officials, asking that a three-judge court be convened, that enforcement of the state disturbing-the-peace statute be temporarily and permanently enjoined, and that the statute be declared unconstitutional on its face, "and/or as applied to the

[1] The appellee University Committee to End the War in Viet Nam is an unincorporated association centered in Austin, Texas. The individual appellees are two members of the association and one nonmember who is sympathetic with its purposes.

conduct of the Plaintiffs herein." The statute in question is Article 474 of the Texas Penal Code, which then provided as follows:

> "Whoever shall go into or near any public place, or into or near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200)."

A few days after institution of the federal proceedings the state charges were dismissed upon motion of the county attorney, because the appellees' conduct had taken place within a military enclave over which Texas did not have jurisdiction. After dismissal of the state charges the defendants in the federal court filed a motion to dismiss the complaint on the ground that "no useful purpose could now be served by the granting of an injunction to prevent the prosecution of these suits because same no longer exists." The appellees filed a memorandum in opposition to this motion, conceding that there was no remaining controversy with respect to the prosecution of the state charges, but asking the federal court nonetheless to retain jurisdiction and to grant injunctive and declaratory relief against the enforcement of Article 474 upon the ground of its unconstitutionality. A stipulation of facts was submitted by the parties, along with memoranda, affidavits, and other documentary material.

With the case in that posture, the three-judge District Court a few weeks later rendered a *per curiam* opinion,

expressing the view that Article 474 is constitutionally invalid, 289 F. Supp. 469. The opinion ended with the following final paragraph:

> "We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements." 289 F. Supp., at 475.

The defendants took a direct appeal to this Court, relying upon 28 U. S. C. § 1253, and we noted probable jurisdiction. 393 U. S. 819. The case was originally argued last Term, but was, on June 16, 1969, set for reargument at the 1969 Term. 395 U. S. 956. Reargument was held on April 29 and 30, 1970. We now dismiss the appeal for want of jurisdiction.

The jurisdictional statute upon which the parties rely, 28 U. S. C. § 1253, provides as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The statute is thus explicit in authorizing a direct appeal to this Court only from an order of a three-

judge district court "granting or denying . . . an interlocutory or permanent injunction." Earlier this Term we had occasion to review the history and construe the meaning of this statute in *Goldstein* v. *Cox,* 396 U. S. 471. In that case a divided Court held that the only *interlocutory* orders that this Court has power to review under § 1253 are those granting or denying *preliminary* injunctions. The present case, however, involves no such refined a question as did *Goldstein.* For here there was no order of any kind either granting or denying an injunction—interlocutory or permanent. Cf. *Rockefeller* v. *Catholic Medical Center,* 397 U. S. 820; *Mitchell* v. *Donovan,* 398 U. S. 427. All that the District Court did was to write a rather discursive *per curiam* opinion, ending with the paragraph quoted above.[2] Although the Texas Legislature at its next session took no action with respect to Article 474, the District Court entered no further order of any kind. And even though the question of this Court's jurisdiction under § 1253 was fully exposed at the original oral argument of this case, the District Court still entered no order and no injunction during the 15-month period that elapsed before the case was argued again.

What we deal with here is no mere technicality. In *Goldstein* v. *Cox, supra,* we pointed out that: "This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.' *Phillips* v. *United States* [312 U. S. 246], at 250. See *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 375

[2] The court did also write an "addendum" in response to a motion for a new trial. 289 F. Supp., at 475.

(1949); *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 321 (1926)." 396 U. S., at 478. But there are underlying policy considerations in this case more fundamental than mere economy of judicial resources.

One of the basic reasons for the limit in 28 U. S. C. § 1253 upon our power of review is that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided—a state of affairs that is conspicuously evident here. The complaint in this case asked for an injunction "[r]estraining the appropriate Defendants, their agents, servants, employees and attorneys and all others acting in concert with them from the enforcement, operation or execution of Article 474." Is that the "injunctive relief" to which the District Court thought the appellees were "entitled"? If not, what less was to be enjoined, or what more? And against whom was the injunction to run? Did the District Court intend to enjoin enforcement of all the provisions of the statute? Or did the court intend to hold the statute unconstitutional only as applied to speech, including so-called symbolic speech? Or was the court confining its attention to that part of the statute that prohibits the use, in certain places and under certain conditions, of "loud and vociferous . . . language"? The answers to these questions simply cannot be divined with any degree of assurance from the *per curiam* opinion.

Rule 65 (d) of the Federal Rules of Civil Procedure provides that any order granting an injunction "shall be specific in terms" and "shall describe in reasonable detail . . . the act or acts sought to be restrained." [3]

[3] Rule 65 (d) reads as follows:

"(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall

As we pointed out in *International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 74, the "Rule . . . was designed to prevent precisely the sort of confusion with which this District Court clouded its command." An injunctive order is an extraordinary writ, enforceable by the power of contempt. "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *Id.*, at 76.

That requirement is essential in cases where private conduct is sought to be enjoined, as we held in the *Longshoremen's* case. It is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign State. Cf. *Watson* v. *Buck*, 313 U. S. 387.[4]

The absence of an injunctive order in this case has, in fact, been fully recognized by the parties. In their motion for a new trial, the appellants pointed out to the District Court that it had given no more than "an advisory opinion." And the appellees, in their brief in this Court, emphasized that "[n]o final relief—of any

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describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

[4] This is not to suggest that lack of specificity in an injunctive order would alone deprive the Court of jurisdiction under § 1253. But the absence of any semblance of effort by the District Court to comply with Rule 65 (d) makes clear that the court did not think that its *per curiam* opinion itself constituted an order granting an injunction.

kind—has been ordered below." Accordingly, they said, "no question is now properly raised as to the precise form of federal remedy which may be granted." They asserted that "the issuance of declaratory and injunctive relief will . . . be appropriate at an appropriate time, to wit, on remand to the court below." But it is precisely because the District Court has issued neither an injunction, nor an order granting or denying one,[5] that we have no power under § 1253 either to "remand to the court below" or deal with the merits of this case in any way at all.[6]

The restraint and tact that evidently motivated the District Court in refraining from the entry of an injunctive order in this case are understandable. But when a three-judge district court issues an opinion expressing the view that a state statute should be enjoined as unconstitutional—and then fails to follow up with an injunction—the result is unfortunate at best. For when confronted with such an opinion by a federal court, state officials would no doubt hesitate long before disregarding it. Yet in the absence of an injunctive order, they are unable to know precisely what the three-judge court

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[5] Even if the opinion and subsequent inaction of the District Court could be considered a denial of an injunction because the injunctive relief demanded was not forthcoming, the appellants could not appeal from an order in their favor. *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U. S. 204 (1939).

[6] We do not decide whether the District Court's opinion might have constituted a "judgment" so as to be appealable to the Court of Appeals for the Fifth Circuit. Cf. *United States* v. *Hark*, 320 U. S. 531, 534; *United States* v. *Schaefer Brewing Co.*, 356 U. S. 227, 232–233; *Burns* v. *Ohio*, 360 U. S. 252, 254–257. See R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 45 (Wolfson & Kurland ed. 1951). In any event, we assume the District Court will now take formal action of sufficient precision and clarity to insure to any aggrieved party the availability of an appeal.

intended to enjoin, and unable as well to appeal to this Court.

It need hardly be added that any such result in the present case was doubtless unintended or inadvertent. We make the point only for the guidance of future three-judge courts when they are asked to enjoin the enforcement of state laws as unconstitutional.

The appeal is dismissed for want of jurisdiction.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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

I join the opinion of the Court but deem it appropriate to express my view that the opinion of the District Court should be viewed as having the operative effect of a declaratory judgment invalidating the Texas statute at issue in this case. The appellants were thus entitled to have this phase of the case reviewed in the Court of Appeals, but could not come directly here since our § 1253 jurisdiction is limited to appeals from injunctive orders. I agree with the Court that the opinion of the District Court cannot be construed as an order granting an injunction and that, if it amounts to an order denying an injunction, it is not appealable to this Court by the appellants.

NEW HAVEN INCLUSION CASES*

Argued March 30, 1970—Decided June 29, 1970

When this Court sustained the Penn-Central merger (389 U. S. 486), it upheld the action of the Interstate Commerce Commission (ICC) in conditioning its approval of the merger on inclusion as an operating entity of the New York, New Haven & Hartford R. Co. (New Haven), whose continued operation the ICC had found to be essential. Since 1961 the New Haven had been under reorganization proceedings under § 77 of the Bankruptcy Act and was close to financial collapse. The basic issue in these cases concerns the propriety of the financial terms for the inclusion. The ICC had remitted the parties to negotiate the terms of the inclusion, and after considering their appraisals issued its inclusion report, in which it concluded that the net liquidation value of New Haven's assets (after deducting liquidation expenses and making a discount to present worth on the basis of hypothesized receipts over the six-year period anticipated for liquidation) was $125,000,000, a figure that the ICC found "just and reasonable" as a condition of the merger under § 5 of the Interstate Commerce Act and "fair and equitable" as part of a plan of reorganization under § 77 of the Bankruptcy Act. The New Haven bondholders thereupon commenced litigation for review of the inclusion report (in its aspect as a condition of the merger) in the three-judge District Court for the Southern District of New York,

*No. 915, *New York, New Haven & Hartford Railroad Co. First Mortgage 4% Bondholders Committee* v. *United States et al.*, No. 917, *Manufacturers Hanover Trust Co., Trustee* v. *United States et al.*, and No. 921, *Chase Manhattan Bank, N. A., Trustee* v. *United States et al.*, on appeal from the United States District Court for the Southern District of New York. No. 914, *New York, New Haven & Hartford Railroad Co. First Mortgage 4% Bondholders Committee* v. *Smith, Trustee, et al.*, No. 916, *Manufacturers Hanover Trust Co., Trustee* v. *United States et al.*, No. 920, *Chase Manhattan Bank, N. A., Trustee* v. *Penn Central Co. et al.*, No. 1038, *Penn Central Co.* v. *Manufacturers Hanover Trust Co., Trustee, et al.*, and No. 1057, *United States et al.* v. *New York, New Haven & Hartford Railroad Co. First Mortgage 4% Bondholders Committee et al.*, on certiorari to the United States Court of Appeals for the Second Circuit in advance of judgment.

which was called upon to review the order under § 5 of the Interstate Commerce Act. The ICC certified to the reorganization court in Connecticut the sale of New Haven's assets to Penn Central, and the New Haven bondholders filed their objections in that court. The bondholders' group and the United States each tried to avoid duplicate litigation—the bondholders by an application in the three-judge court to enjoin the ICC's certification of its plan to the reorganization court (which was denied), and the United States by a motion to dismiss the complaints in the three-judge court (which was also denied). Each court, after hearings, concluded that New Haven's assets had been substantially undervalued and remanded the case to the ICC. The ICC then revalued New Haven's assets at a higher figure than that first reached, which, after deductions for certain factors not previously considered ("the added deductions"), came to $140,600,000. In addition, the ICC directed Penn Central to pay $5,000,000 toward New Haven's interim operating expenses. The reorganization court ordered New Haven's assets transferred to Penn Central, which was done on December 31, 1968. The bondholders filed objections to the revised evaluation with the reorganization court and brought actions against the United States and the ICC in the three-judge court. The reorganization court rejected the plan, though it accepted some of the ICC's determinations. The three-judge court sustained the plan with modifications. Though the two courts agreed on many substantial issues, the total evaluation reached by the reorganization court exceeded that reached by the three-judge court by $28,000,000. The bondholders appealed directly to this Court from the three-judge court's judgment and this Court noted probable jurisdiction. The bondholders appealed to the Court of Appeals from the order of the reorganization court; the United States, the ICC, and Penn Central cross-appealed; and this Court granted certiorari in advance of judgment. The disputed items of valuation, plus one issue affecting the consideration given by Penn Central, are as follows: (1) Though the parties have agreed that New Haven, as Penn Central's partner in the development of the Grand Central Terminal Properties, is entitled to the capitalized value of 50% of the "excess income" from those properties, the bondholders claim that no recognition has been given to New Haven's right to have its share of basic Terminal income, used to defray its share of Terminal expenses, for purposes of determining the fair price Penn Central should pay. (2) The New Haven owned two

large freight yards in the Bronx, which service important industrial enterprises in a 160-acre area and a vital municipal food market installation. The reorganization court ruled that the ICC had erred in rejecting an appraisal by a witness premised upon the yards' availability for continued industrial occupancy with existing trackage and electrical facilities, in favor of a lower appraisal based on his assumption that on New Haven's liquidation the yards would be stripped of those facilities, depressing the value of the land, and necessitating substantial removal expenses. The three-judge court approved the ICC's valuation. (3) The reorganization court rejected, but the three-judge court approved, the added deductions, one made by the ICC in the net liquidation value as an adjustment for the assumed effect of a year's anticipated delay in securing a certificate of abandonment, the other that the ICC made on the basis of a hypothetical sale of all New Haven's land assets at a bulk discount. (4) The reorganization court found that the ICC had overstated the discount for the projected six-year liquidation. (5) The ICC ordered Penn Central to assume interim losses during the actual 11-month period from merger to inclusion to the extent of a ceiling of $5,000,000 (which constituted about 61% of the total loss). The reorganization court upheld the ICC and dismissed the bondholders' contention that Penn Central bear all operating losses. (6) The bondholders attack the ICC's order that New Haven transfer to Penn Central its ownership of stock, which the ICC found worthless, in two concerns. (7) The bondholders urge that Penn Central should pay an added amount to reflect New Haven's "going-concern" value as a supplement to the liquidation value. (8) The New Haven received, in partial payment for the assets transferred to Penn Central, 950,000 shares of Penn Central common stock which were valued at $87.50 per share at the time of the valuation date used by the ICC but which had declined to $63.38 as of the inclusion date. To remedy "the unfairness [arising from] the fact that the purchaser is getting assets of sure present value while the seller is asked to gamble on the future of Penn Central," the reorganization court provided for (and the three-judge court adopted) an "underwriting" formula under which Penn Central would be called upon to make up in cash the difference between the market price of Penn Central stock in 1978 and $87.50 per share, unless before that time the market price had attained $87.50 for a five-day period. The bondholders contend that this formula fails

to cure the overvaluation. The bondholders also urge that the continued deficit operation of the New Haven from the inception of the reorganization proceeding in 1961 to the inclusion in Penn Central in 1968 resulted in their being deprived of property without just compensation in violation of the Fifth Amendment. *Held:*

1. The three-judge court erred in not granting the Government's motion to dismiss to the extent of deferring to the reorganization court in proceedings ultimately involving only the price to be paid for the assets of the debtor's estate. Pp. 419–430.

(a) The reorganization court under § 77 of the Bankruptcy Act and the ICC had full power over the debtor and its property, including the power to formulate and confirm a reorganization plan providing for sale of the debtor's property, and it would have disrupted that plan for the three-judge court to have enjoined certification of the plan by the ICC to the reorganization court. Pp. 419–421.

(b) Though transfer of the New Haven assets was also a part of the merger under § 5 of the Interstate Commerce Act, and neither court had "complete" jurisdiction when the litigation started, the statutory interrelationship between § 5 and § 77 and the ability of the reorganization court to adjudicate all the inclusion issues made it advisable for the three-judge court to have yielded to the reorganization court, in which primary jurisdiction had vested. Pp. 423–427.

(c) When the merger occurred and no question remained of Penn Central's obligation to assume the assets of New Haven, the jurisdiction of the reorganization court became "complete" and the three-judge court had virtually nothing to decide. Pp. 427–428.

2. The reorganization court is empowered by Congress to review the plan to determine whether the ICC has followed the statutory mandate that the plan be "fair and equitable" and whether there was material evidence to support the agency's conclusion. Pp. 431–435.

3. There was no error in the finding of the reorganization court that, under the contractual arrangements, only after Terminal income had been applied to meeting Terminal expenses would the residue be distributed to the two railroads, and thus the basic income could not be "freed up" from the obligation to meet Terminal expenses. Nor did that court err in concluding

that New Haven's access rights to the Terminal under the agreements were not entitled to recognition in evaluating New Haven's assets, since those rights were more than offset by New Haven's deficit operations which Penn Central assumed. Pp. 438–451.

4. The ICC's adherence to the lower of an expert witness' two estimates of the valuation of the Bronx freight yards was clearly erroneous as it was based on the premise that New Haven would dismantle the yards upon liquidation of the rest of the railroad even though Penn Central already had a link by which service to the yards would continue, and implied that a common carrier could deny service to industrial and public activities simply because ownership of adjoining trackage had changed hands. Pp. 451–457.

5. The reorganization court did not err in disallowing the added deductions. Pp. 457–473.

(a) The ICC should not have made a deduction for costs that New Haven would incur during the year's period anticipated to obtain approval for abandonment of train operations, since the valuation date (December 31, 1966) represented not the date on which New Haven would have sought a certificate of abandonment but the date on which it would have commenced its six-year liquidation sale. Moreover, since the interested public bodies have not arranged to continue New Haven's transportation system during the long period New Haven has been in reorganization, there is no justification for assuming that if confronted with an abandonment application they would do so now and that a delay would be necessary for the ICC to hear from those communities. Pp. 459–466.

(b) The ICC's deduction from the estate's liquidation value, based on a hypothetical sale of all New Haven's land assets in bulk was properly rejected by the reorganization court as the ICC had concluded that only its power to compel the sale of the real estate to a single buyer for continued operation justified the bulk-sale discount, and there is no evidence in the record that a bulk buyer would agree to take over New Haven properties for continued service at any price. Pp. 468–473.

6. The adjustment made by the reorganization court in the ICC's erroneous computation of the discount to present values of New Haven's liquidation proceeds over the six-year liquidation period is affirmed as being substantially free from error. Pp. 473–476.

7. The payment made by Penn Central for New Haven's interim operating losses between the effective date of the merger and the date of inclusion, was in accordance with a formula devised by the ICC in its inclusion report that constituted a pragmatic compromise between the competing interests of the Penn Central and the bondholders. The reorganization court's acceptance of that disposition is affirmed. Pp. 476–479.

8. The argument of the Bondholders Committee that the ICC erred in ordering the transfer to Penn Central of stocks that New Haven held in two concerns, which the ICC found were valueless, is foreclosed by *res judicata* since the bondholders had not appealed the order of the reorganization court directing the transfer of New Haven assets. Pp. 479–481.

9. The bondholders' contention that Penn Central should pay an added amount for New Haven's "going-concern" value is without merit, being entirely at odds with the liquidation hypothesis on which appraisal of New Haven's assets was predicated. Pp. 481–482.

10. The "underwriting plan" of the reorganization court added to the assessment of present worth of the Penn Central stock both a reasonable assurance of realization of such worth and the opportunity of additional gain, and on the basis of the record before that court at the time of its order the package constituted full compensation for the assets transferred to Penn Central. In view, however, of the impact of recent events, which make it possible that this aspect of the decree is not realistic, further proceedings will be needed to reassess the consideration that Penn Central must give in exchange for the New Haven properties. Pp. 483–489.

11. The substantial losses to the bondholders that occurred during the course of the reorganization proceedings did not result in any unconstitutional taking of the property of the bondholders, whose rights are not absolute and who will be receiving the highest and best price for the debtor's assets as of the valuation date. Moreover, the bondholders did not petition the reorganization court to dismiss the proceedings and thereby permit foreclosure on the mortgage liens until well after the valuation date. Nor is the price Penn Central must pay unfair, in view of the benefits that were anticipated from the merger. Pp. 489–495.

Nos. 914, 916, 920, 1038, and 1057, 304 F. Supp. 793 and 1136, affirmed in part and vacated and remanded in part; Nos. 915, 917, and 921, 305 F. Supp. 1049, vacated and remanded.

Whitney North Seymour argued the cause for Manufacturers Hanover Trust Co. With him on the brief were *Horace J. McAfee* and *Albert X. Bader, Jr.* *Lester C. Migdal* argued the cause for New York, New Haven & Hartford Railroad Co. First Mortgage 4% Bondholders Committee. With him on the briefs was *Lawrence W. Pollack.* *Joseph Auerbach* argued the cause for Smith, Trustee of the property of New York, New Haven & Hartford Railroad Co. With him on the briefs were *James Wm. Moore, Robert G. Bleakney, Jr.,* and *Morris Raker.* *Leonard S. Goodman* argued the cause for the United States et al. With him on the brief were *Solicitor General Griswold, Assistant Attorney General McLaren, Deputy Solicitor General Springer, John H. D. Wigger,* and *Robert W. Ginnane.* *Hugh B. Cox* argued the cause for Penn Central Transportation Co. With him on the brief were *Roswell B. Perkins, Ulrich Schweitzer, Samuel E. Gates, Robert L. King,* and *Harvey J. Goldschmid.* *Joseph Schreiber* and *Wilkie Bushby* filed briefs for the Chase Manhattan Bank, N. A. *Louis J. Lefkowitz,* Attorney General, *Dunton F. Tynan,* Assistant Solicitor General, and *Walter J. Myskowski* filed a brief for the State of New York. *Robert K. Killian,* Attorney General, *Samuel Kanell,* Special Assistant Attorney General, and *Jack Rubin,* Assistant Attorney General, filed a brief for the State of Connecticut. *Herbert F. De Simone,* Attorney General of Rhode Island, and *W. Slater Allen, Jr.,* Special Assistant Attorney General, joined in the briefs for the States of New York and Connecticut.

Mr. Justice Stewart delivered the opinion of the Court.

These cases represent the latest stage of the litigation arising from the merger of the Pennsylvania and New York Central railroads, which we upheld two Terms ago in the *Penn-Central Merger Cases,* 389 U. S. 486. A con-

dition of that merger was Penn Central's promise to take in the New York, New Haven & Hartford Railroad Company as an operating entity—a promise that Penn Central fulfilled on December 31, 1968, 11 months after its own formation. The ultimate question presented by the cases now before us is the price Penn Central must pay for the assets of the New Haven.†

I

1. *The Penn Central.* The proposed combination of the Pennsylvania and New York Central railroads first came under consideration by the parties and the Interstate Commerce Commission more than 12 years ago, a decade prior to its eventual consummation.[1] The two railroads formally sought permission to merge under the Interstate Commerce Act, 49 U. S. C. § 1 *et seq.*, on March 9, 1962.[2] On April 6, 1966, the Commission authorized the merger of the two roads.[3] The union of the two carriers was the largest railroad merger in the history of the Nation,[4] bringing together the companies that "dominate rail transportation in the Northeast." [5] In 1965 the component roads enjoyed a total operating revenue in excess of $1,500,000,000 and a net annual income of over $75,000,000.[6] The two companies held

†On June 21, 1970, the Penn Central Transportation Company filed a petition for reorganization under § 77 of the Bankruptcy Act, 11 U. S. C. § 205, in the United States District Court for the Eastern District of Pennsylvania. Whether the financial obligations dealt with in the present opinion may become subject to modification in or because of those proceedings is a question with which the present opinion in no way deals.

[1] See *Penn-Central Merger Cases,* 389 U. S., at 494; *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, 379.

[2] *Pennsylvania R. Co.—Merger—New York Central R. Co.,* 327 I. C. C. 475, 479 ("*Merger Report*").

[3] *Ibid.*

[4] *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S., at 392.

[5] *Penn-Central Merger Cases,* 389 U. S., at 493.

[6] *Ibid.*

some $72,000,000 in working capital and $1,242,000,000 in combined investments.[7] With about 19,600 miles of road "sprawling between the Great Lakes on the north . . . and the Ohio and Potomac Rivers on the south," [8] Penn Central was at its inception nearly twice the size of the next largest railroad system in the East and three times that of the third largest.[9]

The predicted economies effected by the merger were likewise enormous; it was thought that within about eight years of the combination they would exceed $80,000,000 annually.[10] Those savings represented a value, capitalized at 8%, of $1,000,000,000.

On June 9, 1967, after considerable litigation involving protective conditions for various affected railroad competitors,[11] the Commission issued a modified order author-

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[7] *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S., at 380.

[8] *Merger Report,* 327 I. C. C., at 489.

[9] *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S., at 447 (separate opinion of DOUGLAS, J.).

[10] *Penn-Central Merger Cases,* 389 U. S., at 493; *Merger Report,* 327 I. C. C., at 501.

[11] As part of its initial merger order, the Commission had prescribed special traffic and indemnity provisions for the benefit of the Delaware & Hudson, Boston & Maine, and Erie-Lackawanna railroads. The Commission had not yet determined whether those three "protected carriers" should be included in either Penn Central or the recently formed Norfolk & Western, but concluded they required sheltering conditions if they were to survive the interim period pending decision as to their ultimate disposition. *Merger Report,* 327 I. C. C., at 531–532. On September 16, 1966, following objections to the initial order from various parties, the Commission abrogated the indemnity provisions originally prescribed for the protected carriers and announced it would reconsider its earlier decision, with possible modifications to be given retroactive effect. *Pennsylvania R. Co.—Merger—New York Central R. Co.,* 328 I. C. C. 304 ("*Reconsideration Report*"). On October 4, 1966, a three-judge District Court in the Southern District of New York declined, one judge dissenting, to enjoin enforcement of the Commission's order. *Erie-Lackawanna R. Co.* v. *United States,*

izing the Penn-Central merger.[12] On October 19, 1967, a court of three judges, convened in the United States District Court for the Southern District of New York to review the Commission's order pursuant to 28 U. S. C. §§ 1336, 2284, and 2321–2325, upheld the Commission's action.[13] On January 15, 1968, this Court affirmed with minor modifications, and thereby sustained the validity of the merger.[14] Two weeks later, on February 1, 1968, Pennsylvania and New York Central merged.

2. *The New Haven.* The New York, New Haven & Hartford Railroad is now an operating division of the Penn Central system. At the time of the merger, however, it was an independent Class I railroad operating some 1,500 miles of line in the Commonwealth of Massachusetts and the States of Rhode Island, Connecticut, and New York; as such, it was the sixth largest railroad in the northeast region and the largest in New England.[15] With an operations area extending from Boston to New York and connecting with nine other Class I railroads, the New Haven served 12 cities of greater than 100,000 population, as well as a number of important defense

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259 F. Supp. 964. Later, the District Court denied injunctive relief sought by bondholders of the New Haven railroad. *Oscar Gruss & Son* v. *United States,* 261 F. Supp. 386. On March 27, 1967, this Court reversed and remanded *Erie-Lackawanna* with instructions that the Commission complete its proceedings relating to the protected roads. *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372. We later vacated and remanded *Oscar Gruss* for reconsideration in light of *Baltimore & Ohio,* 386 U. S. 776. Ensuing developments are recounted in the text.

[12] *Pennsylvania R. Co.—Merger—New York Central R. Co.,* 330 I. C. C. 328 (*"First Supplemental Report"*).

[13] *Erie-Lackawanna R. Co.* v. *United States,* 279 F. Supp. 316.

[14] *Penn-Central Merger Cases,* 389 U. S. 486.

[15] *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S., at 381; *New York, N. H. & H. R. Co. Trustees Discontinuance of Passenger Service,* 327 I. C. C. 77, 79–80 (*"Suburban Discontinuance Case"*).

establishments.[16] In 1964 the railroad employed about 9,800 people and paid them annual wages amounting to $70,000,000.[17] About 30,000 commuters used the line every day to reach work in New York City alone.[18] As described by the Commission,

> "The New Haven has both a large passenger and freight business. It is the fourth largest passenger carrying railroad in the United States, and has the second highest commuter revenue of all such roads. . . . The volume of its freight business . . . is substantially greater . . . . It is the largest freight railroad in New England and ranks tenth in freight traffic among all railroads in the eastern district. . . . Its freight service is considered to be of extreme importance to the industrial well-being of southern New England." [19]

The financial history of the New Haven was for decades a history of extreme vicissitudes. The company's decline and fall, with passage into, out of, and back into railroad reorganization, have been chronicled elsewhere.[20] It first went into reorganization under § 77 of the Bankruptcy Act, 11 U. S. C. § 205, on October 23, 1935. Due

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[16] *New York, N. H. & H. R. Co., Trustees, Discontinuance of All Interstate Passenger Trains*, 327 I. C. C. 151, 163 (*"Interstate Discontinuance Case"*).

[17] *Id.*, at 163–164.

[18] *Id.*, at 169.

[19] *Suburban Discontinuance Case*, 327 I. C. C., at 80.

[20] See generally *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S., at 452–454 (separate opinion of DOUGLAS, J.); L. Brandeis, Financial Condition of the New York, New Haven & Hartford Railroad Company and of the Boston & Maine Railroad (1907); L. Brandeis, Other People's Money 129–136 (1933); Report of the Joint New England Railroad Committee to the Governors of the New England States 53–73 (1923); E. Sunderland, A Brief History of the Reorganization of The New York, New Haven and Hartford Railroad Company 1–5 (1948); Capture of the New Haven, Fortune Magazine, April 1949, p. 86 *et seq.*

in large measure to the difficulties of including formerly leased lines in the reorganized road, nearly 12 years elapsed from the filing of the debtor's petition in the United States District Court for the District of Connecticut to that court's eventual order approving consummation of the Commission's plan of reorganization.[21]

The railroad emerged from reorganization in 1947 with a vastly simplified debt structure in which only the most senior holders of secured interests survived.[22] But in the following years the financial condition of the company again deteriorated, prompting it to seek at first partial and then total discontinuance of passenger service on the former Old Colony lines in Massachusetts.[23] By 1959 the financial condition of the New Haven was such as to render the chance of surplus earnings "slight at best." [24] Through late 1960 and into early 1961 the company's management expended great efforts to stave off bankruptcy by obtaining loans or grants from the Federal and State Governments.[25] By the middle of 1961, current liabilities exceeded current assets by $36,310,000,[26] and the company was losing cash at the annual rate of $18,000,000.[27]

Finally, on July 7, 1961, the New Haven again petitioned for reorganization under § 77 in the United States

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[21] See *In re New York, N. H. & H. R. Co.*, 169 F. 2d 337, 338 n. 6, cert. denied *sub nom. Mulcahy* v. *New York, N. H. & H. R. Co.*, 335 U. S. 867.

[22] See *In re New York, N. H. & H. R. Co.*, 378 F. 2d 635, 640.

[23] *Commission of Department of Public Utilities* v. *New York, N. H. & H. R. Co.*, 178 F. 2d 559, cert. denied, 339 U. S. 943; *In re New York, N. H. & H. R. Co.*, 163 F. Supp. 59.

[24] *In re New York, N. H. & H. R. Co.*, 278 F. Supp. 592, 606, aff'd, 405 F. 2d 50, cert. denied *sub nom. Abex Corp.* v. *Trustees*, 394 U. S. 999.

[25] 278 F. Supp., at 606.

[26] *Id.*, at 601.

[27] *In re New York, N. H. & H. R. Co.*, 289 F. Supp. 451, 456; *In re New York, N. H. & H. R. Co.*, 281 F. Supp. 65.

District Court for the District of Connecticut, a step that the court was later to find had been far too long delayed:

> "[I]n the interest of its creditors, its employees and the public [the railroad] should have petitioned . . . long before it did. The grave problems which . . . beset the reorganization would have been much less acute and infinitely more manageable if bankruptcy had not been put off until its cash was almost entirely depleted, credit was practically gone, maintenance was down and in all other respects the bottom was out of the barrel." [28]

Immediately upon their taking over the New Haven, the trustees appointed by the reorganization court were obliged to borrow $8,000,000 to meet the payroll.[29] The situation did not improve with the passage of time. "[I]n spite of spartan economies and a sizeable reduction in numbers of employees, the costs of operation . . . offset savings and eroded away the accumulated cash." [30] On July 6, 1964, the New Haven trustees petitioned the Commission, pursuant to § 13a (2) of the Interstate Commerce Act, 49 U. S. C. § 13a (2), for authority to discontinue suburban passenger train service in the Boston area. There followed a public hearing, an adjournment to afford Massachusetts authorities an opportunity—ultimately unavailing—to negotiate a contract with New Haven for continuation of some service, and a motion by the New Haven for expedited disposition "by reason of the critical nature of New Haven's finances, the irretrievable drain which the operations in question impose upon New Haven's resources, and the increasing adverse effect which New Haven's situation has upon

[28] *In re New York, N. H. & H. R. Co.*, 278 F. Supp., at 606.

[29] *In re New York, N. H. & H. R. Co.*, 405 F. 2d, at 52.

[30] *In re New York, N. H. & H. R. Co.*, 281 F. Supp., at 65–66.

the public interest and upon New Haven's creditors . . . ." The Commission granted the trustees' application, concluding that for a period beginning four years before the 1961 reorganization petition and continuing thereafter, New Haven's financial condition had been "critical" and "drastically weak . . . ." [31]

By 1965 it was evident that the New Haven was on the verge of collapse.[32] Its year-end current assets amounted to $20,521,000, some $16,685,000 less than current liabilities plus long-term debt payments due within the coming year. The obligations payable after one year totaled $189,042,000. The retained income account showed a deficit of $81,672,000; the working capital account, a deficit of $16,700,000. For the year the net railway operating income showed a deficit of $16,000,000, with overall net income a deficit only $1,000,000 less. The company was in default in its payments of both principal and interest on its long-term debt.[33] In the view of the trustees, New Haven was

[31] *Suburban Discontinuance Case*, 327 I. C. C., at 79, 80, 106.

[32] By this time the railroad's freight operations were also operating at deficit levels. The Commission explained this aspect of the problem as follows:

"Southern New England is a deficit area in terms of food, fuel, and the raw materials for industry. Accordingly, in serving this economy, the New Haven is a short haul railroad with a heavily unbalanced flow of traffic and equipment. As a terminal railroad it faces the constant problems and added costs of switching and deadheading foreign line freight cars to move them back off its own lines. Moreover, as a result of national and regional economic and industrial shifts, New England's outbound products have become increasingly high-value and light-weight in character. With the expansion in the region of a modern, comprehensive highway system during the past 20 years, this outbound freight traffic has become especially susceptible to diversion from rail to private and for-hire trucking service." *Interstate Discontinuance Case*, 327 I. C. C., at 170.

[33] *Id.*, at 164.

"absolutely faced with economic obsolescence if it continues as an independent, short-line, terminal railroad." [34]

On October 11, 1965, the New Haven notified the Commission, pursuant to § 13a (1) of the Interstate Commerce Act, 49 U. S. C. § 13a (1), of its intention to discontinue all its interstate passenger trains effective March 1, 1966.[35] If carried into effect, the proposed discontinuance would have drastically curtailed passenger train service in New York and Massachuetts, and ended it completely in Connecticut and Rhode Island.[36] In the spring of 1966 the Commission, noting that over an 11-year period New Haven had experienced "an unending succession of reverses," concluded that "[t]here now is totally lacking any hope or plan for future survival of this carrier, except that held out by its merger into a trunkline railroad." [37] The Commission acceded in part to the trustees' notice of discontinuance, but invoked its statutory power to keep many of the trains in operation on the ground that "passenger as well as freight service by the N[ew] H[aven] is a national necessity and that termination of either would lead to distress in Connecticut, Massachusetts, and Rhode Island, and would severely damage New York City and the Nation generally." [38]

As 1966 gave way to 1967, the New Haven's situation deteriorated still further. As of April 1967 the reorganization court thought "the prospect for the continued operation of the Railroad was very dim." [39] The road lacked even a current expense fund from which to satisfy the "six months" creditors, and the court thought it

[34] See *id.*, at 175.

[35] See *Merger Report*, 327 I. C. C., at 488.

[36] *Interstate Discontinuance Case*, 327 I. C. C., at 152.

[37] *Id.*, at 172, 173.

[38] *Penn-Central Merger Cases*, 389 U. S., at 507.

[39] *In re New York, N. H. & H. R. Co.*, 281 F. Supp. 65.

"highly unlikely that there ever will be one." [40] In July 1967 the reorganization court found that the New Haven's situation had become "desperately critical"; its cash depletion was "so serious that, if the present rate of loss continues, there will be insufficient left by late September to meet the payroll of approximately $1,400,000 per week." [41]

As 1967 came to an end, so did the New Haven's cash reserve. By August 31 the cash balance fell to $4,500,000—a precarious condition for a company requiring $1,750,000 a week simply to meet current operating expenses.[42] The trustees estimated that as of December 31, 1967, the balance would decline to $3,100,000 and two months later would fall to $850,000.[43] The New Haven's financial position had thus eroded to the point where its shutdown was "imminent . . . ." [44]

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[40] *In re New York, N. H. & H. R. Co.*, 278 F. Supp., at 602.

[41] See *Erie-Lackawanna R. Co.* v. *United States*, 279 F. Supp., at 333. The three-judge court, writing in October 1967, expressed full agreement with these findings:

"No one has contested the forecast of the NH Trustees that their cash will run out at the end of 1967; no one has indicated any probable source of funds for that beleaguered property other than the merged Penn-Central. . . . For our part we are unwilling to take responsibility for such devastating hardship as even a temporary cessation of NH's operations would bring to New England and New York and in a lesser degree to other sections of the country when in our view there is no reason why the merger should not proceed; indeed we believe we have no right to do so. . . ." 279 F. Supp., at 355. "[W]ith the situation now so serious, there can hardly be doubt that it is better to accept what is good for the New Haven than permit the patient to die while in quest of the best." *Id.*, at 335.

[42] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I. C. C. 643, 651 ("*Second Supplemental Report*").

[43] *Ibid.*

[44] *Id.*, at 653.

3. *The inclusion negotiations.* From the outset of the § 77 proceeding in 1961, the trustees of the New Haven and the reorganization court charged with conservation of the debtor's dwindling assets recognized that "a merger with a large trunk line railroad would be the most promising and feasible means of continuing the viability of the New Haven's transportation system . . . ." *In re New York, N. H. & H. R. Co.,* 289 F. Supp. 451, 456; cf. 281 F. Supp. 65. After Pennsylvania and New York Central filed their merger application before the Interstate Commerce Commission in 1962, the New Haven trustees sought inclusion in the new company, both by private negotiations with the component roads and by a petition to the Commission filed June 26, 1962. See *In re New York, N. H. & H. R. Co.,* 378 F. 2d 635, 636; *Merger Report,* 327 I. C. C. 475, 480. As the reorganization court said, it was "apparent that the inclusion of the New Haven in the Penn-Central merger was the only salvation for the New Haven as an operating railroad . . . ." *In re New York, N. H. & H. R. Co.,* 289 F. Supp., at 456; see also *In re New York, N. H. & H. R. Co.,* 304 F. Supp. 793, 800.

The Commission, as we have noted, authorized the merger of the two roads in 1966. But in so doing, it found that "[w]ithout some radical change in circumstances, even if this merger application were denied, N[ew] H[aven] would face a nearly insuperable task in bringing itself out of bankruptcy." *Merger Report,* 327 I. C. C., at 522. The Commission concluded that the proposed Penn-Central combination, "without complete inclusion of N[ew] H[aven], would not be consistent with the public interest . . . ." *Id.,* at 524. Accordingly, it required "all the New Haven railroad to be included in the applicants' transaction," and conditioned its approval of the merger upon that inclusion, *id.,* at 524, 527. In so doing, the Commission spelled out Penn

Central's obligation toward New Haven in unequivocal language. Condition 8 of the Merger Report stipulated as follows:

> "The Pennsylvania New York Central Transportation Company shall be required to include in the transaction all the New York, New Haven and Hartford Railroad Company . . . upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission. Within 6 months after the date this report is served, the parties shall file with the Commission for its approval, a plan for such inclusion. In the event the parties are unable to reach an agreement (and subject to approval by the Bankruptcy Court) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose.
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> . . . . . .
>
> "Jurisdiction is hereby reserved for such purposes. Consummation of the merger by applicants shall indicate their full and complete assent to these requirements." 327 I. C. C., at 553.

Condition 16 of the Merger Report reiterated that

> "Consummation of the transaction approved herein shall constitute on the part of The Pennsylvania Railroad Company and the New York Central Railroad Company, their successors and assigns, acquiescence in and assent to the conditions stated in this appendix and in the attached report." *Id.*, at 555.

Having determined to require the inclusion of New Haven in Penn Central as a condition of merger, the Commission remitted the parties to private negotiation of the terms of inclusion. *Id.*, at 527. The New Haven trustees on the one side, and the Pennsylvania and New

York Central railroads on the other, had already been bargaining for some time, having drafted preliminary documents, dated December 22, 1964, and February 5, 1965, that provided for Penn Central's assumption of New Haven's freight operations. *Oscar Gruss & Son* v. *United States,* 261 F. Supp. 386, 393; *Interstate Discontinuance Case,* 327 I. C. C. 151, 175 n. 6. On April 21, 1966, two weeks after the Merger Report, they executed a Purchase Agreement for the transfer of substantially all the New Haven assets to Penn Central. *Penn-Central Merger Cases,* 389 U. S., at 508; see *In re New York, N. H. & H. R. Co.,* 378 F. 2d, at 636.[45] The Purchase Agreement provided for the transfer of the New Haven properties to Penn Central, with the consideration in exchange to consist in part of cash and in part of stocks and bonds of Penn Central.[46]

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[45] The transfer was to be free and clear of all liens and encumbrances, with certain minor exceptions. The liens and encumbrances would shift to the proceeds of the sale and thus remain an obligation of the New Haven estate.

By negotiating a purchase and sale of the New Haven assets, the parties to the agreement elected not to attempt a recapitalization of New Haven, an enlarged merger that would bring New Haven into the Penn Central system as a corporate entity, or a lease of the New Haven operating assets. At one point, when it appeared the New Haven might not long survive, the Commission had directed the parties to negotiate a lease to be "immediately available upon consummation of the Penn-Central merger," but the negotiators reported they were unable to do so and instead suggested various loan-loss formulas. *Penn-Central Merger Cases,* 389 U. S., at 508; *Erie-Lackawanna R. Co.* v. *United States,* 279 F. Supp., at 334; *Second Supplemental Report,* 331 I. C. C., at 648.

[46] Subsequent modifications to the Agreement were executed October 4, 1966, and December 20, 1967.

The bondholders were not bound by the trustees' acceptance of the Purchase Agreement. The trustees acted on behalf of the debtor, subject to the directive of the reorganization court, but

In September 1966 the trustees filed a petition with the reorganization court reciting the background of the negotiations with Penn Central, the New Haven's large and growing deficits, and the insufficiency of internally generated cash to meet operating demands. In the trustees' view, inclusion in Penn Central afforded "the only practicable means for reorganization of the Debtor that is consistent with the best interest of the public and of all parties interested in the Debtor's estate . . . ." They submitted that operations should continue so long as inclusion was possible, and that the court should grant them leave to press for inclusion on the basis of the Purchase Agreement. *In re New York, N. H. & H. R. Co.*, 378 F. 2d, at 637. On October 24, 1966, the reor-

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they never submitted the Agreement to that court for its approval. Moreover, they had stipulated with Pennsylvania and Central that they would not challenge the terms of the Purchase Agreement. The preliminary memoranda negotiated between the trustees and the two railroads contained a provision, substantially embodied in § 11.7 of the Agreement itself, that New Haven would not make or file

"any further statement, stipulation or other document in the pending Pennsylvania-Central merger proceedings before the I. C. C. . . . , or any judicial review thereof, other than in connection with (a) a position relating to the New Haven taken by any other party . . . , or (b) a failure of the I. C. C. to find either (i) that the New Haven should be included in such merger or (ii) that jurisdiction is to be retained by the I. C. C. for later determination of any petition by the New Haven for such inclusion, *provided, however,* that any such statement, stipulation or other document made or filed by the Trustees shall not be inconsistent with the provisions and intent of this Agreement."

The reorganization court suggested that the bondholders rather than the trustees press for early inclusion due to the impropriety of the trustees' taking "any action which would be or appear to be a repudiation of [the contract's] letter or spirit." See *Erie-Lackawanna R. Co.* v. *United States,* 279 F. Supp., at 333; and see *Oscar Gruss & Son* v. *United States,* 261 F. Supp., at 393–394.

ganization court authorized the trustees to present the Agreement to the Commission, noting that the goal of preserving the New Haven operations "has been the policy from the beginning of these proceedings . . . ." Three days later the trustees and the Pennsylvania and New York Central railroads petitioned the Commission for approval of the New Haven's inclusion on the terms of the Agreement.

On November 16, 1967, the Commission ratified the Purchase Agreement as the basis for the inclusion of New Haven in Penn Central. *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I. C. C. 643 (*"Second Supplemental Report"*). It looked upon the fact that the parties had been able to reach agreement as an indication that even though the New Haven trustees were selling properties having no value as an operating entity, they nevertheless had enjoyed a degree of bargaining power by virtue of the requirement that Penn Central take in New Haven as a condition of the merger. 331 I. C. C., at 657. "[W]here a transaction is bargained at arm's length," said the Commission, "each side is presumably capable of determining its own best interest, and our primary function is to discover whether the transaction will be in the public interest." *Id.*, at 656. The Commission then undertook its independent analysis of the value of the New Haven properties. Although the Purchase Agreement "carrie[d] some probative force as to the values of the properties involved, it [was] by no means controlling." *Id.*, at 657. The Commission must still determine the price "on the basis of all the evidence pertaining thereto, not merely the agreement and supporting evidence." *Id.*, at 660 n. 12.

Upon its independent review of the record, the Commission found that the asset value of the New Haven properties to be transferred to Penn Central and of the

consideration to be given in exchange was $125,000,000. The Commission concluded that payment of that sum by Penn Central to the New Haven estate would be both "just and reasonable" as a condition of the merger under § 5 of the Interstate Commerce Act, and "fair and equitable" as part of a plan of reorganization under § 77 of the Bankruptcy Act. Unwilling to defer the merger until inclusion could take place but recognizing that the danger of an end to all New Haven operations was "very real," 331 I. C. C., at 654, the Commission authorized financial aid from Penn Central to prop up the debtor during the interim period between merger and inclusion to ensure New Haven's continued functioning until its acquisition by Penn Central. See *Penn-Central Merger Cases,* 389 U. S., at 509.

4. *The inclusion litigations.* At this juncture the Commission's determination of the terms of inclusion was subjected to simultaneous judicial review in two separate forums. On January 23, 1968, eight days after this Court's approval of the merger and eight days before the merger itself, the New Haven bondholders commenced five actions in the United States District Court for the Southern District of New York to set aside the Commission's order. The three-judge District Court reconvened to hear the actions and shortly thereafter consolidated the five cases into one. On March 29, 1968, the Commission certified the first step of its plan for the reorganization of the New Haven—the sale of its assets to Penn Central—to the reorganization court.[47] Pursuant

[47] The reorganization court had authorized the New Haven trustees to pursue a "two-step" plan before the Commission, in which the debtor's estate would sell its assets to Penn Central and then the trustees would file a specification of the terms to be accorded the security holders. In 1967, the Court of Appeals for the Second Circuit affirmed the District Court's authorization order with certain modifications not here pertinent, postponing consideration of the

to § 77 (e) of the Bankruptcy Act, 11 U. S. C. § 205 (e), the New Haven bondholders filed their objections to the Commission's plan following notice given by the reorganization court. Thus, the identical question of the price Penn Central would have to pay for the New Haven assets came at the same time before the three-judge District Court in New York and the single-judge District Court in Connecticut.

On July 10, 1968, the three-judge court, following extensive briefing and argument on the numerous issues underlying the price question, found itself unable to agree with the Commission in several major respects. It therefore vacated so much of the Commission's order as found the terms of Penn Central's acquisition of the New Haven's assets to be just and reasonable and remanded the cause for further proceedings. *New York, N. H. & H. R. Co., First Mortgage 4% Bondholders' Committee* v. *United States,* 289 F. Supp. 418. On August 13, 1968, also after extensive briefing and argument, the reorganization court independently returned the Commission's plan for further proceedings. *In re New York, N. H. & H. R. Co.*, 289 F. Supp. 451. On the overriding question of price, the two courts were in accord: by fixing the worth of the New Haven at $125,000,000, the Commission had substantially understated the value of the properties to be transferred. The

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merits of the "two-step" plan because of the prematurity of the question as then presented. *In re New York, N. H. & H. R. Co.*, 378 F. 2d 635, 639. Pursuant to the plan of reorganization, the New Haven is to be reconstituted as a closed-end, nondiversified management investment company. See *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 334 I. C. C. 25, 93 ("*Fourth Supplemental Report*"). The reorganization court has withheld disposition of the second or "distributive" step of the plan pending this Court's resolution of the question of price. *In re New York, N. H. & H. R. Co.*, 304 F. Supp. 1121, 1123–1124.

three-judge court estimated the understatement to be on the order of $45,000,000 to $50,000,000; the reorganization court, $33,000,000 to $55,000,000. 289 F. Supp., at 440, 465.

Meanwhile, the continuing drain on the New Haven's dwindling cash reserves called for—and received—drastic action. Upon remanding the Commission's proposed plan under § 77, the reorganization court ruled that unless the Commission ordered inclusion by January 1, 1969, the court would entertain a motion to dismiss the reorganization proceedings, resulting in termination of all the New Haven's train service. 289 F. Supp., at 459. The court recommended that the Commission direct the early inclusion of New Haven with a partial payment of the purchase price, deferring other issues to later resolution. *Id.*, at 466.

On the remand, the Commission reopened the record for the reception of further evidence and briefing in accordance with the instructions of the two reviewing courts. Its revaluation of the New Haven properties, announced on November 25, 1968, resulted in an increase in total worth of some $37,700,000, yielding a new price of $162,700,000 for the properties to be transferred. *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 334 I. C. C. 25, 53 (*"Fourth Supplemental Report"*). But the Commission then invoked "other pricing considerations" not taken into account at the time of its prior report. Application of the new considerations effected a reduction of $22,081,000 from the newly calculated asset value, leaving a net value of $140,600,000—$15,600,000 more than the Commission's initial estimate, but $17,400,000 less than the lowest range of value suggested by either of the two District Courts. In addition, the Commission required Penn Central to pay $5,000,000 toward the New Haven's interim operating expenses and, yielding to the directive of the reorgani-

zation court, ordered Penn Central to take over the New Haven properties by January 1, 1969. 334 I. C. C., at 74, 76.

The Commission certified its revised plan to the reorganization court on December 2, 1968. Within three weeks the bondholders filed their objections. On December 24, 1968, the reorganization court released the assets of the debtor's estate to Penn Central without approving the price terms set by the Commission. The court reiterated that failure to include New Haven in Penn Central by January 1, 1969, would result in immediate termination of all New Haven train service. On December 31 the estate transferred its assets to Penn Central.

At once the bondholders pressed for judicial review of the Commission's revised evaluation. With their objections to the plan of reorganization already pending before the reorganization court, representatives of holders of the debtor's first and refunding mortgage 4% bonds commenced two separate actions against the United States and the Commission before the three-judge District Court in New York. The Manufacturers Hanover Trust Company and the Chase Manhattan Bank, trustees under other mortgage bonds, commenced two more actions against the same defendants.[48] The three-judge court consolidated the four cases and granted intervention—to the New Haven trustees as parties plaintiff and to Penn Central, the Commonwealth of Massachusetts, and the

[48] The United States Trust Company, as indenture trustee under the New Haven's Harlem River Division mortgage, had been one of the bondholder plaintiffs on the first round. At the suggestion of the reorganization court, 289 F. Supp., at 464, it received recognition of its secured status on the remand, when the Commission directed Penn Central to assume the Division bonds. 334 I. C. C., at 70. The trustee sought no further review.

States of Rhode Island, Connecticut, and New York as parties defendant.

On May 28, 1969, the reorganization court again rejected the plan submitted by the Commission. Although it accepted the Commission's determinations on some issues, the court overruled the Commission with respect to its valuation of the New Haven's Harlem River and Oak Point freight yards and its added deductions introduced for the first time on the remand. The court also instituted its own "underwriting" plan to ensure equivalent value for the estate with respect to the Penn Central common stock given in partial consideration for the transferred New Haven properties. *In re New York, N. H. & H. R. Co.*, 304 F. Supp. 793. An order implementing decision and remanding to the Commission was entered on July 28, 1969. 304 F. Supp. 1136.

On June 18, 1969, the three-judge court filed its opinion in the bondholders' action. With one judge in dissent, the court upheld the Commission's valuation of the freight yards and its added deductions on the remand. The court also adopted the underwriting plan devised by the reorganization court. *New York, N. H. & H. R. Co., First Mortgage 4% Bondholders' Committee* v. *United States*, 305 F. Supp. 1049. A decree fixing the terms of judgment followed on September 11, 1969.[49]

[49] In a *Fifth Supplemental Report*, decided July 10, 1969, and modified August 26, 1969, the Commission complied with the directive of the three-judge court to prepare and serve a proposed decree reflecting the changes ordered in that court's opinion of June 18, 1969. After making the required adjustments, the Commission ordered Penn Central to pay New Haven an additional $990,000 in stocks, bonds, and cash in the same relative percentages as provided in the *Fourth Supplemental Report*. In addition, the Commission called upon the parties to submit proposed terms of a detailed decree relating to the underwriting plan originated by the reorganization court and adopted by the three-judge court. 334 I. C. C. 528. The order of the Commission accompanying the

With the two District Courts thus in agreement, after two rounds of judicial review, on many of the substantial issues that had come before them, but in disagreement on matters amounting to more than $28,000,000 in value, the bondholders took direct appeals to this Court from the judgment of the three-judge court. They also appealed from the order of the reorganization court to the United States Court of Appeals for the Second Circuit. The United States, the Commission, and Penn Central took no appeals from the decree of the three-judge court but cross-appealed to the Court of Appeals from the order of the reorganization court. The Court of Appeals consolidated the appeals from the reorganization court, and the parties then petitioned this Court to grant certiorari to the Court of Appeals in advance of its judgment, pursuant to 28 U. S. C. §§ 1254 (1) and 2101 (e), and Rule 20 of this Court. We noted probable jurisdiction of the appeals from the order of the three-judge court and, with respect to the judgment of the reorganization court, granted certiorari to the Court of Appeals before judgment, accelerating briefing and argument to permit disposition of these cases at the current Term. 396 U. S. 1056.[50]

Fifth Supplemental Report does not appear to have undergone judicial review. At any rate, it is moot in light of the action we take today with respect to the judgments of the New York and Connecticut District Courts relating to the *Second* and *Fourth Supplemental Reports*.

[50] At the same time we affirmed the judgment of the three-judge court in No. 919, *Providence & Worcester Co.* v. *United States*, 396 U. S. 555, and denied certiorari in No. 918, *Providence & Worcester Co.* v. *Smith*, 396 U. S. 1062. In these cases, companions to the main litigation, the Providence & Worcester Company sought plenary review of the District Courts' orders insofar as they had sustained the Commission (1) in requiring Penn Central to operate its trains over the Providence & Worcester tracks as a leased line under the conditions of a former long-term lease to New

II

We first consider the dual review to which the District Courts in New York and Connecticut subjected the price determinations of the Interstate Commerce Commission. From the outset all the parties in the three-judge court recognized that the pricing questions presented in the litigation there were also destined to come before the reorganization court under § 77 of the Bankruptcy Act.[51] Confronted with the prospect of duplicate litigation, the New Haven bondholders asked the three-judge court to enjoin the Commission's certification of its plan of

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Haven, subject to Penn Central's right to commence an abandonment proceeding before the Commission under § 1 (18) of the Interstate Commerce Act, 49 U. S. C. § 1 (18), and subject further to Providence & Worcester's securing a charter revision to eliminate voting restrictions against Penn Central as a principal shareholder; and (2) in limiting the liability of Penn Central with respect to certain claims of Providence & Worcester, both *in rem* and *in personam*, arising against the New Haven prior to the latter's inclusion in Penn Central. See *Manufacturers Hanover Trust Co.* v. *United States*, 300 F. Supp. 185 (opinion of three-judge court).

[51] A similar problem had presented itself in the immediately preceding round of the litigation arising from the merger. There the Commission's order had embraced not only the Penn Central combination and the takeover of New Haven, but the inclusion of the "protected carriers" in the Norfolk & Western system as well. See n. 11, *supra*. Despite the variety of issues and the number of parties, the cases eventually came before a single District Court, and the danger of multiple litigation in six or more different courts was avoided. See *Erie-Lackawanna R. Co.* v. *United States*, 279 F. Supp., at 323–324, aff'd *sub nom. Penn-Central Merger Cases*, 389 U. S., at 497 n. 2, 503, 505 n. 4. Even earlier, when the Commission had first ordered inclusion of all New Haven service as a condition to the Penn Central merger, it had pointed out that "since New Haven is in bankruptcy, its inclusion will entail reorganization problems under section 77 of the Bankruptcy Act which must be resolved in conjunction with any inclusion proceeding herein." *Merger Report*, 327 I. C. C., at 525; see also *id.*, at 527; and see *Second Supplemental Report*, 331 I. C. C., at 652.

reorganization to the District Court in Connecticut. Counsel urged that "if such certification is not restrained, the questions presented by the complaint herein under Section 5 (2) of the Interstate Commerce Act will also be before the Bankruptcy Court under Section 77 of the Bankruptcy Act . . . ." The three-judge court denied the bondholders' application for injunctive relief. In its view, "the balance of convenience tilt[ed] heavily in favor of allowing the Connecticut court to proceed to such extent as it is advised," since the grant of such an injunction could delay the reorganization proceedings for a substantial time.

In this ruling the three-judge court was correct. The jurisdiction of the reorganization court was not open to question. Upon its approval of the New Haven's petition for reorganization in 1961, that court had acquired "exclusive jurisdiction of the debtor and its property wherever located . . . ." Bankruptcy Act, § 77 (a), 11 U. S. C. § 205 (a).[52] Subject to the court's control, the trustees whom it appointed were empowered "to operate the business of the debtor." *Id.*, § 77 (c)(2), 11 U. S. C. § 205 (c)(2). They were thus charged with the dual responsibility of conserving the debtor's estate for the benefit of creditors and preserving an ongoing railroad in the public interest. *Massachusetts* v. *Bartlett*, 384 F. 2d 819, 821, cert. denied, 390 U. S. 1003; 5 Collier on Bankruptcy ¶ 77.02, at 469–470 (14th ed. 1969).[53]

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[52] *Callaway* v. *Benton*, 336 U. S. 132, 142; *Meyer* v. *Fleming*, 327 U. S. 161, 164; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483; *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 662; cf. *Ex parte Baldwin*, 291 U. S. 610, 615; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737.

[53] Cf. *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S., at 676; *Van Schaick* v. *McCarthy*, 116 F. 2d 987, 992.

With these goals in view, the statute bestowed a "broad and general" authority upon both the court and the trustees. Cf. *Palmer* v. *Massachusetts,* 308 U. S. 79, 85. The provisions of § 77 "doubtless suffice[d] to confer upon the [reorganization court] power appropriate for adjusting property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings." *Id.,* at 85–86; cf. 5 Collier, *supra,* ¶ 77.11, at 498–499. Together, the court and the Commission "unquestionably" had "full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that [might] be asserted against it." *Callaway* v. *Benton,* 336 U. S. 132, 147.[54] One such power was precisely that which the Commission was about to propose that the reorganization court exercise—the power to confirm a plan of reorganization providing for "the sale of all . . . of the property of the debtor . . . ." Bankruptcy Act, § 77 (b)(5), 11 U. S. C. § 205 (b)(5). To that end the Commission was required to certify its proposal to the court as a prerequisite to judicial approval. § 77 (d), 11 U. S. C. § 205 (d). Injunctive intervention by the three-judge court would thus have disrupted an essential statutory phase of the New Haven reorganization.

The United States also sought to avoid duplicate litigation—but by bypassing the New York rather than the Connecticut federal court. In a motion filed shortly

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[54] In *Callaway,* this Court stressed the control the reorganization court has over the debtor's property, including any leasehold estate: "Clearly, control of the physical property must remain in the court which has the ultimate responsibility for operating it. And in order to protect the estate of the debtor from dissipation through losses suffered in the operation of the lessor's property, responsibility for the determination of the amount of the losses and provision for their recoupment from the lessor was properly lodged in the court supervising the reorganization of the debtor." 336 U. S., at 144.

after the commencement of the New Haven bondholders' suit in the three-judge court, the Government moved to dismiss the complaints for lack of subject-matter jurisdiction. In support of the motion it was argued that (1) until the Commission certified the terms of inclusion to the reorganization court, Condition 8 under which Penn Central had pledged to take in New Haven was not satisfied and the Commission's order was not yet reviewable; (2) by virtue of the § 77 aspects of the case, the reorganization court had exclusive jurisdiction over the pricing questions sought to be presented to the three-judge court; and (3) even on the assumption that the three-judge court had jurisdiction, it should stay its hand as a matter of equity to avoid an unnecessary interference with the proceedings before the reorganization court.

The Government's motion to dismiss was opposed by Penn Central, the New Haven trustees, the State of New York, and the bondholders. Significantly, the Commission did not oppose the motion. Indeed, the Commission agreed with the United States that "most (and perhaps all) of the issues raised by the plaintiffs in this three-judge Court will be reviewable by the Reorganization Court," conceded that "the resulting concurrent jurisdiction is awkward, at least in theory," and concluded tentatively that "the scope of judicial review . . . in the Reorganization Court would, as a practical matter[,] be the same as in this three-judge Court." The three-judge court denied the Government's motion to dismiss. The bondholders' actions, the court said, came within the letter of the statutes authorizing review of orders of the Commission. The court conceded there was "an area of overlap" between the work of the New York and Connecticut forums, but thought nothing in § 77 or decisional law superseded that dual arrangement. See 289 F. Supp., at 424 n. 3.

The three-judge court correctly observed that in ordering New Haven's inclusion in Penn Central the Commission had properly exercised its authority under both § 5 of the Interstate Commerce Act and § 77 of the Bankruptcy Act. The fact that the New Haven was in reorganization under the Bankruptcy Act did not preclude the Commission from exercising its statutory power, in passing on the merger application of two railroads, to require the inclusion of a third. Interstate Commerce Act, § 5 (2)(d), 49 U. S. C. § 5 (2)(d).[55] "The Commission can undoubtedly carry on § 5 proceedings simultaneously with § 77 reorganization proceedings . . . ." *Callaway* v. *Benton,* 336 U. S., at 140. Here the transfer of the New Haven assets was as much a part of a merger under § 5 as it was a plan of reorganization under § 77.

Moreover, at the outset of the litigation, the jurisdiction of neither the New York nor the Connecticut court was "complete." On the one hand, the reorganization court lacked coercive power over Penn Central: under § 77 it could neither approve nor disapprove the merger *qua* merger, and it could not compel Penn Central to purchase the New Haven assets. So far as § 77 was concerned, Penn Central stood in the position of a potential purchaser, willing but not obliged to buy the New Haven properties. Cf. *Callaway* v. *Benton,* 336 U. S., at 137; *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.,* 318 U. S. 523,

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[55] Section 5 (2)(d) provides: "The Commission shall have authority in the case of a proposed [merger] transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest."

550; *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 161 F. 2d 413, 434 n. 5 (Frank, J., dissenting), cert. denied *sub nom. Protective Committee* v. *New York, N. H. & H. R. Co.*, 331 U. S. 858; *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 595, 619. On the other hand, the three-judge court could not by itself effect a conveyance of the New Haven properties to Penn Central, nor could it compel the debtor's trustees to do so without the consent of the reorganization court.

Moved largely by the concern that neither court might have jurisdiction over the entire case, the three-judge court was of the opinion that matters should proceed simultaneously in both forums with a view to bringing the § 5 and § 77 aspects before this Court at the same time. Given the complexities of the jurisdictional question and the importance of an expedited determination of the merits, the three-judge court produced an understandable solution to the problem insofar as it ensured that the entire case would come before this Court without the risk that the parties might have spent an extensive period litigating in the wrong forum.

But the circumstances of the case did not inexorably command review in two separate courts. There was no danger that application of the "fair and equitable" test under § 77 (e)(1) would yield results different from those to be produced by the "just and reasonable" test of § 5 (2)(b) for mergers or the "equitable" test for inclusions under § 5 (2)(d). See *Callaway* v. *Benton*, 336 U. S., at 140.[56] The reorganization statute mandates

[56] For the text of § 5 (2)(d), see n. 55, *supra*. Section 5 (2)(b) provides in pertinent part: "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed [merger] transaction is within the scope of [an earlier subdivision of the statute] . . . and will be consistent with the public interest, it shall enter an order

that any disposition of the debtor's properties must not be "inconsistent with the provisions and purposes" of the Interstate Commerce Act, Bankruptcy Act, § 77 (f), 11 U. S. C. § 205 (f), and "the requisite findings under the two acts are equivalent." *In re Chicago, R. I. & P. R. Co.,* 168 F. 2d 587, 594, cert. denied *sub nom. Texas* v. *Brown,* 335 U. S. 855. This Court has stressed that § 77 incorporates the elements of § 5, *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U. S. 298, 310, and we have ruled that where the Commission proposes a merger as part of a § 77 plan of reorganization, it must act "in accordance with all the requirements and restrictions applicable to mergers" under the Interstate Commerce Act, *id.,* at 309; cf. *Ecker* v. *Western Pacific R. Co.,* 318 U. S. 448, 481; *New England Coal & Coke Co.* v. *Rutland R. Co.,* 143 F. 2d 179, 186. Here the Commission had demonstrated its awareness of the statutory interrelationship, specifically devising inclusion terms under § 5 to satisfy the requirements of § 77. *Second Supplemental Report,* 331 I. C. C., at 654.

Moreover, there was no reason to suppose that the reorganization court would be unable to adjudicate all the questions presented by the terms of the Commission's inclusion order. Although the three-judge court expressed concern that certain issues, such as a loss-sharing arrangement during the interim period between merger and inclusion, might not lie within the jurisdiction of the reorganization court, the reorganization court nevertheless reached those issues without, so far as the record discloses, jurisdictional objections from any party.

The three-judge court thus confronted a situation where it was asked to consider the same pricing questions, to be determined by recourse to the same standards of

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approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . ."

review, as the reorganization court. "[N]ot only would it . . . involve . . . a duplication of labor to [accept] . . . jurisdiction but it might"—and in fact did—"result . . . in contradictory rulings upon the same issue[s]." *Palmer* v. *Warren,* 108 F. 2d 164, 167, aff'd, 310 U. S. 132. In these circumstances the three-judge court might well have stayed its hand under the traditional principle that "the court first taking over the res, draws to itself power to determine all claims upon it." *Palmer* v. *Warren, supra;* cf. *Oklahoma* v. *Texas,* 258 U. S. 574, 581; *Palmer* v. *Texas,* 212 U. S. 118, 126, 129; *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38, 54; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co.,* 177 U. S. 51, 61. We recognize that that principle has commonly applied in cases where both courts assert *in rem* jurisdiction over the property in dispute, and that here the three-judge court's jurisdiction was *in personam* in character. But the conflict was nonetheless one "between two coordinate courts of concurrent, overlapping jurisdiction, neither belonging to a class which by paramount law is categorically given a jurisdiction over the particular subject matter paramount to the jurisdiction of the other." *In re New York, N. H. & H. R. Co.,* 26 F. Supp. 18, 24, aff'd *sub nom. Palmer* v. *Warren, supra.* And given that conflict, the three-judge court could have followed the settled proposition that "[t]he court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto." *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, 89.

Surely a vesting of primary jurisdiction in the reorganization court comports with the basic purpose of § 77. Congress enacted that statute in part "to prevent the notorious evils and abuses of consent receiverships," *New England Coal & Coke Co.* v. *Rutland R. Co.,* 143

F. 2d, at 184, of which one of the more egregious was the requirement of an ancillary filing and order of appointment in the federal court for every district in which the debtor had property. See 5 Collier, *supra,* ¶ 77.02, at 467. Although, of course, the jurisdiction of the three-judge court was not ancillary to that of the reorganization court in a technical sense, dual review of issues ultimately going only to the valuation of the debtor's estate would resurrect the discredited practice of the equity receivership—it "would tend greatly to foment conflicts between coordinate courts and compel creditors, in the protection of their interests, to ride the circuit, demonstrating the basis of their positions in successive courts." *In re New York, N. H. & H. R. Co.,* 26 F. Supp., at 23.

But we need not decide the question exclusively on the grounds just set out. For in the circumstances in which the United States presented its motion to dismiss in this case, the course of prior litigation had left the three-judge court virtually nothing to decide. On January 15, 1968, this Court had upheld the validity of the Penn Central merger under § 5 of the Interstate Commerce Act, conditioned on the inclusion of New Haven on terms subject to objections to be "registered and adjudicated in the bankruptcy court or upon judicial review as provided by law." *Penn-Central Merger Cases,* 389 U. S., at 511. We had permitted a postponement of the inclusion of New Haven on the basis of Penn Central's acceptance of the inclusion requirement, *id.,* at 509, and because by its act of merger Penn Central would "perforce accept . . . appropriate conditions respecting the New Haven . . . ." *Id.,* at 510.

Two weeks later Penn Central merged. At that point the lack of jurisdictional "completeness" in the reorganization court, to which we have earlier referred, was cured; for there now remained no question of Penn Cen-

tral's obligation to take over the assets of the New Haven. With Penn Central having given its irrevocable consent to the inclusion of New Haven by its act of merger, it was evident that whatever terms the reorganization court might confirm, subject to review on appeal to the Court of Appeals followed by certiorari here, would bind Penn Central by virtue of its merger commitment. Of course, the terms of the inclusion must themselves be "just and reasonable" and "equitable" under § 5. But those terms now involved only the value to be accorded the assets transferred, and resolution of that issue was the essence of the § 77 process. "The heart of . . . a determination [of the validity of a plan of reorganization] is a finding of fact . . . as to the value of the debtor's property." *In re New York, N. H. & H. R. Co.,* 147 F. 2d 40, 49, cert. denied *sub nom. Massachusetts* v. *New York, N. H. & H. R. Co.,* 325 U. S. 884. See 5 Collier, *supra,* ¶77.14, at 538–539; cf. *Consolidated Rock Prods. Co.* v. *Du Bois,* 312 U. S. 510, 524–525; *First National Bank* v. *Flershem,* 290 U. S. 504, 527; *Second Supplemental Report,* 331 I. C. C., at 652. In short, with identical issues before the two courts, with those issues involving only questions going to the value of a § 77 debtor's estate, with congruent standards of review, and with the irrevocable promise of Penn Central to take in New Haven, the three-judge court should have stayed its hand in the New Haven bondholders' litigation.[57]

[57] Such abstention would in no way have limited Penn Central's full participation in judicial review of the Commission proceedings. Penn Central came before the reorganization court as a "party in interest" under § 77 (e) and did not oppose the order of the court making it a party to the proceeding; the company participated fully in all further hearings in the reorganization court; it took a protective appeal from the judgment of the court remanding the matter to the Commission after the first round of review, and it appealed again from the judgment of the court following the second round of review. At no time has anyone questioned Penn Central's

Prior decisions of other three-judge courts, affirmed by this Court on direct appeal, lend support to the proposition that the three-judge court should have deferred to the reorganization court. In *Chicago & N. W. R. Co.* v. *United States,* 52 F. Supp. 65, the debtor railway company brought suit against the Commission in the United States District Court for the Northern District of Illinois, seeking three-judge-court review of a plan of reorganization previously approved by the Commission and the courts. The District Court noted its "limited power" under the statute providing for review by a court of three judges, 52 F. Supp., at 66. It conceded the "seemingly applicable language" of the three-judge-court statute to "any order of the Interstate Commerce Commission," but held that once the Commission has approved a plan of reorganization under § 77, "appeal from Commission orders in connection with bankruptcy proceedings lies only to a district court (of one judge) sitting in bankruptcy, not to a district court (of three judges) assembled under the Urgent Deficiencies Act." *Id.,* at 67.[58] On direct appeal, this Court summarily affirmed the District Court's judgment. 320 U. S. 718.

Even closer in point is a case that arose during the first reorganization of the New Haven Railroad—*Group of Boston & Providence R. Corp. Stockholders* v. *ICC,* 133 F. Supp. 488. Shareholders of the Boston & Providence, also undergoing reorganization, sought judicial review before a three-judge court of the Commission's refusal to provide joint rates as between New Haven and Boston & Providence—exclusively an Interstate Commerce Act function. See Act, §§ 1 (4), 15 (6), 49

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status as a party litigant in the reorganization court or challenged its right to make a full presentation of its case there, on appeal to the Court of Appeals, or on review by writ of certiorari in this Court.

[58] The District Court also relied upon the prior adjudication of the validity of the plan. See 52 F. Supp., at 66 n. 1, 67.

U. S. C. §§ 1 (4), 15 (6). The court held that to grant the shareholders the ruling they sought would contravene the revenue-allocation formula already adopted by the New Haven's reorganization court and affirmed by the Court of Appeals and the Supreme Court. The three-judge court accepted the view of the Commission that "so long as the Boston & Providence lines are operated by the New Haven as lessee for the account of the lessor . . . , the Connecticut district court . . . has exclusive jurisdiction to pass on the accounting for such operation." 133 F. Supp., at 493. Again, this Court summarily affirmed. *Boston & Providence R. Corp. Stockholders* v. *New York, N. H. & H. R. Co.*, 350 U. S. 926.

We therefore hold that the three-judge court here should have granted the Government's motion to the extent of deferring to the reorganization court in proceedings ultimately involving only the price to be paid for the assets of the debtor's estate.[59]

[59] It is noteworthy that when the Commission drafted the provision under which Penn Central was obligated to take in New Haven, it evidently contemplated that review would take place only in the reorganization court. Condition 8 of the Merger Report, the text of which is set out in the text above at 409, required Penn Central to take in New Haven with terms of inclusion to be "fair and equitable"—language peculiar to the Bankruptcy Act, and instinct with legal significance peculiar to that statute. See *Case* v. *Los Angeles Lumber Prods. Co.*, 308 U. S. 106, 115–119; Bankruptcy Act, § 77 (e)(1), 11 U. S. C. § 205 (e)(1). Condition 8 subjected the agreement negotiated by the parties to "the approval of the Bankruptcy Court and the Commission." And it also provided, in the event the parties were unable to agree to the elements of inclusion, for the imposition of "such fair and equitable terms and conditions as the Commission may impose, . . . subject to approval by the Bankruptcy Court . . . ." Repeated references to terms of art in bankruptcy law and to the bankruptcy court cannot be thought to lack meaning. Still less can we assume that the studied omission of any mention of the three-judge court was without significance.

III

In turning to the judgment of the reorganization court, we first review the standards under which that court passed upon the Commission's rulings.

After 35 years of § 77, as amended, it is unnecessary to recanvass the two basic objectives of the statute—the conservation of the debtor's assets for the benefit of creditors and the preservation of an ongoing railroad in the public interest. See generally 5 Collier, *supra,* ¶ 77.02, at 469–470. Central to the statutory objective that the reorganized company should, if at all possible, emerge as a "living, not a dying . . . enterprise," *Van Schaick* v. *McCarthy,* 116 F. 2d 987, 993, is the understanding that "a railroad [is] not like an ordinary insolvent estate." *Palmer* v. *Massachusetts,* 308 U. S., at 86. (Footnote omitted.) To the traditional equity jurisdiction of the bankruptcy court, § 77 adds the oversight of the Interstate Commerce Commission, the agency "specially charged with the public interest represented by the transportation system." *Ibid.* The statute contemplates that "[t]he judicial functions of the bankruptcy court and the administrative functions of the Commission [will] work cooperatively in reorganizations." *Warren* v. *Palmer,* 310 U. S. 132, 138. (Footnote omitted.)

In structuring the cooperative endeavor of agency and court, Congress "placed in the hands of the Commission the primary responsibility for the development of a suitable plan" for the debtor railroad. *Ecker* v. *Western Pacific R. Co.,* 318 U. S., at 468. As the Court said in *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co., supra,* "The ratio of debt to stock, the amount of fixed as distinguished from contingent interest, the kind of capital structure which a particular company needs to survive the vicissitudes of the business cycle—all these have been reserved by Congress for the expert

judgment and opinion of the Commission, which the courts must respect." 318 U. S., at 545. See also *In re New York, N. H. & H. R. Co.,* 54 F. Supp. 595, 604. In the development of the plan of reorganization, § 77 also has accorded the Commission primary responsibility for determining wherein lies the "public interest," which does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system, cf. *United States* v. *Lowden,* 308 U. S. 225, 230, but includes "in a more restricted sense," *ibid.,* concern for "the amount and character of the capitalization of the reorganized corporation," *Ecker* v. *Western Pacific R. Co.,* 318 U. S., at 473–474; cf. *Massachusetts* v. *Bartlett,* 384 F. 2d, at 821, as well as the "adequacy of transportation service, . . . its essential conditions of economy and efficiency, and . . . appropriate provision and best use of transportation facilities." *Texas* v. *United States,* 292 U. S. 522, 531; *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25. As is clear from the legislative history and § 77 itself, the deference to the Commission as initiator of the plan of reorganization stems from the "recognition by everyone of the advantages of utilizing the facilities of the Commission for investigation into the many-sided problems of transportation service, finance and public interest involved in even minor railroad reorganizations and utilizing the Commission's experience in these fields for the appraisals of values and the development of a plan of reorganization, fair to the public, creditors and stockholders." *Ecker* v. *Western Pacific R. Co.,* 318 U. S., at 468. (Footnote omitted.)

But the respect given the Commission as draftsman of the plan of reorganization entails no abdication of judicial responsibility for the workings of the administrative agency. As we have had occasion to say in describing other aspects of the Commission's work, " 'Congress did not purport to transfer its legislative power to

the unbounded discretion of the regulatory body.'" *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 167. Far from displacing the judicial function, § 77 strikes a "balance between the power of the Commission and that of the court." *Ecker* v. *Western Pacific R. Co., supra,* at 468. The chancellor remains "a necessary and important factor in railroad reorganization"; the statutory objective is "attained only through properly coordinated action between the Commission and the court." *Id.,* at 474–475. (Footnote omitted.) It remains for the reorganization court to ascertain that the Commission "has given consideration to each element of value concerned in its over-all appraisal, and has not wrongly decided legal questions involved in the problems of valuation and of allotment of equivalent securities . . . ." *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.,* 161 F. 2d, at 420.

But the reorganization court may also do more. Under § 77 (c)(13), 11 U. S. C. § 205 (c)(13), the court on its own motion may refer matters to a special master for the hearing of such evidence as the court may desire—a provision which permits the "building up of a group of men [entirely apart from the Commission] thoroughly informed in railroad reorganization matters." H. R. Rep. No. 1897, 72d Cong., 2d Sess., 6 (1933). And under § 77 (e), 11 U. S. C. § 205 (e), the court may itself hold hearings upon the Commission's certification of its plan of reorganization, at which the court is empowered to take evidence beyond that received by the Commission—a supplementary power, unknown to conventional judicial review, but deemed essential to the reorganization court's exercise of its extraordinary "cram down" powers.[60] See S. Rep. No. 1336, 74th Cong., 1st Sess., 3

[60] Pursuant to § 77 (e), 11 U. S. C. § 205 (e), "the judge shall confirm the plan [of reorganization] if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required . . . holding more than two-thirds in amount of

(1935); H. R. Rep. No. 1283, 74th Cong., 1st Sess., 3 (1935). The statutory authority to appoint special masters and to hold evidentiary hearings reflects the unique powers possessed by the reorganization court in passing upon the Commission's proposed plan of reorganization.

In sum, Congress has confided to the reorganization court the "power to review the plan to determine whether the Commission has followed the statutory mandates . . . and whether the Commission had material evidence to support its conclusions." *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 509; cf. *Penn-Central Merger Cases,* 389 U. S., at 498–499. In the reorganization court reposes ultimate responsibility for determining that the plan presented to it by the Commission satisfies the "fair and equitable" requirement of § 77. See *In re New York, N. H. & H. R. Co.,* 16 F. Supp. 504, 507. And at the heart of that determination, as we have already noted, is the valuation of the debtor's property. Here, as elsewhere in the reorganization proceedings, the court must look to the conclusion recommended by the Commission. See *Ecker* v. *Western Pacific R. Co.,* 318 U. S., at 472–473; cf. *Freeman* v. *Mulcahy,* 250 F. 2d 463, 472–473, cert. denied *sub nom. Boston & Providence R. Co.* v. *New York,*

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the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required . . . holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the [statutory] requirements . . . ."

N. H. & H. R. Co., 356 U. S. 939; *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 595, 600. And often the Commission's conclusion will entail less a statement of mathematical certainty than an estimate of what the market will say when it speaks to the subject. "But that estimate must be based on an informed judgment which embraces all . . . relevant . . . facts . . . ." *Consolidated Rock Prods. Co.* v. *Du Bois*, 312 U. S., at 526. "The judicial function is to see to it that the Commission's 'estimate' is not a mere 'guess' but rests upon an informed judgment based upon an appraisal of all . . . relevant . . . facts . . . , and is not at variance with the statutory command." *Freeman* v. *Mulcahy*, 250 F. 2d, at 473. In performing that function, the court must proceed with awareness that its review of the Commission's conclusion on valuation, as with every other important determination that the court is to make, calls for an " 'informed, independent judgment' " of its own. *Consolidated Rock Prods. Co.* v. *Du Bois*, 312 U. S., at 520; *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436.

There remains to consider the scope of review in this Court in passing upon the judicial determinations of the reorganization court. That we have granted certiorari to the Court of Appeals in advance of the appellate court's judgment does not alter the fact that "our task is limited." *Penn-Central Merger Cases*, 389 U. S., at 498. It is not for us to pass upon the myriad factual and legal issues as though we were trying the cases *de novo*. "It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end." *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S., at 564.

IV

As we have earlier noted, the purchase and sale negotiated by Pennsylvania, New York Central, and the New

Haven trustees rested upon the estimated liquidation value of the New Haven properties to be transferred, rather than the earning power of the New Haven as an operating entity. *Second Supplemental Report,* 331 I. C. C., at 657. The parties to the Purchase Agreement thus gave recognition to the reality of New Haven's desperate financial situation, as well as to the power of the reorganization court to order the sale of the debtor's properties at not less than the "fair upset" price under § 77 (b)(5) of the Bankruptcy Act. In approving the negotiators' approach to the price question, the Commission observed that asset value rather than earning power was the primary determinant because New Haven had "long been dry of earning power." 331 I. C. C., at 657. "If there is one thing on this record that is clear and undeniable," the Commission concluded, "it is that N[ew] H[aven] has neither earning power nor the prospect of earning power." *Id.,* at 687.

In light of "the chronic deficit character" of the New Haven operation, *id.,* at 658, the reorganization court understandably accepted the liquidation approach to valuation. "The concept of 'going concern value' is fictional as applied to the New Haven," it said, "because it ignores the Railroad's long and continuing history of deficit operations." 289 F. Supp., at 455. (Footnote omitted.)

Before the Commission, the New Haven trustees and Penn Central submitted complete studies of the debtor's liquidation value, consisting of current assets, special funds, investments, real estate, and other assets. As the Commission described it, "Liquidation value as used by both the N[ew] H[aven] trustees and Penn-Central [was] the estimated market value that would be realized in a total liquidation, less the cost of dismantling properties and other liquidation costs and after discounting proceeds to present worth." 331 I. C. C., at 697; cf.

In re New York, N. H. & H. R. Co., 304 F. Supp., at 797–798.

The New Haven study, based on the assets held by the debtor as of December 31, 1965, was made over a nine-month period by persons who, the Commission found, were familiar with the railroad, its operating area, and the nature and condition of its properties. The Penn Central study valued the assets as of December 31, 1966; it was made in under two months by persons less familiar with the railroad. Both studies revealed that nearly half the New Haven's asset value consisted of its holdings in real estate. The New Haven study produced a gross value for all assets, exclusive of New Haven's interest in the Grand Central Terminal properties, of $230,290,000; the Penn Central study, $150,321,000.

Consistent with the liquidation hypothesis, both New Haven and Penn Central deducted from the gross value of the New Haven assets the expenses that would be incurred if a liquidation in fact took place. These included not only the estimated expenses of sale but, in the case of bridges, trestles, and culverts, removal costs for conversion of the realty to nonrailroad use—costs that often left the assets with a net negative value. The New Haven trustees hypothesized both a six- and a 10-year liquidation period, with expenses for liquidation operations plus taxes and interest aggregating $59,481,000 and $76,847,000, respectively; Penn Central estimated the expenses of a 10-year sale to be $62,172,000. The net liquidation value of the assets was arrived at by deducting the liquidation expenses and certain current assets not to be transferred to Penn Central, along with a further discount to present worth to reflect the hypothesis that receipts would be coming in over a six- or 10-year period.

The Commission concluded that once the New Haven estate embarked on a liquidation sale, it would dispose of the assets as quickly as practicable; the Commission

accordingly found that "the bulk of the liquidation could be completed within a period of 6 years." 331 I. C. C., at 663. The Commission also concluded that the 6% discount rate employed by New Haven and challenged as too low by Penn Central was offset by the conservative valuation of the assets themselves. *Id.*, at 664. The Commission's ultimate finding was that the liquidation value of the New Haven assets to be conveyed to Penn Central "is about $125 million as of December 31, 1966." *Id.*, at 688.

As we have noted earlier, the reorganization court did not accept the $125,000,000 figure, with a consequent remand and second round of review. The bulk of the Commission's valuation has now won the approval of the reorganization court and is not challenged by any of the parties here. There remains in dispute, however, the valuation of several items, aggregating nearly $200,000,000, and it is to those items that we now turn.

1. *The Grand Central Terminal properties.* By far the largest component in the dispute over the liquidation value of the New Haven is the debtor's interest in the Grand Central Terminal properties. This real estate complex consists of several parcels in the area of midtown Manhattan bounded by 42d Street on the south, Madison Avenue on the west, 60th Street on the north, and Lexington Avenue on the east. Included in the properties are the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria hotels; the Pan American building as well as other office buildings along Park Avenue; and the Yale Club. The total assessed value of the Grand Central Terminal properties as of 1965 was $227,225,000.

The New Haven railroad acquired the right to run its trains into Manhattan in 1848, when it entered into an agreement for use of the tracks of the predecessor of the New York Central, to extend for the lives of the respec-

tive charters of the two companies. In 1848 New Haven also acquired an easement over the tracks by legislation of the State of New York. See *New York, N. H. & H. R. Co.* v. *ICC,* 55 F. 2d 1028, 1030. The 1848 agreement underlay various subsequent contracts in the 1870's, '80's, and '90's between the New York Central and the New Haven.

In 1903 and 1904 the State of New York enacted further legislation requiring the placement of the railroad tracks below ground through the 15-block stretch north of the present Terminal. It did not take the Central entrepreneurs long to realize that compliance with the legislative edict left the company a vast area of midtown Manhattan suitable for realty development. In 1907 Central entered into the basic contract with New Haven under which the present Grand Central Terminal was built. The 1907 instrument recited that it had become necessary to rebuild the Terminal, including yards and tracks, in order to provide facilities for the proper management and conduct of the two railroads. Central promised to buy needed land and rights-of-way; New Haven, to make payments in connection with the demolition of the old station and the construction of the new. The 1907 agreement further recited that nothing it contained should impair the rights of the parties under the 1848 agreement. It then went on to provide that Central "doth demise, let and lease" the use of the railroad terminal to New Haven in common with Central. "Railroad terminal" was defined to "mean and include the land, and interests in land, and all improvements thereon . . . , and all rights in any ways on which said land may abut . . . ."

Paragraph 4 of the 1907 agreement provided for joint contributions by New Haven and Central to Terminal maintenance and operation, calculated on the parties' respective car and locomotive usage of the station. The paragraph also obligated New Haven to a minimum

annual payment of $160,179.92 without regard to the percentage of its use of the Terminal. In addition, ¶ 14 of the agreement stipulated that the manager of the enterprise should credit all rentals and other compensation received from the railroad terminal to "the fixed charges or to the cost of maintenance and operation of the said Railroad Terminal, as the same may be applicable."

In 1909, Central and New Haven began the joint financing of construction on the property referred to in the 1907 agreement, and in 1913, they entered into a supplemental agreement in order "to express more fully the intent of the parties hereto as to the right of the New Haven Company and the Central Company with respect to the construction, maintenance and use" of the Terminal properties. The supplemental agreement recited that New Haven's right of user included "the right . . . to join with . . . Central . . . in the construction, holding, maintenance and leasing of buildings . . . upon the land included within the Railroad Terminal." The heart of the 1913 amendment was a detailed provision for the sharing and reimbursement of construction and maintenance costs, along with a reaffirmation of the procedure established in ¶ 14 of the 1907 agreement, under which all rentals were to be credited to the Terminal enterprise. In the following years the two parties entered into hundreds of subagreements relating to the leasing, financing, and sharing of rentals from buildings constructed in the Terminal area. Income from the buildings was credited to the fixed charges, and to the maintenance and operation of the Terminal itself.

None of the agreements between Central and New Haven expressly provided for the disposition of "excess income" left over after the satisfaction of the Terminal expenses. For half a century after the 1913 agreement, the "excess income" question was of academic interest only, since expenses annually exceeded revenues. But

in 1964, and in each succeeding year, the accounts showed excess income. New Haven demanded part of it, and Central refused. The trustees then brought a contract action in the New York Supreme Court to protect New Haven's interest in the income.

When the New Haven trustees first began negotiations with Pennsylvania and Central for the inclusion of the debtor's assets in Penn Central, they proposed that New Haven's interest in the nonoperating Terminal properties be excluded from the takeover, with final disposition deferred until the outcome of the then-pending litigation. But Central insisted it would not consider inclusion of New Haven in the merger unless it got absolute title to all the Terminal properties. The New Haven trustees thereupon sought the advice of legal counsel. They were told that under the agreements with Central, New Haven not only had no fee or leasehold interest in the properties, but had no rights at all that would survive cessation of its train service in and out of the Terminal other than the reimbursement of monies already advanced toward construction of buildings in the area. Although the New York lawsuit was pending to determine New Haven's right to participate in the excess income, the trustees concluded that as an alternative to risking "tremendous expense and long delay" in litigation, 289 F. Supp., at 462, resolution of the inclusion negotiations was of sufficient value to warrant their transferring the debtor's interest, whatever it might be, to Penn Central for no consideration whatever in exchange.

From the outset the bondholders dissociated themselves from the trustees on the question of the debtor's rights in the Terminal properties. Some of the New Haven creditors claimed the value of those rights to be $20,000,000—the sum of unreimbursed advances for building construction and capital improvements as carried on the New Haven books. Others said it was $50,000,000—the capitalization of one-half the excess in-

come at 5%. Still others argued for one-half the value of the fee itself—nearly $115,000,000.

In its Second Supplemental Report the Commission eschewed responsibility for determining the legal rights of New Haven in the properties and set out only to value the debtor's claim. Confronting the complex legal relationship between Central and New Haven, with the consequent unpredictability of litigation, and unwilling to defer valuation of New Haven's interest to the completion of all possible contract actions between the two parties, the Commission set the value of the claim at $13,000,000. It arrived at this figure by taking the average of two unrelated sums: $5,000,000, representing Penn Central's estimate of the nuisance value of New Haven's claim; and $20,000,000, representing the capitalization of New Haven's share of the average of the excess income in 1964 and 1965, based upon its proportional usage of the Terminal.

Faced with the Commission's disclaimer of responsibility for resolution of the legal controversy between Central and New Haven, and given the Commission's Draconian solution to the question of value, the reorganization court appointed a special master to consider New Haven's legal interest in the Terminal properties.[61] Based on his

[61] Without pausing to assess the propriety of the method by which the Commission originally assessed the value of New Haven's interest in the Terminal properties, we think the reorganization court was correct in undertaking its own resolution of the contractual question. The validity of New Haven's claim "present[ed] a legal question which must necessarily be taken into account" in determining value. *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 161 F. 2d 413, 422, cert. denied *sub nom. Protective Committee* v. *New York, N. H. & H. R. Co.*, 331 U. S. 858. The legal question was one "to which the Commission's specialized skill and experience do not extend." 161 F. 2d, at 429 (L. Hand, J., concurring). The authority of the court to take further evidence is unquestioned. Bankruptcy Act, §§ 77 (c)(13), 77 (e), 11 U. S. C. §§ 205 (c)(13), 205 (e).

study of the complex contractual relations between the two parties, of which we have touched above only on the salient features, the Special Master concluded that Central and New Haven had entered into a "joint venture or partnership . . . of some kind." The Special Master dismissed as untenable both Central's argument that by virtue of its sole ownership of the fee it would acquire full right, title, and interest in the Terminal properties upon the cessation of New Haven's train service, and the bondholders' argument that as a partner the debtor had an undivided one-half interest in the fee. In 1907, when the parties entered into the basic agreement, Central had had title to the realty, and New Haven had had a perpetual right to the use of the tracks by force of state legislation. New Haven thus had "not come to the bargaining table in 1907 in the posture of a supplicant." The two railroads together had joined in the design and construction of a Terminal complex greater than either needed for its own requirements; they had undertaken a "major real estate development to extend over a period of many years"; and to those ends they had provided for a sharing of the Terminal expenses on the basis of their respective car usage, along with a committal of Terminal revenues to the operation of the project. As the Special Master put it, "There can be no question that by mutual agreement these revenues from all of the Grand Central Terminal properties were pooled to apply on the fixed charges and maintenance and operational costs of the Terminal."

In light of the conclusion that Central and New Haven had embarked on an enterprise akin to a partnership, the Special Master concluded that once the Terminal revenues satisfied expenses, the excess income belonged equally to each of the railroads. In his view, the car-use formula of the 1907 agreement ceased to be effective once revenue met expenses, and the principle of equality be-

tween partners took its place. The Special Master noted that the parties had not expressly dealt with the question whether New Haven's interest in the properties would end if New Haven ceased to use the Terminal. But he concluded that in such an event New Haven would still be entitled to half of the excess income; that right "would not and could not be terminated by the mere discontinuance of [New Haven] passenger service into and out of the Terminal." [62]

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[62] In 1912 Central and New Haven had erected the Hotel Biltmore through a subsidiary, each railroad supplying half the funds, which were finally reimbursed in 1957. In 1958 Central sought to lease the Biltmore to a controlled subsidiary over New Haven's objection. When New Haven refused to sign the lease, Central claimed that New Haven had broken its agreement and thereby had forfeited all interest in that portion of the enterprise. Central brought suit in New York state court to secure a determination of the parties' respective interests in the property. See *New York Central R. Co.* v. *New York, N. H. & H. R. Co.*, 24 Misc. 2d 414, 208 N. Y. S. 2d 605, aff'd as modified, 13 App. Div. 2d 309, 216 N. Y. S. 2d 928, aff'd *per curiam*, 11 N. Y. 2d 1077, 184 N. E. 2d 194. The conclusions of the New York courts paralleled those of the Special Master. The Supreme Court ruled that New Haven's right to share in rentals after credits to Terminal expenses survived reimbursement of its investment, 24 Misc. 2d, at 428, 208 N. Y. S. 2d, at 618. The Appellate Division agreed, holding that the parties had, "in effect, converted themselves into owners of the fee together" and that "the development of the lands over the tracks was but another step in the joint exploitation of the railroad properties made possible by the covering of the tracks . . . in which [properties] each party had a joint interest . . . ." 13 App. Div. 2d, at 318, 216 N. Y. S. 2d, at 936. The latter court rejected the notion that after paying large sums of money for the construction of buildings and assuming the risk of loss operations in the Terminal enterprise, New Haven should have acquired no right "except the right to join docilely in each of the decisions made by Central." *Id.*, at 319, 216 N. Y. S. 2d, at 937. Although Central retained sole ownership in the fee, that fee was encumbered by the rights of New Haven. The Appellate Division concluded that New Haven's position *vis-à-vis* Central could be described as that of a partner. *Id.*, at 320, 216 N. Y. S. 2d, at 937.

On the first round of review the reorganization court accepted the Special Master's report and incorporated it by reference in its own opinion. The court therefore remanded the matter to the Commission with instructions to value New Haven's one-half interest in the Terminal's future excess income. In addition, the court requested the Commission to "consider and make findings as to what value, if any, attaches to New Haven's present right to share in the income for the purpose of defraying its cost of operating in and out of the terminal." 289 F. Supp., at 463.

In its Fourth Supplemental Report the Commission accepted the determination of the reorganization court that New Haven would have retained a right to one-half the excess income even upon liquidation. 334 I. C. C., at 30–31. Following an extensive consideration of future Terminal expenses and office-building and hotel income, the Commission projected a future excess income of $4,550,000 a year, of which New Haven's 50% share, capitalized at 8%, amounted to $28,438,000. 334 I. C. C. at 39. The new figure thus came to more than twice that awarded by the Commission on the first round.

The Commission also complied with the request of the reorganization court that it consider the value of New Haven's right of access into the Terminal. The Commission concluded that the right would have no value to New Haven unless a buyer were willing to pay for it; that the only potential buyer in sight was the State of New York, which would not need to bid for use of the Terminal; and, accordingly, that New Haven's right of user was valueless. 334 I. C. C., at 32. The bondholders' claim of value for the right of access, the Commission said, amounted to a demand for one-half of all of the income free of the Terminal expenses. *Id.*, at 32 n. 11. On the second round of review, the reorganization court agreed that the Commission's determinations must stand with respect to both the liquidation

value of New Haven's interest in the Terminal properties and its right of free access into the station.[63]

Many aspects of the controversy over the Grand Central Terminal properties have now dropped from contention.[64] The bondholders no longer claim that New Haven is entitled to one-half the value of the fee. Penn Central no longer claims that its fee ownership of the properties reduced New Haven's status to that of a mere grantee retaining only the privilege of entry into the Terminal. All parties accept New Haven's right to the capitalized value of one-half the excess income.[65] What

[63] "The Special Master . . . concluded there was no value in the interest, principally because it is not the kind of interest that would survive liquidation; nor, if it did, could it be assigned. Moreover, there was no evidence that the expenses of maintaining the terminal would be any less. And the idea that the State of New York, or an interstate authority might pay, directly or indirectly, some consideration for availing itself of that use is highly speculative in view of the bargaining positions of the states and the disposition of the I. C. C. to require Penn Central to furnish such access free of charge to a state or public authority which assumed the commuter service, as a condition of Penn Central's getting rid of that much of the losing and burdensome passenger service. While mitigation of a burden may in some circumstances furnish a consideration, it is not a measurable one for the purpose of this issue in the case." 304 F. Supp., at 806.

[64] At one stage the litigation over the value of New Haven's interest in the Terminal properties also involved disputes over which of four different sets of account books the Commission should use, the base period from which the Commission might extrapolate future income and expenses, the rate at which the projected income flow should be capitalized, and the probable income flow from a new office building to be constructed on the site of the railroad station.

[65] The Bondholders Committee presses its challenge that the Commission has understated New Haven's share of excess income by $700,000 a year, with a capitalized loss of $8,750,000 in value. The challenge is predicated on the claim that the Commission improperly concluded that future hotel profits would not increase but would remain constant. 334 I. C. C., at 38. The reorganization court upheld the Commission in this regard, 304 F. Supp., at 806. We do

remains is the claim of the bondholders that New Haven is entitled to the capitalized value of its share not only of the excess income remaining after satisfaction of the Terminal expenses, but of the basic income meeting the expenses themselves. Yet the central finding of the reorganization court remains unrefuted: that by force of the agreements between New York Central and New Haven, the Terminal income was first to be devoted to meeting Terminal expenses; only then was the residue to become available for distribution to the two railroads. To be sure, the parties customarily referred to their respective shares of the Terminal revenues. But the Special Master found that the Terminal revenues were allocated to Central and New Haven on their respective car-use bases as an accounting convenience. The car-use formula established by the 1907 agreement "resulted, for accounting purposes, in the corresponding proportion of the revenue entering the Terminal Account being treated as the property of each railroad, and in each

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not overturn its judgment on a matter such as this, calling for an informed prediction of future income, expenses, and the rate of return on invested capital in a specific business activity uniquely located in midtown Manhattan.

In addition, it is suggested that upon a cessation of New Haven Terminal operations the costs of maintaining the station would decrease, with a consequent augmentation in the excess income. Of course the station revenues would decrease as well—perhaps as much as or more than the expenses. In the absence of any record evidence on the point, we cannot assume that liquidation would thus have benefited New Haven.

On the second round of review the reorganization court ordered Penn Central to pay New Haven the latter's share of accrued excess income for 1967 and 1968, as a separate sum apart from the purchase price. 304 F. Supp., at 806–807. The Bondholders Committee now asks us to award interest with respect to this payment. The reorganization court rejected the claim, doubtless because the uncertainty of New Haven's legal interest in the excess income precluded a finding that the amount represented a liquidated obligation owed by New York Central. We agree with the court's ruling.

railroad's being relieved *pro tanto* from the amount of its liability to meet the charges . . . ."

The bondholders argue that the basic income of the Terminal could somehow be "freed up" from the obligation to meet Terminal expenses. But the Special Master considered and rejected that theory.

> "Both parties . . . committed themselves to pouring these revenues from the entire Grand Central complex into the Terminal Account under paragraph 14 of the Agreement of 1907. The revenues were to enter that account and were to be expended, superior to the individual interests of each railroad, by being applied on payment of the fixed charges and expenses of operation and maintenance of the Terminal. Those revenues were pledged to that purpose regardless of whether New Haven utilized one per cent or fifty per cent of the Terminal's passenger facilities, or whether it used any of those facilities at all. It was not contemplated that if either railroad discontinued passenger trains into Grand Central the other would be saddled with the entire expense of a terminal larger than either railroad needed without being credited with these entire revenues from the Grand Central Terminal properties to the extent that they were required to meet expenditures . . . ."

Nevertheless, Chase Manhattan argues that the commitment of revenues is merely a creature of the agreement between Central and New Haven as construed by the Special Master, and that the transfer of New Haven's Terminal interests on December 31, 1968 "wiped out" that agreement. "The agreement thereafter was no longer in existence," says Chase, "and Penn Central now has this [basic] income (both the former New York Central's share and the former New Haven's share) free and clear of any restriction against its use in any way

Penn Central sees fit." Stated in this fashion, the argument is self-defeating: since New Haven's right to the basic income derives solely from its agreement with Central, a "wiping out" of that agreement necessarily leaves New Haven without the right as well as without the obligation. But, more importantly, it simply is not true that Penn Central now has New Haven's former share in such income without "any restriction of any kind . . . ." Penn Central also has New Haven's loss operations into and out of the Terminal, and it must meet the expenses occasioned by those operations from some source. Since by definition New Haven's share of the basic income was, as an accounting matter, equal to its share of the Terminal expenses, by its 1968 transfer it has merely surrendered an amount equal to its gain: it has given up its share of the income pledged to the costs of operations at the Terminal, but it has relieved itself of the obligation to meet those costs. By the same token, Penn Central has gained New Haven's share of income, but with the matching loss of New Haven's expenses.

The bondholders' argument must be that entirely apart from the contractual arrangements with Central, New Haven had a valuable right of free access into the Terminal, which Penn Central has now taken over with no compensating payment in exchange. This argument, too, is without merit. It is a misnomer to describe New Haven's right of access to the Terminal as "free." New Haven had a right of entry, rather than a privilege, in the sense that it had access, independently of the consent of the fee owner of the tracks, by force of legislative edict. But the right bestowed by the legislature was conditioned "upon such terms . . . as [have] been or may hereafter be agreed upon by and between" New Haven and Central's predecessor. N. Y. Sess. Laws of 1848, c. 143, § 6. Thus the New Haven right of access has never been free from the obligations imposed by the agreements with Central.

But even if the access right were "free" in the sense that it could survive elimination of New Haven's agreements with Central, we agree with the reorganization court that the Commission correctly concluded it would have no value. And that is the case whether the right is deemed transferred to Penn Central, as in fact it was, on the date of inclusion, or whether, consistent with the liquidation hypothesis on which the parties valued New Haven's other assets, it is deemed to have been offered for sale to a third party upon New Haven's cessation of operations. In the former event, the analysis pertinent to New Haven's contract rights applies with equal force. Penn Central has in fact succeeded to New Haven's right of access, but it has also succeeded to New Haven's deficit operations. Conversely, New Haven has given up a right of entry in exchange for relief from the obligation to provide train service at the station. Indeed, to the extent that the expenses generated by New Haven's use of the Terminal exceeded the revenues attributable to that activity, Penn Central has lost and New Haven gained on the exchange.[66]

The same result is reached if New Haven is deemed to have gone into liquidation. For the bondholders have never shown that anyone would pay a penny for the right to carry on New Haven's deficit-ridden Terminal operation. If nobody would pay a liquidating New Haven for the right to lose money, the right is, again,

[66] The parties have devoted much discussion to Penn Central's negotiations with the States of New York and Connecticut for the transfer of the New Haven commuter service to a public authority. Manufacturers Hanover says the States have agreed to pay an annual toll to run the trains into the Terminal, thus demonstrating that the New Haven right of access does have value; Penn Central claims the States are to pay only for the use of the tracks and that it will give them a right of entry into the Terminal for nothing. Both sides point to newspaper articles in support of their arguments. None of this is record evidence, and we do not consider it.

worthless. The Commission found that the only potential buyer would be the State of New York, moving to preserve the commuter service in the public interest. 334 I. C. C., at 32. Whether the State would have to pay *Penn Central* for the use of Penn Central's tracks and its share of Terminal expenses is not before us. On the liquidation hypothesis, the State would not have to pay Penn Central for New Haven's right of access, for Penn Central would not own it. And the State's paying *New Haven* depends on at least four independent contingencies: whether New Haven's right of access would survive liquidation; whether the right would exclude the power of Central to bestow a similar access right on a third party while New Haven's own went unused; whether, under the agreement with Central, the right would be capable of assignment; and whether the State, if required to pay New Haven anything to enter the Terminal, would choose instead to operate the commuter trains only to subway connections in the Bronx rather than all the way into Manhattan. We agree with the Commission and the reorganization court that these imponderables render the value of New Haven's right of access so speculative as to defy reasoned attribution of any value to it.

2. *The Bronx freight yards.* One of New Haven's principal real estate holdings consisted of two freight yards located on some 160 acres in the south Bronx, New York, between the East River on the one side and the Major Deegan Expressway and Bruckner Boulevard on the other. The Harlem River yard occupies nearly 4,000,000 square feet across the East River from Manhattan and Queens; it has been described by a qualified appraiser as "a unique industrial facility that could be well used by any heavy industrial concern." About a mile north of the Harlem River yard, and connected to it by the existing trackage of New Haven's Harlem Division

line, lies the Oak Point yard, characterized by the appraiser as "one of the most desirable industrial facilities in New York City."

Two other facilities in the area are worthy of note. The first is the Hunts Point Market, located northeast of the Oak Point yard. The market is a $100,000,000 municipal installation and the central distribution area for the wholesaling of produce for the New York City metropolitan area. It lies on the promontory flanked by the Bronx and East Rivers, and is connected to the New Haven's Harlem Division line through a spur track owned by the city. The market is the largest receiver of rail traffic in the area, and plans are under way for further expansion. *Fourth Supplemental Report,* 334 I. C. C., at 43–44. The second facility is the former Port Morris yard of Penn Central, situated midway between the Harlem River and Oak Point yards and lying athwart the Harlem Division trackage that connects the two New Haven yards. Port Morris is linked by a branch line to Penn Central's Harlem Branch division, a principal element in the Penn Central System. An interchange track runs from the Port Morris branch line to the border of the Oak Point yard.

Before the Commission, the parties submitted five different estimates of the value of the Harlem River and Oak Point yards. The bondholders offered the testimony of an appraiser who thought the land would bring $32,000,000 for residential use and $26,000,000 for industrial use; the New Haven trustees offered the testimony of another appraiser who submitted two studies showing $22,650,000 and $18,090,990, both for industrial use; and Penn Central, that of a third appraiser who set the value, again for industrial use, at $15,585,000. In its Second Supplemental Report the Commission accepted the lower of the values proposed by the trustees' witness—$18,090,-990. 331 I. C. C., at 668.

On the first round of judicial review the reorganization court thought that on the present record "there was substantial evidence to support the Commission's valuation and not enough to show that it was unfair or inequitable," but concluded that a clarification of the basis of the Commission's valuation was desirable. 289 F. Supp., at 464. On the remand, controversy centered on the alternative appraisals offered by the trustees' witness. It soon became evident that in valuing the freight yards the Commission had pursued the liquidation hypothesis with a vengeance. The higher appraisal of the trustees' witness had rested on the premise that upon cessation of New Haven operations the Bronx yards would be available for continued industrial occupancy, with existing trackage and electrical facilities left in place. The presence of such facilities commanded at least a 10% premium in Bronx realty values. The witness' second appraisal had assumed that upon liquidation New Haven would strip the yards of these facilities, thereby depressing the value of the land and incurring substantial costs of removal. 334 I. C. C., at 42. Adoption of that assumption resulted in the loss of over $4,000,000 in value.[67]

[67] "An example of the difference in approach in the trustees' two appraisals is afforded by the so-called REA Building in the Harlem River yard. This building was specially built for REA Express with four tracks running through the center of its ground floor. In the first, and higher, trustee appraisal the building was valued at $675,000 because of these tracks and the railroad service they provided. In the second, and lower appraisal, it was assumed that the tracks were dismantled. This would require reconstruction of the ground floor. The building would then be suitable only for an entirely different type of tenant. Without tracks, it would have a lower rental value. Its appraised value was, therefore, reduced to $400,000 in the second appraisal. Differences in the values of various other tenant-occupied buildings in the two yards resulted from following similar procedures in their appraisals." 334 I. C. C., at 43. (Footnote omitted.)

In its Fourth Supplemental Report the Commission adhered to its acceptance of the lower of the witness' two estimates, reiterating its reliance upon the liquidation premise. That premise justified the assumption that New Haven would dismantle the yards once the rest of the railroad was scrapped, since with no link to Penn Central the yards would have no value either as operating facilities or for industrial use with railroad connections.

But the fact of the matter was that even on the liquidation hypothesis the New Haven yards did *not* lack rail connections to Penn Central. Penn Central already had in place a branch line running from its Port Morris yard to its Harlem Branch division. That Port Morris line, along with the interchange track running up to the border of the Oak Point yard and meeting the New Haven's line at that point, would have continued in place even upon a liquidation of New Haven. The trustees' witness acknowledged that in arriving at the lower of his two values for the New Haven yards, he had been unaware of the Penn Central link at Port Morris. Nevertheless, the Commission attributed no significance to the witness' unawareness of the Port Morris connection, because it concluded that even with the existing link to the New Haven yards, it was "extremely doubtful" that Penn Central would continue to provide service into the area after a New Haven liquidation. Once New Haven vanished, the Commission reasoned, Penn Central would be under no legal obligation to perform switching service beyond its own Port Morris line or to extend its line into the former New Haven yards. And the Commission accepted the testimony of a Penn Central witness that the company would have no economic incentive to provide service, because of the unprofitability of the perishable freight destined for the Hunts Point Market, as well as the absence of necessary track clearances and yard classifying facilities. 334 I. C. C., at 44–45.

On the second round of review the reorganization court ruled that the Commission had erred in rejecting the higher of the witness' two appraisals. "It is undisputed that the Port Morris branch was and is there and operating and Penn Central has not been authorized to abandon it." 304 F. Supp., at 807. The court overruled the Commission's determination that Penn Central would cease to provide service not only to the industrial enterprises in the 160-acre area of the two yards, but to the Hunts Point Market as well.

> "The great bulk of produce for feeding of the millions of residents of metropolitan New York is brought in by rail through these yards to this market and distribution point. To assume that the State and City of New York would stand idly by and permit the life line to its huge and costly enterprise to be cut, just as it is in the midst of planning its necessary enlargement, because it was unwilling or unable effectively to bring pressures to bear or take steps on its own to preserve the connection with Penn Central is absurd . . . ." 304 F. Supp., at 807–808.

The ruling of the reorganization court is, at the least, free from the error that would require us to overturn its judgment on this matter. As the Commission's own report makes evident, the agency based its startling conclusion that Penn Central could deny service to the area, not on the facts of record, but in adherence to the untenable assumption that on liquidation New Haven would have uprooted the valuable trackage and electrical facilities already in place. According to the Commission, "[t]he record does not support any finding of substantial need for Penn Central service that would justify the construction by that carrier of the trackage necessary to connect Harlem River and Oak Point yards

and the latter yard and Hunts Point, *if N[ew] H[aven] were to be liquidated.*" 334 I. C. C., at 47. (Emphasis supplied.) Of course we may assume that Penn Central could not be forced to buy land and build track to provide service into areas, noncontiguous to its rail system, to which it did not hold itself out as a common carrier. But it is a far cry from that proposition to the statement that a common carrier could deny service to industrial and public activities simply because ownership of adjoining trackage had changed hands.[68] The record facts are that the trackage the Commission said Penn Central would have to construct is already in place, connecting the two yards and the market.[69] The Commission nonetheless continued to presuppose the removal of the New Haven's rail facilities. "On this record," the Commission reiterated, "*and the assumption of N[ew] H[aven]'s liquidation and the dismantling of its system,* Penn Central would not serve, and could not be compelled to serve, the Harlem River or Oak Point industries, or the Hunts Point Market." 334 I. C. C., at 47. (Emphasis supplied.) There is not a shred of record evidence to support the Commission's assumption as applied to the New Haven yards. It is not rational

[68] Under the Interstate Commerce Act, Penn Central is obliged to "provide and furnish transportation upon reasonable request therefor," § 1 (4), 49 U. S. C. § 1 (4), and to offer switch connections and cars for traffic to branch lines or private side track constructed by shippers to connect with the railroad wherever practicable and justified by the added business, § 1 (9), 49 U. S. C. § 1 (9).

[69] Penn Central claims it could not provide service to the yards over the Port Morris branch because of clearance difficulties on the line. The reorganization court observed that Penn Central's own evidence largely refuted the contention. This finding of the District Court, based on its study of the record and its intimate familiarity with the subject matter, is free from clear error, and we do not disturb it.

to suppose that the managers of the hypothetical liquidation sale, devoted to obtaining the highest possible price for the assets of the debtor, would have ignored the best use of the yard facilities and stripped them of more than $4,000,000 in value.[70]

3. *The added deductions.* On the remand the Commission recalculated the liquidation value of the New Haven, as directed by the reorganization court, and arrived at a new sum of $162,700,000. "A property value of this sort inheres in the assets," the Commission said, "if we assume that the railroad may immediately shut down and begin a 6-year program of selling off the road parcel-by-parcel, and virtually tie-by-tie." 334 I. C. C., at 53. But the Commission declined to approve the new figure as the proper liquidation value of the debtor.

> "The liquidation value that results in this reopened proceeding exceeds the agreed price [of $125,000,000], obliging us to make a new determi-

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[70] Penn Central's own witnesses conceded the Port Morris connection would "doubtless" enable the industries at Harlem River and Oak Point to continue their rail usage even after a New Haven liquidation; that someone, whether the City of New York or a third party, would have to acquire access for rail service to the Hunts Point Market; and that the only rational way to provide such service would be to move cars from the Penn Central system via the Port Morris connection. The Commission itself found that during a test month in the summer of 1968 more than 2,300 cars passed from the Penn Central main lines to the market and yard industries via the Port Morris connection. 334 I. C. C., at 44.

At one point Penn Central claimed that even on the higher of the two appraisals, the record evidence required a downward adjustment of $461,000. The reorganization court made a partial correction to reflect a conceded duplication, but implicitly rejected Penn Central's argument as to the balance. Since Penn Central does not press the issue here, we do not consider it.

nation as to whether the price resulting from such a valuation is fair.

"The establishment of liquidation value as a pricing floor on this record must assume that the N[ew] H[aven] may be shut down at once and be liquidated in parcels. Such a pricing theory assumes that the public may be denied an opportunity to be heard. It is wholly inconsistent with the requirement we have imposed on Penn Central to absorb the N[ew] H[aven], which requirement rests entirely upon the public's need for a continuing N[ew] H[aven]. Any assumption that N[ew] H[aven] may be shut down and broken up must necessarily permit the conclusion that Penn Central may be relieved of its inclusion obligation. It is inequitable to conceive at the same time both a right in the bondholders to break up the N[ew] H[aven] and an obligation on Penn Central to keep it going. The demands of equity are no more satisfied by conceiving that the bondholders have a constitutional right to shut down the N[ew] H[aven] which is superior to the public's right to keep it going.

"The foregoing liquidation value assumes that this Commission has no function under the Interstate Commerce Act to decide whether public convenience and necessity permit the abandonment of N[ew] H[aven]'s entire line or portions of it. In view of our often repeated findings that there is a public need for the services of this railroad, there is no warrant for assuming that the creditors may now break up the railroad or devote the properties to another use. The estate is not relieved of its obligation to serve the public. A price that is premised on outright rejection of that obligation is inequitable

> and awards the estate a windfall that is not supported by any record evidence." 334 I. C. C., at 54–55.

On the basis of this reasoning, the Commission then proceeded to take into account "other pricing considerations"—costs of liquidation it had not reached in its earlier report because of its conclusion that the $125,000,000 price arrived at by the parties was proper under the Interstate Commerce and Bankruptcy Acts.

> "The alleged right to liquidation values derives from an alleged right to abandon; and there are recognized limitations on the right to abandon that in themselves limit the creditors' entitlement to the liquidation value we have computed under the court's instructions. Under section 1 (18) of the Interstate Commerce Act, the Commission is empowered to impose reasonable limitations on the abandonment right." 334 I. C. C., at 57.

The Commission's new "pricing considerations" consisted of two elements: a one-year delay the New Haven would have incurred in securing the approval of the Commission and the courts to abandon train operations; and a bulk-sale discount that a purchaser of all the debtor's assets, to whom the Commission could order the road to sell, would have commanded. Together the added deductions amounted to $22,081,000.

(a) *The one-year delay.* The Commission found that an application for a certificate of abandonment, as required by § 1 (18) of the Interstate Commerce Act, would have precipitated a lengthy process of administrative action and judicial review resulting in at least a one-year delay in the commencement of actual liquidation operations. The Commission assumed that the year's delay would have occasioned a freeze on liquidation activity, following which the sell-off would have proceeded

as projected in the Second Supplemental Report. The abandonment delay, the Commission found, would have added costs of $4,940,000 in preserving the assets of the estate, $2,500,000 in real estate taxes, and $7,946,000 in a discount of the sale receipts back to present worth.

On review the reorganization court rejected the delay concept, ruling that the added deduction violated the liquidation hypothesis upon which the debtor's assets had been valued. Neither the parties nor the Commission had previously postulated the deduction now imposed, because the liquidation hypothesis itself had presupposed a lawful abandonment of service. 304 F. Supp., at 798. That presupposition was rooted in the hard fact that for more than three years prior to December 31, 1966, the New Haven had been kept alive, despite its hopeless financial condition, solely in the name of the public interest and in anticipation of inclusion in Penn Central.

> "By late 1963 it was clear to the Trustees of the New Haven and to the Reorganization Court that only two courses were open: the Trustees must press to accomplish the inclusion in a Penn Central merger or they must press for liquidation. The former was obviously in the public interest and the latter was not. The course of inclusion was followed; but because the merger and the reorganization proceedings stretched out far beyond what was originally forecast, the 'interim' became seven and a half years; and 'losses reasonably incident to working out the solution most consistent with the public interest' eroded the debtor's estate in excess of $60 million.
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> . . . . .
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> "Like Laban of old, the Commission would now require further servitude of the debtor—in this case the creditors. But the duty of the debtor's creditors to suffer losses for an interim period has already

> been fulfilled and the public interest has already been served to the extent that in fairness and equity the public had any right to demand." 304 F. Supp., at 800. (Footnote omitted.)

The Commission and Penn Central take issue with the reorganization court's disallowance of the deduction for delay. The dispute between them and the bondholders is not, however, broad in concept. It does not draw into question the right of the Commission to insist that New Haven obtain permission to abandon its operations: no one here quarrels with the proposition that in the event of a liquidation, New Haven would have been obliged to obtain a certificate from the Commission pursuant to § 1 (18) of the Interstate Commerce Act. The parties agree that since a delay occasioned by abandonment proceedings before the Commission, followed by judicial review, inheres in the liquidation process, the Commission may exercise its expertise in gauging the extent and expense of such a delay, and Penn Central need not pay for the consequent diminution in the value of the assets of the debtor. The dispute is, rather, a a narrow one. It is simply whether, in the circumstances of this case, the valuation initially arrived at by the Commission already presupposed that the debtor had a certificate of abandonment in hand, so that assignment of a cost attributable to that factor amounts to an unwarranted double deduction.

Before this Court the Commission and Penn Central urge the view that until the remand the Commission had not taken the delay factor into account. They justify the deduction on the second round as a development of the governing liquidation hypothesis adopted on the first. Once we enter the world of a liquidation that

never occurred, they say, the Commission is more competent than the courts to project incidental costs and delays. On the remand the Commission merely refined the liquidation approach to reflect added expenses not initially considered because of the fairness of the price arrived at by the parties. The new price ordered by the courts compelled re-examination of the elements of liquidation, of which abandonment delay is surely one. And when it comes to predicting the likelihood of delay in passing on an application for a certificate of abandonment, the Commission is, as Penn Central puts it, "a uniquely qualified finder of fact . . . ." [71]

At once the "refinement" rationale confronts an imposing obstacle raised by the Commission's own Second Supplemental Report. That report makes clear that the Commission had the element of delay before it in making its original valuation, but declined to apply any deduction on its account. The Commission considered—and rejected—Penn Central's request "that an allowance be made *to the earliest date at which a liquidation could reasonably be anticipated* for the constant diminution of N[ew] H[aven]'s assets." 331 I. C. C., at 698. (Emphasis supplied.) That rejection necessarily implied that the Commission had recognized the cost attributable to the delay occasioned by an abandonment proceeding, but determined not to weigh it in the balance. Thus we deal, not with a delay factor brought to light for the first time on the second round, but with one taken into ac-

[71] The Commission itself justified the refusal of the hearing examiner to take evidence on the question of delay by saying: "To the extent that evidence was proffered on the processing time of possible abandonment proceedings involving N[ew] H[aven], such matters are within our knowledge and evidence thereon was unnecessary." 334 I. C. C., at 29.

count now even though deliberately excluded before. Justification, if any there be, must begin with the realization that the Commission changed its mind in midstream.

The reorganization court rejected the Commission's conclusion that the valuation date selected in the Second Supplemental Report—December 31, 1966—represented the date on which New Haven would have sought a certificate of abandonment rather than the date on which the railroad would have commenced its six-year sale. In doing so, the court relied on more than the Commission's shift in position between its second and fourth reports. The court rested on its express finding of fact that "but for the adoption by the Trustees of a course to serve the public interest, abandonment proceedings could and would have been commenced in late 1963 and liquidation would have been started, certainly by the valuation date of December 31, 1966." 304 F. Supp., at 801. That finding comes to us from the federal judge who has presided over the second New Haven reorganization since its inception. "In view of the district judge's familiarity with the reorganization, this finding has especial weight with us." *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 533. Not only are we unable to say the finding is erroneous; we do not see how the record of these proceedings permits any other conclusion.

Indeed, the Commission and Penn Central do not challenge that conclusion. Instead, they seek support for the delay deduction by urging that if confronted with an abandonment application, the Commission would have had to "hear the communities that would be affected by the abandonment. If there is hope of a public takeover of segments, we must allow time for the States and communities to present their plans." 334 I. C. C., at 58.

But apart from the fact that this Court itself once characterized the notion that the affected States or the Federal Government might take over the road and its operations as "sheer speculation," *Penn-Central Merger Cases,* 389 U. S., at 507, the reorganization court specifically rejected the Commission's argument.

> "During seven and one-half years, the Federal government, the states, the communities and the public in general were fully informed by the Trustees of the Railroad as to the inability of the New Haven to survive as an independent railroad. And, apart from seeking inclusion in a merged Penn Central, the Trustees were engaging in a holding operation to afford the public bodies, as the real guardians of the public interest, the opportunity to act—to take over or adopt measures to preserve the New Haven transportation system. Response to this was partial tax assistance and, in the latter half of the period, grants which covered about ⅓ of the annual passenger losses. . . . Otherwise nothing has come to the attention of this court, to indicate anything more than a highly speculative prospect, that any or all of the states concerned or their municipalities had the slightest interest in taking over and operating the New Haven or any segment of it.
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> "In spite of full awareness of the situation of the bankrupt line and with nothing to prevent their doing so, no standby legislation, for use if inclusion of the New Haven by Penn Central fell through, was ever enacted or sought to be passed in seven and one-half years by the Federal Government or by any of the states for the take over and operation of the New Haven freight and passenger system or a segment of it (except for the west-end and the Boston commuter services); nor was any plan ever

filed by the governmental bodies incorporating such take over and operation." 304 F. Supp., at 800–801.[72]

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[72] These findings comport with the observations of the reorganization court in February 1965, when the trustees sought permission to discontinue all passenger service:

"The record shows that the public interest has been thus far supported by the creditors of this estate with no substantial participation from the states. . . .

. . . . . .

"Far from being indifferent to the public interest, the court has indulged that interest and allowed it to prevail over the creditors' rights for three and one-half years.

"In spite of this long interval, very little has been produced. Massachusetts never fulfilled its commitment to grant tax relief. New York, by conditioning future tax relief on a commitment by the Trustees to lease new equipment and conduct commutation service at present levels with no assurance that the deficits would be underwritten, has used it as a lash over the back of the debtor to compel it to do the State's will at a time when it has not had the strength to do so. Tax relief in Connecticut and Rhode Island was continued, but with a requirement that certain standards of service be met and, accordingly, that the passenger deficits continue to be incurred.

"If the public interest so urgently demands the continuance of the New Haven's passenger service, as the States seem suddenly to have discovered, they should have stopped taxing its property a long time ago. Commuters and other passengers demand better equipment and better service; the States insist upon imposing a continuing tax burden—everyone wants to draw the last ounces of blood out of this near corpse; but no one gives it the transfusion it so badly needs. It is now too late in the day to talk about saving the situation with tax relief. As the Railroad has not been able to use its vital cash for taxes, liens have been accumulating ahead of the creditors, forcing them further down the ladder of priorities, and accelerating and compelling the action which the court has taken today. If this tax burden continues to grow and the Railroad is not otherwise relieved, the creditors will be compelled to move for liquidation of the New Haven and the court will have no recourse but to order it. If the states wish essential passenger services continued, an underwriting which goes far beyond tax relief will be necessary."

We think the reorganization court was entirely correct in concluding that:

> "The policy of imposing an interim burden of losses, through its deficit operation, on a railroad in reorganization is to afford a reasonable opportunity to the responsible agencies to arrange the continuation of the railroad's operation, but the law does not require the furnishing of two or three or four opportunities. The duty was more than amply fulfilled by the New Haven. The public interest has had one huge bite of the apple; it is not entitled to another." 304 F. Supp., at 801.

It is argued that the Commission nonetheless should be permitted to tax New Haven with the cost of a one-year delay because in fact the debtor sought no abandonment certificate from the Commission. The Commission and Penn Central attribute this failure to New Haven's self-interest. "The fact is," the Commission said, "that both the creditors and the trustees exercised options, assuming the risks involved therein, and the bondholders may not now be heard to ascribe to someone else the responsibility for the selection of their course of action, or inaction." 334 I. C. C., at 58. (Footnote omitted.) But the continued operation of the New Haven as a railroad depleted the estate by at least $60,000,000. 304 F. Supp., at 800. We fail to see how the self-interest of either the estate or its creditors was bettered by that operation.

Nor is there any substance to the contention that by failing to press for immediate liquidation of the debtor, the bondholders somehow waived their right to object to the imposition of the deduction for delay. The record that shows the preservation of New Haven in the public interest long after it had ceased to be viable as an independent enterprise demonstrates at the most that the bondholders had resigned themselves to bearing the costs

of interim operations pending inclusion in Penn Central. It contains no support for the proposition that they consented to the imposition of more than $15,000,000 in *hypothetical* costs on top of the tens of millions in *actual* costs they were forced to bear. As the reorganization court put it, "[S]uch a second round of loss superimposed on the first, like Pelion on Ossa, is as unfair and inequitable as can be imagined . . . ." 304 F. Supp., at 801. It cannot be sustained under any construction of the Bankruptcy Act.[73]

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[73] What we have said disposes of the deduction for delay on the ground advanced by the reorganization court. Entirely apart from that explanation, a second line of reasoning leads to the same result. The delay deduction assumed the postponement of the commencement of liquidation for one year; the Commission postulated a one-year freeze prior to the beginning of sale. See 334 I. C. C., at 60 n. 2. But the Commission thereby assumed that during the one-year delay period nothing would happen; the trustees would sell no properties and enter into no contingent contracts for disposition of the debtor's assets. Absent Commission explanation, we cannot assume that the delay would have resulted in so total a suspension of the sales program during the first year, as well as a failure of the sale managers to expedite disposition of the properties and thereby shorten the contemplated six-year liquidation period. It is not for us to determine the extent to which imposition of a one-year pause at the outset would have enabled the trustees to accelerate the sale in the fifth and sixth years. But acceptance of the delay deduction in principle would compel a remand to the Commission for explanation of its tacit assumptions that the initial year would have been devoid of activity and the later years would merely have proceeded as before.

It is suggested that with the one-year freeze the delay concept may be viewed as a mere shifting of the valuation date to December 31, 1967. That date, it is said, is as rational as the date originally chosen. And so it may be. But the adjustments in value take into account only the expenses and depreciation attributable to a one-year pause, with no consideration to countervailing income and increases in capital value. The Commission says a comprehensive revaluation of the debtor's assets as of December 31, 1967, would produce a much greater loss than the $15,386,000

(b) *The bulk-sale discount.* New Haven's land holdings consisted of over 25,000 acres located along its rights-of-way in four States. In its Second Supplemental Report the Commission accepted the New Haven trustees' appraisal of the realty. The New Haven analysis was prepared by the company's general real estate agent, who relied in some instances on the studies of outside appraisers. The agent drew on a fund of actual experience, for the New Haven had long had a real estate department engaged in the disposition of nonoperating properties. From the inception of the New Haven trusteeship through November 1966, that department had completed 853 separate realty sales for a gross consideration of some $13,900,000. The Commission found that the large volume of past sales provided a "firm base" for the New Haven estimate. 331 I. C. C., at 667.

The New Haven agent assumed that the company would sell off its lots in normal-sized parcels. He gave specific consideration to each part of the railroad's property and reached his values on a zone-by-zone basis. He based his estimates of fair market value on his expert judgment, sales in the area, existing tax valuations, and the adaptability of the land to nonrailroad use. He discounted by 50% whenever the New Haven's records indicated questionable title; on the six-year liquidation

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actually deducted. But in the absence of proof we again cannot assume that that would be the case. For authority to that effect we need look no further than to the Commission itself, which, as we have earlier noted, rejected Penn Central's request on the first round for a further allowance for the "constant diminution of N[ew] H[aven]'s assets" to reflect the occurrence of abandonment delay. On that occasion the Commission noted that "a large portion of N[ew] H[aven] assets consists of land," and added: "We cannot assume that these values will diminish. It is at least as reasonable to presuppose that the values will increase." 331 I. C. C., at 698. If the Commission could not assume diminution in realty values at the time of the Second Supplemental Report, we do not see how, without some explanation, it could assume it at the time of the Fourth.

hypothesis, he deducted $15,971,000 as the cost of operating the New Haven realty department; and on the further assumption that the debtor would have to sell some of the property during the final year at vastly reduced prices, he made a further deduction of $8,178,000.

On the remand, the Commission ordered a further deduction from the liquidation value of the estate, based on a hypothetical sale in bulk of all the New Haven's land assets.

> "The liquidation value urged by the creditors assumes not only the immediate right to abandon, . . . but also the right to break up the railroad and sell the parcels for their highest and best price. We think such a right may be restricted when a buyer for the entire bulk of the N[ew] H[aven] properties appears who will continue the operation of needed services." 334 I. C. C., at 60. (Footnote omitted.)

The Commission calculated the deduction on the premise that "[t]he bulk-sale discount merely reflects a market appraisal of the risks that the estate avoids, and the bulk buyer assumes." *Id.*, at 61. The Commission then credited the evidence that Penn Central had presented through a realty expert with respect to a bulk sale of the New Haven land properties. The expert testified to the premium to be charged by a "single purchaser of property who would, in turn, sell off the property probably to many users and who would obtain his profit by reason of its purchase and resale." On the basis of this testimony, the Commission found that a bulk buyer would command at least a 10.5% return on his investment, calculated as the sum of a 75% borrowing at 9% and a 25% self-financing at an internal charge of 15%, and that such an investment rate required an additional 4.5% discount of the New Haven land values over and above the 6% by which they had already been

reduced. This bulk-sale discount resulted in a further diminution of $6,695,000 in the valuation of the New Haven assets. 334 I. C. C., at 61–62.

On the second round of review the reorganization court rejected the bulk-sale deduction as "improper and without support in law or reason." 304 F. Supp., at 805.

> "Value, under the circumstances of this case, can only be arrived at through the dismantling of the transportation plant and a piece by piece sale of the properties. It is clear from the record that a market existed for the disposition of the properties on this basis. Their value is the best price the market place will give the seller, less the costs and expenses relevant to the sale . . . . It makes no difference whether the purchaser wants to use the property as is, or to improve and develop it. The question is how much will the market place give for a particular item of property." *Ibid.*

The court answered the argument that the discount merely reflected the risk of nonsale that the seller transferred to the bulk buyer by pointing to the Commission's prior deduction of over $8,000,000 for that purpose. Moreover, the deduction violated the requirement that the sale price meet the "fair upset" minimum imposed by § 77 (b)(5) of the Bankruptcy Act. "That lowest price is what the market would pay, which is implicit in the standard used here, i. e., fair liquidation value. Neither a trustee nor an equity receiver could, with the court's approval, sell for less." 304 F. Supp., at 806.

Penn Central now protests that the reorganization court has erred in rejecting the bulk-sale discount. It says its expert witness duplicated no discounts previously taken; he proceeded on the basis of all previous deductions. In addition, it is argued, his analysis took into account the problem of market absorption caused by the

mass marketing of some 1,700 sale parcels and the risk of further depression of land values occasioned by cessation of New Haven's operations—factors not considered by New Haven's witness. The hypothetical bulk sale, Penn Central says, was merely a construct for quantifying the risks that New Haven itself would have assumed in undertaking the sale of its realty; it afforded a means to determine "the minimum rates of return necessary to attract capital to the business of owning and disposing of the New Haven's land." Penn Central insists that the bulk-sale analysis thus constituted a "pricing out" of an additional cost of liquidation; it was "simply an analytical device for approximating risks that would occur if the land were retailed over time as promptly as possible . . . ."

We may assume that Penn Central's "pricing out" theory is a rational one. But the record demonstrates that the Commission rejected it as insufficient to justify application of the bulk-sale theory. Penn Central's analysis, said the Commission,

> "overlooks what is necessarily the bondholders' position—namely that aside from principles of equity and fairness they have a fixed right to sell off N[ew] H[aven] in parcels, so that even a bulk buyer must pay the per-parcel price. Our answer is that we may compel the bulk sale and the bulk sale discount as a condition of an abandonment certificate, and, therefore, as a reduction of the present price. ". . . We . . . might compel N[ew] H[aven], if it filed for abandonment, to sell in bulk and thereby make a bulk sale price appropriate." 334 I. C. C., at 61.

The Commission thus ruled that only by assuming an actual buyer in bulk who would take over the New Haven properties for continued railroad operations could it compel the transfer of the real property at the re-

duced price. Far from setting forth a theory of compulsory transfer "completely independent" of a "pricing out" analysis, the Commission concluded that only its power to compel the sale of the real estate to a single buyer for continued operation justified the bulk-sale discount.

We do not consider whether the Commission could lawfully impose such a bulk-transfer obligation on a railroad in liquidation at the cost of reducing the per-parcel valuation of its assets.[74] For the record before us is devoid of evidence that a bulk buyer would agree to take over the New Haven properties for continued service at any price. When a railroad has a lengthy history of deficit operations with no prospect of improvement, and a consequent operating value of zero or even a negative figure, the Commission cannot rationally assume that a *deus ex machina* will emerge to spend millions for the opportunity to lose millions more.

Penn Central's witness gave no testimony in support of any such theory. He was a professional developer of real estate, not a railroad operator. And he testified to what extra charges *he* would levy, after all previous deductions for the costs and risks of sale, to assume the risk of nonsale as well as the entrepreneurial activity of retailing the realty parcels. His testimony established nothing more than that he would not undertake the task

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[74] The Commission frequently requires an abandoning railroad to sell its properties in bulk to a party (typically a public authority) that will undertake continued operation of the service, but typically sets the sale price at "not less than net salvage value of the property sought to be acquired." See, *e. g., Rutland R. Corp. Abandonment,* 317 I. C. C. 393, 425; *Chicago N. S. & M. R. Abandonment,* 317 I. C. C. 191, 200, aff'd *sub nom. Illinois* v. *United States,* 213 F. Supp. 83, aff'd *per curiam,* 373 U. S. 378; *Fort Dodge, D. M. & S. R. Co. Abandonment,* 312 I. C. C. 708, 712; *Chicago A. & E. R. Corp. Abandonment,* 312 I. C. C. 533, 537; *Arkansas & O. R. Corp. Abandonment,* 312 I. C. C. 501, 505.

of per-parcel sales that New Haven had assumed unless the company paid him a handsome fee. The Commission could hardly have compelled the New Haven trustees to turn over the assets of the debtor to such an entrepreneur, who would, on his own testimony, have proceeded *himself* to do just what the Commission said it was empowered to forbid the bondholders to do—dismantle the estate, rid himself of railroad-connected assets, and devote his talents to the disposition of the realty.

4. *The discount of liquidation factors.* In its Second Supplemental Report the Commission accepted the projection offered by the New Haven trustees that they could substantially complete a liquidation sale in six years. 331 I. C. C., at 663. Accordingly, the Commission discounted the estimated receipts of sale over the six-year period to reflect their present value—a deduction of $17,563,000. *Id.*, at 661. It did not, however, discount the estimated *expenses* of liquidation, although these, too, were projected to occur over the six-year period. The reorganization court was of the view that if future receipts were to be discounted to present value, future expenses should likewise be. 289 F. Supp., at 461; cf. *id.*, at 427–428. On the remand the Commission concurred. It noted that the parties were very close in their estimates of the proper discount, and it concluded that $3,800,000 represented the correct figure. *Fourth Supplemental Report,* 334 I. C. C., at 39–40.

On the second round of review the reorganization court observed that despite three valuation changes netting a $6,600,000 reduction in estimated worth, the Commission had failed to adjust the old, inapplicable discount figure. Accordingly, the court directed the Commission to file "a new formulation and computation of the discount for present value of the New Haven's liquidation proceeds, in accordance with generally recognized

accounting principles and based upon the changes made in valuation items through and including those stated in the present opinion." 304 F. Supp., at 810–811. The court added that the Commission could submit its new formulation and computation in the form of a letter or short brief, and afforded other parties in interest one week to file their comments, as well as any formulations and computations of their own, also in a letter or brief. In accordance with this directive of the court, the Commission submitted its new calculations, and the bondholders replied. In its order adjudging the price to be paid, the reorganization court ruled that "[t]he sum of $2,415,899 should be added to liquidation value inasmuch as it was improperly deducted in applying the discount to present value found by the Commission . . . ." 304 F. Supp. 1136, 1137.

In its brief before this Court the Bondholders Committee states that the reorganization court's directive resulted from the Commission's continued failure to calculate discounts back to present value with respect to four items, three of them to the detriment of New Haven and one to the detriment of Penn Central. The first is the $8,177,633 deducted as the cost of hypothetical forced sales of New Haven realty during the last years of the liquidation. The Commission could have treated the item either as part of the value of the unsold land and then written it off as a cost of sale, with a discount back to present value for both sides of the balance sheet, or as a wash to be eliminated in computing both receipts and expenses. In fact the Commission did neither: it included the figure on both sides of the books, but discounted back only in the asset column. The result, says the Committee, is an error of $2,066,488. A similar shortcoming in determining the liquidation values of road property, such as ties and rails, added another error of $1,474,057. Third, says the Committee, the Commission

erroneously spread the sale of certain realty over the full six-year period when the undisputed evidence showed that New Haven could sell the land in 12 to 18 months; this resulted in an overstatement of $118,000 in the discount attributable to the net proceeds. Finally, the Commission assumed that New Haven could sell off $47,121,400 in equipment, investments, and materials during the first year of the liquidation, but failed to spread the assumed receipts over the entirety of that year, with a consequent understatement of $1,372,646 in the applicable discount. A netting of the four items, together with an added correction of $130,000 made by the Commission, results in the $2,415,899 adjustment ordered by the reorganization court.

The Commission does not dispute that it made the errors as alleged by the Committee. Its sole reply is that the bondholders have waived their claims in this regard by failing to present them to the Commission. Penn Central concedes that "the first two errors asserted by the bondholders represent miscomputations" in Penn Central's favor. But it argues that the amount of the fourth error and the existence of the third were the subject of conflicting testimony before the Commission, and it joins in the Commission's contention that the bondholders have waived the right to a resolution in their favor by failing to press a timely objection before the Commission when the agency first made its alleged mistakes.

The record demonstrates that the bondholders have the better of this argument. It is undisputed that both the bondholders and Penn Central presented witnesses to the Commission on the remand who agreed that the Commission had erred in its discounts and who differed only in minor amounts. See *Fourth Supplemental Report,* 334 I. C. C., at 40. But the Commission simply bypassed the agreement, unpersuaded that it had erred

in its prior opinion. *Id.*, at n. 17. The bondholders then carried the persistent discounting error to the reorganization court on the second round and won corrective relief. The submission of proposed adjustments by way of a letter was not, as is suggested, an untimely filing of claims, but a proper presentation pursuant to the instruction of the court—an instruction made necessary by the Commission's failure to straighten out the discounts after two rounds of hearings and reports, with errors that the bondholders on one side and Penn Central on the other now frankly concede aggregate over $5,000,000. Of the four items advanced by the Committee, only the third is subject to any real doubt, and that $118,000 item can hardly be considered a substantial sum in the context of these cases. A further remand to the Commission to resolve the accuracy of such a figure would serve no useful purpose at this stage of the litigation. The reorganization court resolved the controversy in favor of the bondholders following extensive oral argument on the issue. We affirm its judgment on these issues as free from that degree of error that would require us to overturn its finding.

5. *The loan-loss formula.* In its Second Supplemental Report the Commission, projecting a three-year interim period between merger and inclusion and concluding that a short-term lease would not be appropriate, required Penn Central to extend $25,000,000 in loans to the New Haven in exchange for first-priority trustees' certificates. 331 I. C. C., at 702–706.[75] In addition, it ordered Penn Central to share in New Haven's operating losses to the extent of 100% in the first year, 50% in the sec-

[75] In its Fourth Supplemental Report the Commission provided for payment of the trustees' certificates by cancellation against the price adjustments provided for in the Purchase Agreement. 334 I. C. C., at 70.

ond, and 25% in the third, not to exceed $5,500,000 in any one year. *Id.*, at 718–719. On the first round of judicial review the sliding-scale aspect of the formula was disapproved as an improper deterrent to the bondholders' assertion of their legal rights, 289 F. Supp., at 444, pursuant to the suggestion of MR. JUSTICE DOUGLAS at an earlier stage of the proceedings, see *Penn-Central Merger Cases*, 389 U. S., at 557–558 (separate opinion), and on the remand the Commission abandoned it. 334 I. C. C., at 71–72.

The $5,500,000 annual ceiling derived from the assumption, based on calculations provided by the New Haven trustees and accepted by the Commission, that despite the massive cash drain in 1967, future annual New Haven operating losses would be unlikely to exceed $5,400,000 in succeeding years. 331 I. C. C., at 718–719. Coupled with the sliding-scale formula, the annual ceiling thus proposed that Penn Central absorb the entirety of New Haven's 1968 cash loss. On the first round the reorganization court expressed the opinion that even with the abrogation of the sliding scale, Penn Central's share of that loss "should be a substantial percentage." 289 F. Supp., at 464.

By the time the parties returned to the Commission on the remand, it was evident that the trustees' appraisal of their ability to contain the New Haven's deficits had been far too optimistic. From February through December 1968, the trustees had already drawn down $14,000,000 of the $25,000,000 loan that was supposed to last for three years; at that rate they would exhaust the loan in another six or seven months. 334 I. C. C., at 72. The cash loss was equally grim: the projected 1968 cash deficit stood at $15,672,000, with an estimated operating deficit of $8,200,000. Despite the $2,800,000 increase in the operating deficit over the trustees' initial prediction, the Commission adhered to its original ceiling and, pro-

rating over the 11-month period from merger to inclusion, required Penn Central to pay $5,000,000. 334 I. C. C., at 74. On the second round of review the reorganization court affirmed without discussion.

The bondholders now urge that Penn Central be required to bear the entire operating loss from merger to inclusion. New Haven incurred that loss as an independent entity, say the bondholders, only because it remained outside of Penn Central after the merger, at Penn Central's request and for Penn Central's convenience. It is urged that the Commission's ceiling was originally calculated to place the entire loss of the first year on Penn Central, and that the original intention should be carried out.[76]

Penn Central denies responsibility for the fact that inclusion took place some 11 months after merger rather than along with it, and puts the blame at the door of the bondholders for their litigious insistence upon working out the terms of inclusion prior to the event. It also notes that it has been obliged to take over New Haven less than a year after its own formation, rather than at a later point in the three-year period originally envisaged by the Commission.

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[76] In addition, the bondholders contend the calculation of the operating loss upon which the formula is based is itself unfair. Chase Manhattan and the Committee say the calculation excludes items such as rent for leased roads and interest paid during bankruptcy, aggregating some $2,600,000. The Commission refused to include such items because it thought them "more nearly capital charges, that is, costs of providing the railroad plant . . . ." *Second Supplemental Report,* 331 I. C. C., at 718. Chase Manhattan attacks the Commission's ruling on the ground that New Haven paid out the monies in question in 1968 only because it had not yet been included in Penn Central. But the test for an operating loss as opposed to a capital charge is not whether a cash disbursement took place; the Commission could properly limit Penn Central's liability to the former category.

While the issue is not free from doubt, we cannot say the reorganization court committed error in letting the Commission's action stand. Without ascribing fault to any party, we note the unfairness to the bondholders in requiring them to bear whatever portion of the operating loss Penn Central does not pay due to the inability of Penn Central and the trustees to negotiate an interim lease. On the other hand, there is a countervailing unfairness to Penn Central in requiring it to bear the full burden of New Haven's losses while it lacked exclusive and assured control over the operations of the debtor. The $5,000,000 paid by Penn Central is no drop in the bucket; it amounts to 61% of the operating loss as figured by the Commission and nearly one-third of the entire cash loss for the interim period. In no sense did Penn Central's contribution represent a payment for assets received; on the liquidation hypothesis, the Commission could rationally have declined to require any payment at all. Chase Manhattan argues that "[e]ither there was no equitable obligation on the part of Penn Central to pay any of the New Haven loss during the period from the date of the Penn Central merger to the date of its acquisition of the New Haven assets or there was an obligation to pay the entire loss." We cannot agree that the Commission was obliged to adopt such an all-or-nothing approach. Under the circumstances, the Commission's final disposition represents a pragmatic compromise of the competing interests, and in the absence of a controlling contrary principle of law we do not disturb the reorganization court's acceptance of the Commission's judgment.

6. *New Haven investments.* The Bondholders Committee complains that New Haven has transferred its stock ownership in two concerns—the New York Connecting Railroad and the Railway Express Agency—with no value given in exchange. The Connecting Railroad

was owned jointly by New Haven and Penn Central on a 50–50 basis, *Fourth Supplemental Report,* 334 I. C. C., at 44 n. 20, and is now presumably a wholly owned subsidiary of the merged company. REA is owned by various railroads; at the time of inclusion New Haven held about 4.5% of the outstanding stock.

In both instances the Commission valued New Haven's investment interest on the liquidation hypothesis. A witness presented by the New Haven trustees, whose testimony the Commission accepted, stated that because of Connecting Railroad's $18,000,000 funded debt its stock would have no liquidation value whatever. As to the REA, he said that its stock would have little or no value because of pending litigation over a tender offer for the stock [77] as well as recent legislation increasing the permissible size and weight of parcel post packages. *Second Supplemental Report,* 331 I. C. C., at 678.

The Bondholders Committee does not attack the Commission's finding of zero value for the Connecting Railroad and REA stock. Instead, the Committee says that if the shares were worthless, the Commission erred in requiring their transfer to Penn Central. Were the stock to have had no value on the liquidation of New Haven, the Committee argues, the reorganization court would, in the absence of bids for the shares, have ordered their distribution to the creditors to do with as they pleased. Accordingly, the Committee calls for the return of the stock to New Haven.

The Committee's request overlooks the fact that even though the shares in question might be worthless to a New Haven undergoing liquidation, the Commission could nonetheless order their transfer on the ground of their value to an ongoing Penn Central required to take in New Haven as an operating entity. But entirely apart

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[77] See *Denver & R. G. W. R. Co.* v. *United States,* 387 U. S. 485.

from that consideration, and without pausing to assess the correctness of the zero valuation placed on the stock, we agree with Penn Central that the Committee's request for the return of the stock is foreclosed by *res judicata*. For the Committee—as well as all the other bondholders—took no appeal from the order of the reorganization court directing the transfer of the New Haven assets subject to a later determination of value.[78]

7. *"Going-concern" value.* The bondholders urge that Penn Central should pay an added amount to reflect the "going-concern" value of the New Haven. This sum, it is stressed, would be calculated, not as an alternative to liquidation value, but as a supplement to it. Since it is universally agreed that the New Haven was a losing operation in the form in which Penn Central was obliged to take it over, the bondholders display considerable temerity in pressing for inclusion of what could prove, in an ultimate analysis, to be only a substantial negative figure.[79]

The Commission rejected the notion that the New Haven had a going-concern value over and above the liquidation value of its physical properties. In the Commission's view, the bondholders' estimate of $55,075,000 for such intangibles as organizational costs was premised on the replacement of a defunct railroad and

[78] The Bondholders Committee raised the question in its petition for certiorari whether the reorganization court had erred in its assignment of zero value to the certificates of contingent beneficial interest issued in connection with the reorganization of the Boston & Providence Railroad. See 304 F. Supp., at 810. The Committee has not revived the issue in its brief, nor has it responded in its reply brief to the Government's contention that it has abandoned the claim. Accordingly, we do not consider the matter further.

[79] In 1968 the New Haven suffered an estimated operating deficit of $8,200,000. That figure, capitalized at 8%, amounts to more than $100,000,000.

overlooked the probability that no one would ever have rebuilt the New Haven in its present form. More fundamentally, the Commission correctly repudiated the claims based on going-concern value as antithetical to the liquidation hypothesis on which the appraisal of the New Haven's assets had proceeded. As the Commission said, "It is not realistic to assume that a potential buyer would pay the liquidated value of the N[ew] H[aven] assets and then pay additional amounts representing elements of going concern value in the face of N[ew] H[aven]'s past deficit operations and its bleak prospects for the future." *Second Supplemental Report,* 331 I. C. C., at 686–687.

The Bondholders Committee concedes that the intangible assets in fact acquired by Penn Central "would be worthless to the New Haven in an assumed liquidation . . . ." That is enough to end the matter. The bondholders are not entitled to treat the New Haven as a liquidating enterprise with respect to certain items and as an operating railroad with respect to others, depending on which approach happens to yield the higher value. Nothing could be more unfair or inequitable to Penn Central than to permit the New Haven bondholders, at its expense, to have the best of both worlds.[80]

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[80] The decisions of the New York state courts relied upon by the bondholders are inapposite. In *In re City of New York,* 18 N. Y. 2d 212, 219 N. E. 2d 410, appeal dismissed *sub nom. Fifth Avenue Coach Lines* v. *City of New York,* 386 U. S. 778, the city had condemned the Fifth Avenue Coach lines. The trial court treated the takeover as one of a going concern and fixed the award at reproduction cost new less depreciation. The Court of Appeals agreed that since Fifth Avenue had demonstrated a capacity for profitable operations under reasonable rates, it was entitled to going-concern value, but that the trial court had erred in excluding evidence of value of the "intangible going concern assets, that is, the component of value in the business which in addition to the value of the tangible assets reflects an efficient operation." *Id.,* at 220, 221, 219 N. E. 2d,

8. *The "underwriting" plan for the Penn Central stock.* Thus far we have considered the disputes over the valuation of the New Haven assets transferred to Penn Central. We now reach the one issue raised in connection with the consideration given by Penn Central in exchange. The Purchase Agreement negotiated by Pennsylvania and New York Central on the one side and the New Haven trustees on the other provided that Penn Central should pay in part for the New Haven properties with 950,000 shares of its common stock.[81] As a New Haven trustee stated, "[O]ne of the principles for which we negotiated at considerable length was that the bulk of

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at 412, 413. The opinion of the Court of Appeals does not disclose whether payment of liquidating value would have yielded a higher price. In *In re Port Authority Trans-Hudson Corp.*, 20 N. Y. 2d 457, 231 N. E. 2d 734, cert. denied *sub nom. Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 390 U. S. 1002, the Court of Appeals dealt with a public taking of railroad tunnels under the Hudson River owned by a company in reorganization and having only a "dim financial future . . . ." 20 N. Y. 2d, at 465, 231 N. E. 2d, at 736. The tunnels, which required only $88,000 to be put in working order, had cost $32,000,000 to build, and would have cost $400,000,000 to replace; their liquidating value was a negative figure, because of costs that would have been incurred in plugging them up. *Id.*, at 467 and n. 2, 470, 231 N. E. 2d, at 737 and n. 2, 739. Because the Port Authority was taking the tunnels for continued operation, the Court of Appeals held the proper valuation was depreciated original cost plus the value of intangible assets also attributable to the operation as a going concern. *Id.*, at 471–472, 231 N. E. 2d, at 740. In neither of these cases did the New York courts require the taking authorities to pay *both* an operating and a liquidating value. Rather, they awarded the owners the value reflecting the highest and best price for their properties—precisely the treatment accorded the New Haven here.

[81] At the time of the Second Supplemental Report, an issue of 950,000 Penn Central common shares to New Haven would have given the debtor 4% of the total shareholder equity in the new company. 331 I. C. C., at 689.

the consideration should be in the form of common stock or, failing that, should be debt instruments having either conversion rights or options which would permit the claimants to the New Haven's Estate to participate in the benefits of the merger." In confirming the terms of the agreement, the Commission accepted the testimony of a New Haven trustee that the value of the stock could range anywhere from $75 to $100 a share on the date of closing and that the average, $87.50, represented his estimate of market value at the time of inclusion. 331 I. C. C., at 688–689. The Commission adopted the $87.50 per share value placed on the Penn Central stock by the trustee as reasonable. *Id.*, at 689–690.

On the first round of review the reorganization court agreed that the $87.50 per share figure represented a fair value for the Penn Central stock, based on the Commission's calculation of the estimated future earning power of the new company and the testimony of the New Haven trustee, "a well qualified expert." The court saw "no reason why recent fluctuations in the market value of these shares should change the disposition of the matter . . . ." 289 F. Supp., at 462.

On the remand, the bondholders challenged the Commission's stock valuation. The Commission cursorily rejected the attack on the ground that the bondholders' witness was unfamiliar with Penn Central's operating and financial plans, gave undue weight to extraordinary past expenses, and generally neglected the future prospects of the company. 334 I. C. C., at 68 n. 40.

By the time of the second round of judicial review, inclusion had taken place and the Penn Central had given its consideration in exchange. The bondholders, renewing their charge that the Commission's prophecy had been erroneous, pointed to the actual market performance of the stock. As of the inclusion date, December 31, 1968, the market price stood at 63⅜, more than

20 points below the Commission's estimated value. If that date should be thought suspect because of year-end sell-offs, the bondholders noted that throughout 1968 the price had fluctuated between 53½ and 86½, with a mean price between February 1 and December 31 of 69½. Thus, the bondholders contended, the primary component of their bundle of consideration had turned out to be worth anywhere from $17,000,000 to $23,000,000 less than it was supposed to be.

On the second round the reorganization court rejected the bondholders' contention that the Commission had predicted an $87.50 value as of the closing date.

> "[T]he Commission, presumably in an effort to assure fairness to Penn Central, did not use the market value of December 31, 1966 or an average of the values at or about December 31, 1968, the actual date of transfer. Instead, it adopted the theory that, after all, the purpose of using stock in payment was to tap the expected future economic benefit of the Penn Central merger which would come to full fruition seven to ten years after its effective date on February 1, 1968, but would be reflected in an upward trend of the stock at the time of closing or transfer of New Haven's assets to Penn Central, then estimated to be in 1970.
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> "[T]he theory of giving recognition to an intrinsic value in the shares, which will be realized when the full economic benefits of the merger have been achieved, not only assists the Penn Central by relieving it of the need to divest itself of a crippling amount of cash, which would be prejudicial to its merger program, but affords the New Haven an opportunity to participate in probable future profits." 304 F. Supp., at 808–809.

The court nonetheless recognized an element of unfairness to the New Haven bondholders in that the New Haven was compelled to accept the stock "at a substantial present loss on an assurance of future gain." As the court put it, "The nub of the unfairness and inequity is not the 87½ fixed for present calculations, but the fact that the purchaser is getting assets of sure present value while the seller is asked to gamble for its payment on the future of the Penn Central." *Id.*, at 809. The court concluded that this did not necessitate a change in price or an amendment to the valuations postulated by the Commission. "To be fair and equitable, however, it does require a supplemental provision fulfilling the implicit promise by the purchaser to pay $83.1 million as part of the price for the assets conveyed." Accordingly, the court provided that

> "if at any time the market price of Penn Central common shares reaches and maintains 87½ per share on the New York Stock Exchange for a period of five consecutive days on which the Exchange is open and doing business (not counting days on which the Exchange is closed to trading) between the date of final consummation of the plan of reorganization and February 1, 1978, then and in that event it will be conclusively presumed that Penn Central has, in transferring the shares to the New Haven, made payment of the $83.1 million of the purchase price represented by the shares. If, however, the common shares of Penn Central do not reach and maintain the price as aforesaid, then the value of the shares will be determined by the average of the means between high and low prices of Penn Central shares on the New York Stock Exchange for the 30 business days next preceding February 1, 1978, on which the Exchange is actually operating and there are

> sales of Penn Central shares. Penn Central will forthwith become liable to pay in cash to the New Haven, or its successor or successors, the difference between said mean market prices of those 30 days and 87½ for each share . . . ." 304 F. Supp., at 809–810.

The court provided that the benefit of Penn Central's underwriting of any difference between the mean market price and 87½ would inure only to the New Haven and would not follow the shares into the hands of third-party buyers.

In addition, the court afforded Penn Central the option of relieving itself of the 1978 underwriting obligation in the following manner:

> "The Penn Central is granted an option, operative between the date of final consummation of the plan and February 1, 1978, to discharge its obligation to underwrite and pay the difference between such average market price and the higher 87½ at the end of the ten year period by paying on one or more blocks of 50,000 shares to the New Haven . . . the difference between the mean market prices for sales of Penn Central common shares and 87½ per share as of a specific day of sales on the Exchange which shall previously have been designated by Penn Central in a written notice delivered to the New Haven at least 5 days prior to such market date." *Id.*, at 810.

The underwriting plan of the reorganization court thus combined a series of essential findings and protective features. First, it ratified the Commission's determination that intrinsic value rather than market price should guide the appraisal of the worth of the Penn Central common stock; second, it predicted that that intrinsic value would be reflected in a market price of at least

$87.50 per share by the time Penn Central fully realized the benefits of its merger; third, it provided that Penn Central would secure the New Haven estate against the risk that the market price of its stock would not reflect that minimum intrinsic value within the first nine years after inclusion; and fourth, it contemplated that New Haven would be left free to participate in whatever future appreciations in value Penn Central's stock might enjoy. In sum, the reorganization court devised a plan that added to its assessment of present worth both a reasonable assurance of realization of such worth and the opportunity of additional gain. In so doing, the reorganization court in effect determined that postponement of immediate realization of $87.50 per share was offset by the possibility of even greater future market price of the stock, and that the package constituted fair compensation for the assets transferred to Penn Central.

On the basis of the record before the District Court at the time of its order, we would have no hesitancy in accepting its findings, conclusions, and proposed underwriting plan as consistent with the history of the reorganization proceedings and supported by substantial evidence. But we cannot avoid the impact of recent events in assessing the propriety of the decree that that court has entered. See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 445. And those events make it possible that this aspect of the reorganization court's decree may be wholly unrealistic.

The fairness and equity that are the essence of a § 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value. And the same considerations of fairness and equity prevent imposing on Penn Central the burden of immediate payment in full, particularly when it is remembered that the New Haven bondholders have never objected to the receipt

of Penn Central stock in exchange for the New Haven assets.

Accordingly, we set aside the order of the Connecticut District Court insofar as it determines that an intrinsic value of $87.50 inheres in the Penn Central common stock and implements an underwriting plan to secure payment of that sum. Further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central.

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We turn finally to the contention of the bondholders that quite apart from the specific items that together go to make up the price to be paid for the New Haven assets, the plan of reorganization itself is not only unfair and inequitable under the Bankruptcy Act but violates the Fifth Amendment as a taking of property without just compensation.

The purchase price that the Commission and the reorganization court have required Penn Central to pay to the New Haven estate is based upon the liquidation value of the seller's assets, appraised as of December 31, 1966. That price hypothesizes a shutdown of New Haven followed by a sell-off of its assets at their highest and best value. In the circumstances of this case, and for the reasons we have already set out at length, we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum. Moreover, we today require a reassessment of the consideration that Penn Central is to give in exchange for those properties. We thereby accord the bondholders the right to a liquidation and a per-parcel sale that is theirs by virtue

of their mortgage liens. The Bankruptcy Act does not require that they be given more. Nor is it necessary to consider the bondholders' claim that anything less than full liquidation value would amount to an uncompensated taking in violation of the Fifth Amendment.

But the Bondholders Committee presses another Fifth Amendment argument. It points to the Commission's own finding that from the inception of the New Haven reorganization through 1968 the debtor's estate had amassed more than $70,000,000 in administrative and pre-bankruptcy claims that take priority over the bondholders' liens. *Fourth Supplemental Report,* 334 I. C. C., at 126. The reorganization court itself noted that " 'losses reasonably incident to working out the solution most consistent with the public interest' [have] eroded the debtor's estate in excess of $60 million." 304 F. Supp., at 800. (Footnote omitted.) Although the extent to which the ongoing deficit operation has impaired the bondholders' security is unclear, it is undeniable that the continued operation of the railroad into the late 1960's, together with the legal uncertainties engendered by the doubtful future of the company, have greatly depressed the value of the bondholders' interests. Cf. *Penn-Central Merger Cases,* 389 U. S., at 509.[82]

A § 77 reorganization court may not, of course, disregard a claim that injurious consequences will result to a secured creditor from the suspension of the right to enforce his lien against the property of a debtor. That claim, however, "presents a question addressed not to

[82] As previously noted, the holders of the Harlem River Division bonds have received satisfactory security by Penn Central's assumption of the mortgage. See n. 48, *supra.* We are informed that the right of the holders of the General Income bonds to participate in the reorganized company depends on the outcome of this litigation. The holders of the First and Refunding Mortgage bonds stand somewhere in between. See 289 F. Supp., at 442 n. 18.

the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised." *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 677. Here the reorganization court recognized its duties under the Bankruptcy Act and the Constitution. In August 1968 it ruled as follows:

> "In view of the history of this deficit operation from the time of the filing of the petition under § 77 and even before, the size of the losses, the long period of time necessarily involved in seeking to work out a solution, short of liquidation, through inclusion in the Penn-Central, the present condition of the Railroad and the rate of loss and out-flow of cash in the recent past and in the foreseeable future, this court finds that the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property and consequently the interests of the bondholders, without just compensation. It is therefore constitutionally impermissible, and obviously no reorganization plan which calls for such a taking can be approved." 289 F. Supp., at 459.

We do not doubt that the time consumed in the course of the proceedings in the reorganization court has imposed a substantial loss upon the bondholders. But in the circumstances presented by this litigation we see no constitutional bar to that result. The rights of the bondholders are not absolute. As we have had occasion to say before, security holders

> "cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created. But they invested their capital in a pub-

> lic utility that does owe an obligation to the public. . . . [B]y their entry into a railroad enterprise, [they] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs." *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.,* 328 U. S. 495, 535–536.

Only two Terms ago, when we last considered the Penn Central merger, we quoted approvingly the Commission's statement that "[i]t is a fundamental aspect of our free enterprise economy that private persons assume the risks attached to their investments, and the N[ew] H[aven] creditors can expect no less because the N[ew] H[aven]'s properties are devoted to a public use." *Penn-Central Merger Cases,* 389 U. S., at 510. We added:

> "While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders . . . ." *Id.,* at 510–511.

In this context we appraise the bondholders' claim that the continued operation of the New Haven from the inception of the reorganization proceeding in 1961 to the inclusion in Penn Central in 1968 worked an unconstitutional taking of their property. There is no longer room for dispute that the bondholders will receive the highest and best price for the assets of the debtor as of December 31, 1966. That price of course reflects the depreciation of the properties and the losses incurred in the operation of the railroad from the commencement of reorganization proceedings under § 77 in the middle of 1961. But the Bondholders Committee does not tell

us what the depreciation and losses attributable to the prevaluation period are. Moreover, no bondholder formally petitioned the reorganization court to dismiss the proceedings and thereby permit a foreclosure on the mortgage liens until April 1967—well after the 1966 valuation date.[83]

Nor can Penn Central be held liable for the further decline in New Haven's value from the valuation date to the actual inclusion. The new company did not even come into existence until midway through that period, and from the point of its own creation until it took in the New Haven, it contributed substantially to recompense the debtor for its operating losses. Moreover, the failure of the bondholders to press for early liquidation of the New Haven meant that their initial application for a dismissal of the reorganization proceedings came just as the objective of salvaging the New Haven appeared possible to achieve. As the reorganization court noted, only two of the several bondholder groups made that initial application; it was not joined by the trustees, nor was it endorsed by other representatives of the bondholders and creditors; and it came just as the Commission was about to certify a feasible plan of reorganization to the court. "To jettison everything achieved and turn back just as a glimmer of light begins to show at the end of a long dark tunnel," said the court, "not only carries with it an aura of unreality but borders on the fantastic." *In re New York, N. H. & H. R. Co.*, 281 F. Supp., at 68.

On the other hand, we must also reject any lingering suggestion by Penn Central that the price it must pay for the New Haven assets is unfair in either a statutory or a constitutional sense. At first glance there is a

[83] As late as October 1966 the reorganization court noted that the policy of preserving the New Haven as an ongoing railroad "has been concurred in by the bondholders . . . ."

seeming anomaly in the requirement that Penn Central pay a liquidating value for property it must operate at a loss. But it is not correct to say that New Haven's right to liquidate is inconsistent with Penn Central's obligation to operate, or that if the New Haven's creditors had such a right, Penn Central must have it as well. The bondholders had the right by force of their state-created liens under the New Haven's mortgage obligations. Penn Central had no such right, because its merger was expressly conditioned on its assumption of responsibility for continued New Haven service. There was nothing inequitable in an arrangement that permitted the bondholders to recover the value of their liens on the property of the debtor at the same time that it required Penn Central to pay that value in exchange for the nearly $1,000,000,000 worth of benefits that the merger was then anticipated to produce.

As the Commission said at the time of its Second Supplemental Report, "Calling upon Penn-Central to pay more than the N[ew] H[aven] is worth as a going concern is not unreasonable within the meaning of section 5 (2). . . . The Penn-Central merger (which will bring substantial dollar savings to the merger applicants) was approved with the thought that some of the merger savings would be available specifically to ward off a liquidation and shutdown of the N[ew] H[aven] so that adequate transportation service would remain available to the public which now relies on the N[ew] H[aven]." 331 I. C. C., at 687–688.

The reorganization court made the point with clarity and force:

> "The whole purpose of making the inclusion of the New Haven a condition of the merger was to require Penn-Central, which, in being permitted to merge, was granted the opportunity to realize tremendous economic benefits, to take over and operate

> a helplessly sick but still needed railroad, which it could well afford to do. It is part of the price Penn-Central is called upon to pay for the right to merge. The right to merge was granted, the merger has taken place, and the price should be paid." 289 F. Supp., at 465–466.

For the reasons stated in this opinion, the judgment of the United States District Court for the District of Connecticut, reviewed on writs of certiorari in Nos. 914, 916, 920, 1038, and 1057, is affirmed in part and vacated and remanded in part. The judgment of the United States District Court for the Southern District of New York, appealed from in Nos. 915, 917, and 921, is vacated, and those cases are remanded with instructions to abstain pending the further proceedings before the Interstate Commerce Commission and the reviewing courts under § 77 of the Bankruptcy Act.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the decision of these cases.

MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of these cases.

MR. JUSTICE BLACK, with whom MR. JUSTICE HARLAN joins, dissenting.

The central issue in these cases, easily lost I fear in the 98-page opinion of the Court, can in my judgment be briefly and simply stated. After this Court's decision in the *Penn-Central Merger Cases,* 389 U. S. 486, the Interstate Commerce Commission assumed its difficult statutory task of determining the liquidation value of the assets of the New Haven Railroad, a determination which if upheld by the courts would decide the purchase price

Penn Central would have to pay for the bankrupt New Haven. The Commission made that valuation determination, and the question before this Court is whether, under the appropriate standards of court review, the Commission's valuation of the New Haven's properties should have been sustained or rejected by the reviewing courts. This question comes here from two federal district courts, both of which were called upon to review the Commission's valuation of the New Haven properties, (1) a bankruptcy court convened under § 77 of the Bankruptcy Act, 11 U. S. C. § 205, to consider the reorganization of the New Haven, and (2) a three-judge merger court convened under 28 U. S. C. §§ 1336 (a), 2321–2325, to review the Commission's merger and inclusion orders. Both district courts had jurisdiction under these statutes to examine the Commission's valuation decisions. And the proper scope for each court's review was the same: were the Commission's findings supported by substantial evidence and consistent with applicable statutory requirements? Yet the reception the Commission's determination received from the two courts on the final round of review was dramatically different. The bankruptcy court took issue with several of the Commission's important findings as to the New Haven's liquidation value and, substituting its own ideas of the proper method of appraising the railroad's properties, increased by over $28,000,000 the value the Commission had placed on the assets of the New Haven. 304 F. Supp. 793. In sharp contrast, the three-judge merger court noted the "severe limitations" on the scope of its review of valuation matters, 305 F. Supp. 1049, 1053, and, after carefully examining the Commission plan, sustained the agency's determinations.[1] Judge Friendly, writing for the three-

[1] The three-judge merger court corrected the Commission's findings on minor valuation points which are not relevant here. The Commission has subsequently made findings consistent with the three-judge court opinion on these questions. 334 I. C. C. 528.

judge merger court, stated the fundamental reason for that court's disagreement with the bankruptcy court:

> "Essentially, we think our disagreements . . . reflect a difference in view concerning how far we are at liberty to substitute our own notions for the decisions the Commission has taken in what we regard as a sincere effort to comply with the tasks both courts assigned it on remand." 305 F. Supp., at 1065.

I

Both district court decisions are now properly before this Court for our review, and, contrary to the position taken by the Court today, it is my view that the Court has an obligation to pass upon both those judgments, not just one. As the quoted passage from Judge Friendly's opinion for the three-judge merger court indicates, the answer to the question whether this Court should follow the three-judge court and sustain the Commission's valuation of the New Haven properties turns largely on the proper scope of judicial inquiry into the agency determination. Our previous cases make it clear that the scope of judicial review of the Commission's appraisal of such properties is narrowly limited to ensuring that the agency findings are supported by material evidence and consistent with statutory standards. The federal courts, this Court included, should defer whenever possible to Commission expertise on complex questions of valuation. It is my position, elaborated in what follows, that the application of this test to the record before the Commission in these cases can only lead to the conclusion that the Commission did not abuse its discretion in valuing the New Haven and, accordingly, that the three-judge court was correct in sustaining its determinations and the bankruptcy court wrong in rejecting them. The three-judge court's excellent opinion is, in my view, compelling support for the idea that a reasonable reviewing court exer-

cising the proper scope of review would find that the Commission acted wholly within its discretion. Moreover, I find myself in agreement with Judge Friendly that the bankruptcy court greatly exceeded its reviewing authority and in so doing improperly substituted its own views on valuation for those of the Commission.[2]

The Court today reaches conclusions completely at odds with those stated above and affirms the decision of the bankruptcy court. I do not think the Court could reach the result it does but for its mistaken assumption that the bankruptcy court was somehow the more appropriate of the two courts to review the Commission's valuation determinations and that, accordingly, the excellent opinion of the three-judge court could be simply ignored on the ground that that court should have abstained in favor of the bankruptcy court. Congress has granted jurisdiction to review the Commission findings to both courts under the peculiar circumstances presented in these cases, and the Court offers only makeweight arguments to support its holding that the three-judge court should have abstained from reaching the valuation questions. In my view, both courts were obligated to fulfill their statutory mandate to review the Commission's valuation findings, and this Court has an obligation to treat with equal dignity the decisions of each of those courts. For this reason I cannot agree that the Court is justified in proceeding as if Judge Friendly's opinion for the three-judge merger court simply did not exist.

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[2] Of course, the bankruptcy court and the three-judge merger court agreed on many of the issues that were presented to them, some of which were questions of valuation and some of which were not. Apart from the question of the underwriting plan, *ante*, at 488–489, the Court today affirms both district courts on those issues on which both agreed, and I concur in that result. I differ with the Court, however, on its handling of all those questions of valuation over which the two district courts disagreed.

Nor can I accept the Court's position that in reviewing the conclusions of the bankruptcy court it should apply a standard of review that attaches great weight to the conclusions of that court rather than to those of the Commission. Our prior cases indicate that the correct rule is just the opposite. In sum, the Court first disposes of the three-judge court's opinion by assuming that that court should have abstained, and it then adopts a deferential posture toward the conclusions of the bankruptcy court. In so doing the Court clears the way for its affirmance of the bankruptcy court. The Court's approach and the result it reaches are intimately related, and I regret that I cannot agree with either.

II

On the question of valuing the New Haven's assets, the tasks which the three-judge merger court and the bankruptcy court were called upon to perform in these cases were virtually identical, and for both courts that task was a narrowly circumscribed one. The statutes governing review in both courts provide the same flexible standard: under § 77(e) of the Bankruptcy Act the bankruptcy court was to determine if the terms for the sale of the New Haven's assets were "fair and equitable," and under §§ 5 (2)(b) and (d) of the Interstate Commerce Act the three-judge court was to ensure that the terms of the merger and inclusion were "just and reasonable" and "equitable." More important, our previous cases leave no doubt that the two district courts and, accordingly, this Court are permitted only a limited scope for their review of the Commission's valuation findings. In *Ecker* v. *Western Pacific R. Co.*, 318 U. S. 448, 472, this Court emphasized that under § 77 (e) of the Bankruptcy Act, "Valuation is a function limited to the Commission, without the necessity of approval

by the [bankruptcy] court." The Court elaborated its holding this way:

> "The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise. One of the primary objects of the bill was the elimination of obstructive litigation on the issue of valuation and the form finally chosen approached as near to that position as seemed to the draftsmen legally possible. Judicial reexamination was not considered desirable . . . . The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reexamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards." 318 U. S., at 472–473.

See also *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 508–509; *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 536–542. These cases make it clear that Congress delegated the valuation function to the Commission and that the Commission's determinations can be reviewed by the federal courts under § 77 (e) only to determine whether they are supported by substantial evidence and conform to the applicable statutory standards.

The scope of review of the three-judge merger court under § 5 of the Interstate Commerce Act is virtually identical to that of the reorganization court under § 77. The function of the three-judge court is only to determine if the Commission's actions "are based upon substantial evidence and to guard against the possibility of gross error or unfairness." *Penn-Central Merger Cases*, 389 U. S. 486, 524. If a court finds the Com-

mission's "conclusions to be equitable and rational," it should not, as it seems to me this Court does today, "second-guess each step in the Commission's process of deliberation." *Ibid.*

The reasons compelling such judicial restraint lie not only in the accumulated expertise of the Commission but also in the inherent uncertainty of the valuation process itself. "An intelligent estimate of probable future values . . . , and even indeed of present ones, is at best an approximation. . . . There is left in every case a reasonable margin of fluctuation and uncertainty." *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290, 310. These inevitable uncertainties of a complex valuation were greatly magnified in this case, for here the Commission was called upon to determine what values the New Haven properties would have, as the three-judge court put it, in "a liquidation that never happened, that in the world as we know it scarcely could have happened, and that, if it had happened, could have happened in any one of a number of equally imaginary ways . . . ." 305 F. Supp., at 1056. Given the extremely hypothetical context in which the Commission made its determinations, it is impossible for any reviewing court to know if the Commission's findings even approximated the true liquidation value of the railroad. Because of this enhanced uncertainty, the area in which the Commission was required to exercise its judgment in this case was unusually wide, and a reviewing court could properly upset its conclusions in only the clearest instances of abuse.

I indicated previously that when these criteria for judicial review are taken into account, it becomes impossible for me to believe that the Commission abused its discretion in deciding as it did the exceedingly complex and difficult valuation issues discussed at length in the Court's opinion. The three-judge merger court con-

cluded that the Commission's findings in this regard were supported by substantial evidence and consistent with relevant principles, and, after reviewing the record and the opinion of the Commission, I find myself in wholehearted agreement with the three-judge court's conclusion. Judge Friendly's fine opinion leaves no doubt in my mind that the court for which he wrote was fully aware of both the limited scope of its reviewing power and also its obligation within those limits to scrutinize carefully each of the significant decisions of the Commission. Thus, the court assumed that "[i]f the Commission made demonstrable errors, it is our duty to correct these . . . ," but, unlike the Court today, it refused "to re-examine every judgment made by the Commission and to substitute our own whenever we think it better." 305 F. Supp., at 1056. The three-judge court's opinion sets out fully and adequately the reasons why the Commission should be affirmed on each of the disputed points, and there is nothing to be gained from my repeating those reasons here.

III

The Court's opinion affirming the bankruptcy court attempts to avoid the force of the foregoing considerations by first holding that the three-judge court should have abstained from reaching the valuation issue and then assuming for some reason which is not clear to me that this Court should apply a limited scope of review to the valuation findings of the bankruptcy court rather than to the Commission's findings. This approach is, I submit, premised on erroneous assumptions.

A

There can be no question but that under relevant federal statutes both the three-judge merger court and the bankruptcy court had jurisdiction to review the Commission's determination of the New Haven's liqui-

dation value. See 11 U. S. C. § 205; 28 U. S. C. §§ 1336 (a), 2321–2325. The Court today does not really dispute this conclusion, but argues instead that the bankruptcy court might have had "primary jurisdiction" to decide the valuation issues, citing to support this idea several quite inapposite cases dealing with *in rem* jurisdiction, and, alternatively, that the three-judge court should have "abstained" because the only remaining issue was "the value to be accorded the assets transferred, and resolution of that issue was the essence of the § 77 process." *Ante,* at 428. Actually, the only "primary jurisdiction" involved here was the primary jurisdiction of the Commission to decide questions of valuation. Moreover, the question of the New Haven's value may well have been central to the § 77 proceedings, but, in ordering the New Haven's inclusion in Penn Central, the Commission exercised authority under both § 5 of the Interstate Commerce Act and § 77 of the Bankruptcy Act. The question of the New Haven's value was equally central to the requirement under § 5 that the Commission determine before issuing an inclusion order that the terms of the inclusion are "equitable." 49 U. S. C. § 5 (2)(d). Review of the Commission's valuation was therefore as appropriate on the merger and inclusion side as on the bankruptcy side, and the Court's argument to the contrary is completely conclusory. Accordingly, I think the three-judge merger court was correct when it decided that, "unfortunate as the duplicitous system of review may be, we see no basis on which we can properly decline to exercise the jurisdiction conferred upon us . . . ." 289 F. Supp. 418, 425.

B

The Court also errs, I think, when it assumes that it should defer to the findings of the bankruptcy court rather than to those of the Commission. The reasoning

behind this novel approach is never clearly stated. At times, the Court seems to take the view that the proper role of the bankruptcy court on valuation questions lies somewhere between that of a trial court charged with the responsibility of making a fair estimate of the value of the New Haven properties and an appellate court whose responsibility is limited to reviewing the Commission's valuation. The adoption of this hybrid role for the bankruptcy court is strenuously urged upon us in some of the briefs in this case. Such a theory arguably justifies a deferential attitude on the part of this Court toward the reorganization court's determinations and also provides at least a partial justification for the bankruptcy court's *de novo* valuation estimates. However, the notion that the bankruptcy court has special powers in reviewing Commission valuations and in weighing the public interest is completely untenable in light of *Western Pacific* and the cases following it. Those cases make it clear that while the bankruptcy court does have certain special functions in § 77 reorganizations, the role of the bankruptcy court in the areas of concern here is simply that of an appellate court. As we said in *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 508:

> "[T]he experience and judgment of the Commission must be relied upon for final determinations of value and of matters affecting the public interest, subject to judicial review to assure compliance with constitutional and statutory requirements."

To like effect was the conclusion reached in *Chicago, R. I. & P. R. Co.* v. *Fleming*, 157 F. 2d 241, 245, a case following *Western Pacific:*

> "[T]he Commission is allowed wide discretion in reaching its conclusions, and if its findings are supported by substantial evidence and follow

> legal standards they must be affirmed by the courts . . . ."

In my opinion these and other cases preclude the notion that the bankruptcy court has special factfinding and interest-weighing functions sufficient to justify this Court's viewing it as a quasi-trial court.

Alternatively, the majority's position might be that even though the reorganization court had no special review powers, this Court should still give great weight to its conclusions concerning the Commission's price determinations. This position might have some force were there grounds for confidence that the bankruptcy court in this case applied the correct scope of review in examining the Commission determinations, but no such grounds for confidence exist here. This Court has an obligation to examine carefully the opinion of the bankruptcy court to determine if that court did in fact apply the correct scope of review. Such an inquiry necessarily involves the Court in determining if the agency's decisions are consistent with applicable law and supported by substantial evidence. As I indicated earlier, the record in this case simply does not support the conclusion that the reorganization court stayed within its proper scope of review of the Commission determinations. Since the reorganization court applied the wrong reviewing standard, there is no justification for this Court's giving any deference to the valuation determinations of that court.

The Court's opinion is thus poised between two equally unsatisfactory alternatives. Its conclusions must either rest on the theory that the reorganization court has extraordinary reviewing powers, a theory which I think is precluded by *Western Pacific* and the cases which follow it, or the Court must take the position that the reorganization court correctly applied the *Western Pacific* standard, a conclusion which seems to me untenable in

light of the record in these cases and the opinion of the three-judge merger court.

IV

Today's decision will have the effect of greatly burdening the Penn Central by increasing the amount that company owes to the New Haven bondholders by an additional $28,000,000. The imposition of this additional burden can only bring about a further deterioration of the Penn Central's already seriously compromised financial position [3] and will further reduce the ultimate chances of success of this venture in which the public has a considerable stake. The public interest in these cases certainly lies in establishing and maintaining the Penn Central as a viable private enterprise with reasonable rates and efficient services. Here the Commission had a duty "to plan reorganizations with an eye to the public interest as well as the private welfare of creditors and stockholders." *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 535. See also the *Penn-Central Merger Cases*, 389 U. S. 486, 510–511. Because Penn Central's economic soundness will be vitally affected by the price it has to pay for the New Haven assets, the Commission had an obligation, which I think it fulfilled in these cases, to prevent an overvaluation of the New Haven assets which might unnecessarily jeopardize the newly merged Penn Central system. If the Commission resolved close and fairly debatable issues of valuation in favor of Penn Central rather than the New Haven bondholders, the agency's actions were wholly justifiable in terms of its statutory mandate to protect the public. Although the courts must review Commission determina-

[3] As the Court notes in a footnote to its opinion, *ante*, at 399, the Penn Central Transportation Company has filed a petition for reorganization under § 77 of the Bankruptcy Act in the United States District Court for the Eastern District of Pennsylvania.

tions of value to guarantee that those valuations are "fair and equitable" to the bondholders, that reviewing authority does not permit a court to substitute its views for those of the Commission. Judicial review of Commission valuations must be exercised in light of the fact that "Congress has entrusted the Commission, not the courts, with the responsibility of formulating a plan of reorganization which 'will be compatible with the public interest.' § 77 (d)." *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 544. Here the Commission struck a balance between public and private interests that was clearly within its discretion, and I think it is both improper and unwise for this Court to upset that balance and place an additional $28,000,000 burden on the Penn Central, a burden that I fear may ultimately be borne by the consumers of the Penn Central's services or by the Federal Treasury.

For the reasons stated above, I would affirm the judgment of the three-judge merger court on the valuation issue and would reverse the judgment of the bankruptcy court to the extent that it is inconsistent with the three-judge court.

MORRIS ET AL. *v.* SCHOONFIELD, WARDEN, ET AL.

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

No. 782. Argued April 22, 1970—Decided June 29, 1970

Case remanded for reconsideration in light of intervening Maryland legislation and decision in *Williams* v. *Illinois*, *ante*, p. 235.

301 F. Supp. 158, vacated and remanded.

Robert G. Fisher argued the cause for appellants. With him on the briefs were *Aaron M. Schreiber, Elsbeth Levy Bothe,* and *Melvin L. Wulf.*

George L. Russell, Jr., argued the cause for appellees. With him on the brief were *Francis B. Burch,* Attorney General of Maryland, *Alfred J. O'Ferrall III,* Assistant Attorney General, *Ambrose T. Hartman,* and *Roger C. Duncan.*

PER CURIAM.

We noted probable jurisdiction [1] and set the case for oral argument with *Williams* v. *Illinois, ante,* p. 235, decided today. However, Maryland has recently enacted legislation [2] dealing directly with the issue presented, and our holding in *Williams,* that an indigent may not be imprisoned beyond the maximum term specified by statute solely because of his failure to pay a fine and court costs, may shed further light on the question raised here. We therefore vacate the judgment and remand the case to the District Court for reconsideration in light of the intervening legislation and our holding in *Williams* v. *Illinois, supra.*

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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[1] 397 U. S. 960.

[2] Chapter 147 of the 1970 Laws of Maryland (approved April 15, 1970).

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, concurring.

I agree that this case should be remanded for reconsideration in light of our opinion in *Williams* v. *Illinois*, *ante*, p. 235, and the recent enactment by the Maryland General Assembly of new legislation bearing on the questions presented.

However, I deem it appropriate to state my view that the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.

As I understand it, *Williams* v. *Illinois* does not mean that a State cannot jail a person who has the means to pay a fine but refuses or neglects to do so. Neither does it finally answer the question whether the State's interest in deterring unlawful conduct and in enforcing its penal laws through fines as well as jail sentences will justify imposing an "equivalent" jail sentence on the indigent who, despite his own reasonable efforts and the State's attempt at accommodation, is unable to secure the necessary funds. But *Williams* means, at minimum, that in imposing fines as punishment for criminal conduct more care must be taken to provide for those whose lack of funds would otherwise automatically convert a fine into a jail sentence.

SIMMONS ET UX. *v.* WEST HAVEN HOUSING AUTHORITY

APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF CONNECTICUT

No. 81. Argued December 8, 1969—Decided June 29, 1970

The appeal, involving the issue whether a Connecticut statutory requirement that tenants wishing to appeal from an eviction judgment must post a bond offends the Due Process or Equal Protection Clause if applied to foreclose appellate review for indigent tenants, is dismissed, as the record is ambiguous regarding the underlying reason appellants were denied an opportunity to appeal the eviction judgment.

5 Conn. Cir. 282, 250 A. 2d 527, dismissed.

Francis X. Dineen argued the cause for appellants. With him on the brief was *Joanne S. Faulkner.*

F. Michael Ahern, Assistant Attorney General, argued the cause for the State of Connecticut as *amicus curiae* in support of appellee. With him on the brief were *Robert K. Killian,* Attorney General, and *Robert L. Hirtle, Jr.,* Assistant Attorney General, joined by the Attorneys General for their respective States as follows: *Joe Purcell* of Arkansas, *Duke W. Dunbar* of Colorado, *Theodore L. Sendak* of Indiana, *Kent Frizzell* of Kansas, *Jack P. F. Gremillion* of Louisiana, *James S. Erwin* of Maine, *A. F. Summer* of Mississippi, *Robert Morgan* of North Carolina, *Paul W. Brown* of Ohio, *George F. McCanless* of Tennessee, *Vernon B. Romney* of Utah, and *James E. Barrett* of Wyoming; and by *Peter J. O'Dea,* Attorney General of the Virgin Islands.

Briefs of *amici curiae* urging reversal were filed by the Center on Social Welfare Policy and Law et al. and by the National Legal Aid and Defender Association.

PER CURIAM.

We noted probable jurisdiction in this case to decide whether § 52–542 of the Connecticut General Statutes[1] requiring a bond for the protection of his landlord from a tenant who wished to appeal from a judgment in a summary eviction proceeding, offends either the Due Process or Equal Protection Clause of the Fourteenth Amendment if applied to foreclose appellate review for those too poor to post the bond, 394 U. S. 957 (1969).

Because of an ambiguity in the record concerning the underlying reason these appellants were denied an opportunity to appeal the trial court's judgment ordering that they be evicted, we now conclude that this appeal should be dismissed, *DeBacker* v. *Brainard,* 396 U. S. 28 (1969); *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947).

After unsuccessfully litigating in the trial court a summary eviction proceeding begun by their landlords, appel-

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[1] At the time of the decisions below in this case, § 52–542 provided:

"Bond on appeal; stay of execution. When any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue or, where no lease had existed, for the reasonable value for such use and occupancy, during the pendency of such appeal, or which may be due at the time of its final disposal; and execution shall be stayed for five days from the date judgment has been rendered, but any Sunday or legal holiday intervening shall be excluded in computing such five days. No appeal shall be taken except within said period, and if an appeal is taken within said period execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken for the purpose of delay; and if execution has not been stayed, as hereinbefore provided, execution may then issue, except as otherwise provided in sections 52–543 to 52–548, inclusive."

This version of § 52–542 has been repealed and a revision substituted effective as of October 1, 1969, see Conn. Pub. Acts No. 296 (1969).

lants moved in the trial court for a waiver of the bond requirement so that they might appeal. The trial court, apparently of the view that it had the power to waive the statutory bond requirement in an appropriate case, denied appellants' motion on a finding that "this appeal is being taken for the purpose of delay." App. 23. Appellants sought review of the trial court's denial of their motion in the Connecticut Circuit Court, and that court denied review and dismissed appellants' appeal. It is unclear from that court's opinion, however, whether it thought the bond requirement of § 52–542 left no room for a waiver,[2] or instead based its refusal to hear appellants' appeal in part on the trial court's finding—cited in the Circuit Court's opinion [3]—that the appeal

[2] The opinion states in one place that "[a] sufficient bond with surety is essential to a valid appeal." 5 Conn. Cir. 282, 285, 250 A. 2d 527, 529 (1968). The court also said that "[w]ant of bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal." *Id.*, at 288, 250 A. 2d, at 531. At oral argument here, however, the State of Connecticut, appearing as *amicus curiae*, contended that the statutory bond requirement could, in an appropriate case, be waived. The opinion of the Circuit Court did not expressly pass on this issue, which it appears was not settled under Connecticut law at the time of its decision. A subsequent decision of a Connecticut circuit court suggests that the bond requirement is an absolute and necessary condition for an appeal, but it too did not consider the waiver contention made by the State before this Court, see *Housing Authority* v. *Jones*, 5 Conn. Cir. 350, 252 A. 2d 465 (1968). Moreover, this decision did not consider the effect of the 1969 amendment to § 52–542, see n. 1, *supra*.

[3] The opinion states in another place:

"On January 19, 1968, the trial court held a special hearing on the defendants' application for waiver of security on appeal. The court found that no rent had been paid since May 1, 1967, nor had the defendants offered to pay any part of the rent due; that the record contained 'dilatory tactics, and [was] loaded with defenses interposed to delay and obstruct the summary process action'; and that the 'appeal is being taken for the purpose of delay.' Accord-

before it was taken only for purpose of delay. 5 Conn. Cir. 282, 250 A. 2d 527 (1968). Appellants' petition to the Supreme Court of Connecticut to certify the case for review was declined.

In these circumstances, we deem it inappropriate for this Court to decide the constitutional issue tendered by appellants.

Dismissed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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

This was a summary procedure brought by a landlord [1] to obtain possession from his tenants for nonpayment of rent. The trial court found for the landlord and the tenants appealed.

Connecticut law requires one taking an appeal in such an action to post a bond with surety. The tenants showed they were financially unable to post the bond and claimed that to require a bond with surety to obtain an appeal would under those circumstances be a denial of equal

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ingly, the court denied the application for waiver of security on appeal." 5 Conn. Cir., at 284, 250 A. 2d, at 529.

The same Circuit Court, in later granting the landlord's motion for an order terminating a stay of execution of the eviction order, expressly affirmed the trial court's findings saying:

"We have before us the entire file in the case. The record and briefs comprise some 140 typewritten pages. Upon a review of the whole matter, we are satisfied that [the trial judge] was justified in concluding, as he did when he denied the defendants' application for a waiver of security on appeal, 'that this appeal is being taken for the purpose of delay.'" 5 Conn. Cir., at 290, 250 A. 2d, at 532.

[1] Appellee operates a federally assisted low-rent housing project under the authority of Title V of the Housing Act of 1959, 73 Stat. 679, 42 U. S. C. § 1401 *et seq.* (1964 ed. and Supp. V) and Conn. Gen. Stat. Rev. § 8–38 *et seq.*

protection. The trial court refused to waive the requirement for a bond with surety saying that "the appeal is being taken for the purpose of delay."

The Circuit Court affirmed. The Appellate Division ordered the termination of a stay of execution. 5 Conn. Cir. 282, 250 A. 2d 527. The Supreme Court denied certification.

I would reverse this judgment. A rich tenant, whatever his motives for appeal, would obtain appellate review. These tenants, because of their poverty, obtain none. I can imagine no clearer violation of the requirement of equal protection unless it be *Griffin* v. *Illinois,* 351 U. S. 12. Whether the case is criminal or civil, wealth, like race, is a suspect criterion for classification of those who have rights and those who do not. *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663; *Lee* v. *Habib,* 137 U. S. App. D. C. 403, 424 F. 2d 891.[2]

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[2] In that case Judge J. Skelly Wright, speaking for the Court of Appeals said:

"The limits of a state's duty affirmatively to equalize a defendant's ability to participate meaningfully in the judicial process are only now being sketched out in the cases. The picture is far from complete, but recent cases dealing with costs in divorce cases and transcripts on appeal from proceedings involving determination of parental rights, coupled with the expansive readings being given to *in forma pauperis* statutes, all suggest that the trend seems to be toward more, not less, affirmative action. Thus, while most of the cases extending equal protection to the judicial process have involved criminal proceedings, the constitutional mandate that there be no invidious discrimination between indigent and rich litigants is being recognized in civil cases as well.

"The equal protection clause applies to both civil and criminal cases; the Constitution protects life, liberty and property. It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case. Often a poor litigant will have more at stake in a civil case than in a criminal case." 137 U. S. App. D. C., at 412–413, 424 F. 2d, at 900–901.

What the merits of the tenants' appeal may be is not for us to say. But the appeal raised questions not easily answered. The terms of the lease stated that it could be terminated by not less than 30 days' notice, while apparently no more than five days' notice was given. A housing authority that is federally assisted has the right by 42 U. S. C. § 1404a (1964 ed., Supp. V), "to maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action is authorized by the statute or regulations under which such housing accommodations are administered." There is not a word in appellee's argument that indicates that the federal regulations permit eviction on five days' notice where the lease requires 30 days' notice.

The case has been argued as if appellants are "cheap skates" seeking to get something for nothing. That simply is not true, for the record shows:

> "Mrs. Faulkner: Your Honor, may I urge upon you that if you grant our motion to have the defendants deposit the rent in court the landlord will not be hurt any further by delay in this proceedings. He will be protected because the monthly rent will be deposited. If he is successful on appeal he will be able to get the rent.
>
> "The Court: Do you suggest, if that should be the conclusion, that the clerk could issue an execution upon failure to pay?
>
> "Mrs. Faulkner: Yes.
>
> "The Court: In other words, you will be willing to stipulate on behalf of your clients that if the rent were not paid that the clerk would, may be empowered forthwith to issue an execution?
>
> "Mrs. Faulkner: Yes, Your Honor.
>
> "The Court: That appeal to you all right?
>
> "Mr. Philbin: Frankly it doesn't. During this period of time, it could take a considerable period of

time, even if the tenant pays the fund into the clerk's office, they are not available to the plaintiff and we are still as a practical matter losing the rents during that period of time. Eventually if we prevail and get this money this would be an extended period of time." App. 19–20.

The State of Connecticut represents that its summary eviction statute is based on an English Act of 1737, 11 Geo. 2, c. 19; and with all respect, the decisions below reflect an 18th century lawyer's approach to the task of protecting a landed interest. Every appeal of course entails delay; and in a sense all appeals are antithetical to the spirit of summary eviction. But we live today under a different regime. Unlike 1737, appellate courts are no longer closed to the poor. Eviction laws emphasize speed for the benefit of landlords. Equal protection often necessitates an opportunity for the poor as well as the affluent to be heard. I disagree with the Court that the issue is not squarely presented in this case.[3] I would reverse this judgment.

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[3] On review, the Connecticut court stated that a "sufficient bond with surety is essential to a valid appeal." But in the setting of the opinion, as I read it, that meant no more than a description of the normal manner of effecting an appeal. And the Connecticut court's insistence that the tenants did not lack "the economic power to make themselves heard in a court of law" refers to the fact that they were ably represented by attorneys for the New Haven Legal Assistance Association, Inc., a factor only emphasizing their indigency. Not a word in the opinions of the Connecticut courts suggests that the statutory bond requirement could not be waived.

UNITED STATES *v.* SWEET

CERTIFIED APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 577. Decided June 29, 1970

Transfer of a case from the Court of Appeals for the District of Columbia Circuit to this Court under the certification provisions of the Criminal Appeals Act is improper where the appeal from the District Court to the Court of Appeals was pursuant to D. C. Code § 23–105, which does not provide for transfer to this Court. Moreover, the Court of Appeals has not determined that it lacked jurisdiction to hear the appeal under § 23–105, which is not affected by the Criminal Appeals Act.

Case returned to Court of Appeals for further proceedings.

PER CURIAM.

On September 30, 1968, the District Court for the District of Columbia dismissed, "with prejudice," an indictment charging appellee Sweet with various crimes under the D. C. Code, on a finding that the Government had not acted promptly enough in bringing the case to trial. The United States appealed this dismissal pursuant to D. C. Code § 23–105* to the Court of Appeals for the District of Columbia Circuit. That court, without making any determination of its jurisdiction under § 23–105, certified the case to this Court pursuant to 18 U. S. C. § 3731, the Federal Criminal Appeals Act.

We conclude that certification under § 3731 was not proper in the circumstances of this case. Section 3731

*D. C. Code § 23–105 (a) (Supp. III, 1970) provides:

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside."

provides in terms for certification only "[i]f an appeal shall be taken *pursuant to this section* to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court . . . ." (Emphasis added.) The Government's appeal to the Court of Appeals in this case was not pursuant to § 3731 but instead expressly pursuant to D. C. Code § 23–105, which contains no provision allowing transfer to this Court. Moreover, as noted earlier, it appears that the Court of Appeals has made no determination that it lacked jurisdiction to hear the Government's appeal under the broad terms of § 23–105, a statute that we previously held was unaffected in scope by the subsequent passage of the Criminal Appeals Act, *United States* v. *Burroughs,* 289 U. S. 159 (1933).

Accordingly, we hold that transfer to this Court was inappropriate and we return the case to the Court of Appeals for further proceedings.

It is so ordered.

Mr. Justice Douglas dissents.

Mr. Justice Marshall took no part in the decision of this case.

RASKIN, EXECUTOR *v.* P. D. MARCHESSINI, INC., ET AL.

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

No. 241. Decided June 29, 1970

Certiorari granted; vacated and remanded.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the Court of Appeals for reconsideration in light of *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375.

PERINI *v.* COLOSIMO

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

No. 801. Decided June 29, 1970

Certiorari granted; 415 F. 2d 804, vacated and remanded.

PER CURIAM.

The motion to dispense with printing the petition and the motion of the respondent for leave to proceed *in forma pauperis* are granted. The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Chambers* v. *Maroney, ante,* p. 42.

MR. JUSTICE HARLAN is of the opinion that certiorari should be denied. However, the case having been taken for review, he would affirm the judgment below for the reasons stated in his separate opinion in *Chambers* v. *Maroney, ante,* p. 55.

DUNN *v.* LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 664. Decided June 29, 1970

254 La. 425, 223 So. 2d 856, appeal dismissed.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE MARSHALL would reverse the judgment below for the reasons stated in his separate opinion in *Williams* v. *Florida, ante,* p. 116.

CROUSE, WARDEN *v.* WOOD

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

No. 936. Decided June 29, 1970

Certiorari granted; 417 F. 2d 394, vacated and remanded.

PER CURIAM.

The motion of the respondent 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 United States Court of Appeals for the Tenth Circuit for further consideration in light of *Chambers* v. *Maroney, ante,* p. 42.

MR. JUSTICE HARLAN is of the opinion that certiorari should be denied. However, the case having been taken for review, he would affirm the judgment below for the reasons stated in his separate opinion in *Chambers* v. *Maroney, ante,* p. 55.

DIAL ET AL. *v.* FONTAINE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 1032. Decided June 29, 1970

303 F. Supp. 436, appeal dismissed.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. *Gunn* v. *University Committee to End the War in Viet Nam, ante,* p. 383.

MR. JUSTICE DOUGLAS dissents from the dismissal of the appeal.

HOCKER, WARDEN *v.* HEFFLEY

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

No. 1195. Decided June 29, 1970

Certiorari granted; 420 F. 2d 881, vacated and remanded.

PER CURIAM.

The motion of the respondent 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 United States Court of Appeals for the Ninth Circuit for further consideration in light of *Chambers* v. *Maroney, ante,* p. 42.

MR. JUSTICE HARLAN is of the opinion that certiorari should be denied. However, the case having been taken for review, he would affirm the judgment below for the reasons stated in his separate opinion in *Chambers* v. *Maroney, ante,* p. 55.

HUTCHERSON ET AL. *v.* LEHTIN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 1385. Decided June 29, 1970

313 F. Supp. 1324, appeal dismissed.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. *Gunn* v. *University Committee to End the War in Viet Nam, ante,* p. 383, and *Mitchell* v. *Donovan,* 398 U. S. 427.

PENNER *v.* UNITED STATES

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

No. 1532. Decided June 29, 1970

Certiorari granted; 420 F. 2d 344, vacated and remanded to District Court.

PER CURIAM.

On the basis of a confession of error by the Solicitor General and of an independent review of the record, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the United States District Court for the Western District of Oklahoma with instructions to dismiss the indictment.

PEET *v.* UNITED STATES

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

No. 1886, Misc. Decided June 29, 1970

Certiorari granted; 420 F. 2d 549, vacated and remanded to District Court.

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 United States District Court for the Northern District of California for resentencing. *Gutknecht* v. *United States,* 396 U. S. 295.

GUERRIERI *v.* UNITED STATES

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

No. 1969, Misc. Decided June 29, 1970

Certiorari granted; vacated and remanded to District Court.

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 United States District Court for the Western District of Pennsylvania for findings as to whether or not petitioner is in fact an indigent and proceeding in good faith pursuant to 28 U. S. C. § 1915.

HOYT ET AL. *v.* MINNESOTA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 1544. Decided June 29, 1970

Certiorari granted; 286 Minn. 92, 174 N. W. 2d 700, reversed.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed, *Redrup* v. *New York,* 386 U. S. 767.

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

I am not persuaded that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure—rather than one capable of some flexibility and resting on concepts of reasonableness—of what each of our several States constitutionally may do to regulate obscene products within its borders.

Here a Minnesota trial court (just as the Ohio trial court did in *Walker* v. *Ohio,* 398 U. S. 434 (1970)), endeavored to apply standards articulated by this Court in prior cases, and embodied in a precisely worded Minnesota statute, and reached the conclusion that the materials in question were obscene within the meaning of that statutory definition. Six of the seven Justices of the Supreme Court of that State, citing *Redrup* v. *New York,* 386 U. S. 767 (1967), and other decisions of this Court, have identified the offending material "for what it is," have described it as dealing "with filth for the sake of filth," and have held it obscene as a matter of law. 286 Minn. 92, 95, 174 N. W. 2d 700, 702. I cannot agree that the Minnesota trial court and those six justices are so obviously misguided in their holding that

they are to be summarily reversed on the authority of *Redrup*.

At this still, for me, unsettled stage in the development of state law of obscenity in the federal constitutional context I find myself generally in accord with the views expressed by MR. JUSTICE HARLAN in *Roth* v. *United States*, 354 U. S. 476, 496, 500–503 (1957); *Jacobellis* v. *Ohio*, 378 U. S. 184, 203–204 (1964); and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, 458–460 (1966), and with those enunciated by THE CHIEF JUSTICE in *Cain* v. *Kentucky*, 397 U. S. 319 (1970), and in *Walker* v. *Ohio*, *supra*.

KELLEY *v.* ARIZONA

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

No. 1232, Misc. Decided June 29, 1970

Certiorari granted; 104 Ariz. 418, 454 P. 2d 563, vacated and remanded.

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 *Chambers* v. *Maroney*, *ante*, p. 42.

MR. JUSTICE HARLAN would vacate the judgment and remand the case to the Supreme Court of Arizona for the reasons stated in his separate opinion in *Chambers* v. *Maroney*, *ante*, p. 55.

MORICO *v.* UNITED STATES

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

No. 672. Decided June 29, 1970*

Certiorari granted; No. 672, 415 F. 2d 138; No. 35, Misc., 404 F. 2d 586; No. 88, Misc., 408 F. 2d 493; and No. 738, Misc., 413 F. 2d 133, vacated and remanded.

PER CURIAM.

Motions for leave to proceed *in forma pauperis* in Misc. Nos. 35, 88, and 738, granted. The petitions for writs of certiorari are granted, the judgments are vacated, and the cases are remanded for further consideration in light of *Welsh* v. *United States,* 398 U. S. 333.

THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be denied.

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*Together with No. 35, Misc., *Vaughn* v. *United States,* on petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit; No. 88, Misc., *McQueary* v. *United States,* and No. 738, Misc., *Callison* v. *United States,* on petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit.

Reporter's Note

The next page is purposely numbered 901. The numbers between 526 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM JUNE 22 THROUGH JUNE 29, 1970

JUNE 22, 1970

Affirmed on Appeal

No. 1522. ADAMS ET AL. *v.* CITY OF COLORADO SPRINGS ET AL. Appeal from D. C. Colo. Judgment affirmed.

Appeals Dismissed

No. 1356. GORUN ET AL. *v.* MONTANA. Appeal from Sup. Ct. Mont. dismissed for want of a substantial federal question. Reported below: —— Mont. ——, 466 P. 2d 83.

No. 1537. SOUTHERN RAILWAY CO. *v.* CITY OF HARRODSBURG. Appeal from Ct. App. Ky. dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

No. 1588. BURNETT *v.* CAMDEN, ADMINISTRATRIX. Appeal from Sup. Ct. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Ind. —— and ——; 254 N. E. 2d 199 and 255 N. E. 2d 650.

No. 1379, Misc. KHABIRI *v.* COLEMAN, JUDGE. Appeal from Sup. Ct. App. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1730, Misc. TAYLOR *v.* CALIFORNIA. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction and petition for certiorari denied.

No. 1465, Misc. LEVY *v.* ORR ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1467, Misc. WOOD *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Orange, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1587, Misc. NETTLES *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1590, Misc. MURRAY *v.* MURRAY. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1612. HARDER, COMMISSIONER OF WELFARE OF CONNECTICUT *v.* DOE ET AL. Appeal from D. C. Conn. Motion of appellees for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction.

Miscellaneous Orders

No. —. PITCHER *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 5th Cir. Application for stay of deployment, granted by MR. JUSTICE BLACK until action by the full Court, denied as moot.

No. —. CLAY, AKA ALI *v.* UNITED STATES. C. A. 5th Cir. Application for modification of bail order presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. —. VALE *v.* HENDERSON, WARDEN. C. A. 5th Cir. Renewed application for bail presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. 153, Misc., October Term, 1968. MCCRORY *v.* MISSISSIPPI, 393 U. S. 532. Motion to implement judgment denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 905. GROVE PRESS, INC., ET AL. *v.* MARYLAND STATE BOARD OF CENSORS. Appeal from Ct. App. Md. [Probable jurisdiction noted, 397 U. S. 984.] Motion of appellants to remove case from summary calendar denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 1189. LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 397 U. S. 1034.] Motion of United Americans for Public Schools for leave to file a brief as *amicus curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 1337. DECKER, U. S. DISTRICT JUDGE, ET AL. *v.* HARPER & ROW PUBLISHERS, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 397 U. S. 1073.] Further consideration of motion of petitioners for leave to supplement record and motion of respondents to strike portions of petitioners' designation of record postponed to hearing of case on the merits. Material submitted with petitioners' motion may be lodged with the Clerk.

No. 1960, Misc. VAN CLEAVE *v.* NELSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 553. HACKNEY, COMMISSIONER OF PUBLIC WELFARE OF TEXAS, ET AL. *v.* MACHADO ET AL., 397 U. S. 593. Motion of appellees to retax costs denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 2245, Misc. WILLARD *v.* HATCHER, CLERK, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 1555. TILTON ET AL. *v.* FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. Conn. Probable jurisdiction noted and case set for oral argument following No. 1189 [probable jurisdiction noted, 397 U. S. 1034]. Reported below: 312 F. Supp. 1191.

No. 1809, Misc. COHEN *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist. Motion for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits and case transferred to appellate docket. Reported below: 1 Cal. App. 3d 94, 81 Cal. Rptr. 503.

Certiorari Granted. (See also No. 727, *ante,* p. 30.)

No. 1484. ORGANIZATION FOR A BETTER AUSTIN ET AL. *v.* KEEFE. App. Ct. Ill., 1st Dist. Certiorari granted. Reported below: 115 Ill. App. 2d 236, 253 N. E. 2d 76.

No. 33, Misc. ODOM *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted, limited to retroactivity of *North Carolina* v. *Pearce,* 395 U. S. 711, and case transferred to appellate docket. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. Reported below: 403 F. 2d 45.

No. 240, Misc. BIVENS *v.* SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Case transferred to appellate docket. Reported below: 409 F. 2d 718.

Certiorari Denied. (See also No. 1588, and Misc. Nos. 1379, 1465, 1467, 1587, 1590, and 1730, *supra.*)

No. 1247. UNION PACIFIC RAILROAD CO. *v.* HALL LUMBER SALES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 419 F. 2d 1009.

No. 1317. GAMBINO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 419 F. 2d 1355.

No. 1353. AUERBACH ET AL. *v.* UNITED STATES; and No. 1478. RANDELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 2d 921 and 423 F. 2d 676.

No. 1483. VANDERBOOM ET AL. *v.* CITY NATIONAL BANK OF FORT SMITH, ARKANSAS. C. A. 8th Cir. Certiorari denied. Reported below: 422 F. 2d 221.

No. 1518. HUIE *v.* BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR. Sup. Ct. Ala. Certiorari denied. Reported below: 285 Ala. 185, 230 So. 2d 514.

No. 1527. FISHMAN *v.* CITY OF STAMFORD ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 159 Conn. 116, 267 A. 2d 443.

No. 1534. LOCAL UNION NO. 167, PROGRESSIVE MINE WORKERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 538.

No. 1540. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 1056.

No. 1011. NORTON ET AL. *v.* DISCIPLINE COMMITTEE OF EAST TENNESSEE STATE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 419 F. 2d 195.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Petitioners were suspended as students at East Tennessee State University for distributing leaflets critical of the university administration. They brought an action in federal district court under 42 U. S. C. § 1983 seeking reinstatement and expungement of the records of their suspension, claiming that their rights to freedom of speech and procedural due process had been violated. The District Court denied the requested relief after holding a full evidentiary hearing, and the Court of Appeals affirmed, Judge Celebrezze dissenting. 419 F. 2d 195 (C. A. 6th Cir. 1969). I would grant certiorari.

The pamphlets involved in this case were published and distributed by students angered by what they regarded as the backward policies of the university administration and the apathy of their fellow students toward these policies. They criticize, often in a crude and sarcastic tone, the positions of the administration on such matters as dress, social regulations, ROTC, campus police behavior, and censorship of the college newspaper. They go on to draw unfavorable comparisons between the response of students at East Tennessee and the response of other students in Czechoslovakia, France, and elsewhere in this country, and call upon students to "stand up and fight" for their "constitutional right to protest, demonstrate, and demand their rights."*

*The pamphlets are reproduced in full as an appendix to the opinion of the Court of Appeals, 419 F. 2d, at 201.

No charges were brought against these students that the time, place, or manner of distribution was in any way improper. The sole charge was based squarely on the content of the pamphlets—namely, that they were "of a false, seditious and inflammatory nature." There is no evidence that the pamphlets created any disturbance on campus, nor is there any concrete evidence from which one could infer any substantial danger that they would. Rather there is only the conclusory testimony of university officials that the pamphlets "could conceivably" have caused an eruption, and reference to "fears that we might have serious consequences." *Id.*, at 197. The only support given to these assertions is the description of an incident in which some 25 students visited the dean after the pamphlets were circulated and stated that they "wanted to get rid of this group of agitators." *Id.*, at 199.

It seems to me altogether too late in the constitutional history of this country to argue that individuals can properly be punished for pamphleteering in these circumstances. These pamphlets are similar in some ways to the broadsides circulated by popular writers in England and the Colonies, official suppression of which helped lead to adoption of the First Amendment; to the writings of Republican polemicists, against which the Sedition Act prosecutions were aimed—prosecutions this Court has said violated the First Amendment, *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 273–276 (1964); and to leaflets distributed by protesters during the First World War and the 1920's, which evoked the classic opinions of Holmes and Brandeis, since vindicated by history, upon which so much of our law of free speech and the press is based. *Abrams* v. *United States,* 250 U. S. 616, 624 (1919) (Holmes, J., dissenting); *Gitlow* v. *New York,* 268 U. S. 652, 672 (1925) (Holmes, J., dis-

senting); cf. *Whitney* v. *California,* 274 U. S. 357, 372 (1927) (Brandeis, J., concurring).

Indeed many of these older examples of the pamphleteering art were far cruder in tone and more inflammatory in content than the rather mild invocations of student protest before us here. Where such writings are suppressed, they are normally called "seditious" and "inflammatory," and legal action against them is justified—as it was here—on the ground that they constitute an "incitement" to crime or other disturbance that the offended officials have a right or duty to prevent. But to accept that formula without close examination of the facts would be to submerge the First Amendment altogether, for as Mr. Justice Holmes said, in words that are often quoted but at least as often disregarded, "[e]very idea is an incitement." *Gitlow* v. *New York, supra,* at 673. On this record, there was nothing approaching incitement of the kind that could constitutionally be punished as extending beyond the realm of speech into that of action. In their own testimony, the university officials demonstrated no more than the sort of "undifferentiated fear or apprehension of disturbance," which, as we held in *Tinker* v. *Des Moines School District,* 393 U. S. 503, 508 (1969), "is not enough to overcome the right to freedom of expression" even in the context of a classroom and as applied to high school rather than college students.

I cannot believe that this Court would hesitate one moment before striking down a criminal conviction based upon these pamphlets, or for that matter a civil judgment, or a prior restraint by injunction or administrative order against their distribution. This case differs in that the distribution took place upon a campus, the authors were college students, and the sanction was suspension from the university. As to the last point, it seems clear that suspension is punishment, and that punishment for

speech is "abridgment" in the constitutional sense. *Tinker* v. *Des Moines School District, supra.* As to the former two points, they do not change the case. "The first amendment applies with full vigor on the campus of a public university." Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1037 (1969). Officials of public universities wield the powers of the State, and in my view they are no more free than policemen or prosecutors to punish speech because it is rude or disrespectful, or because it causes in them vague apprehensions, or because for any other reason they do not like its content.

Student protesters are unpopular today, and the activities of some of them fall far outside any plausible construction of the constitutional guarantees of free expression. There is a tendency to lump together the burning of buildings and the peaceful but often unpleasantly sharp expression of discontent. It seems to me most important that the courts should distinguish between the two with particular care in these days, when officials under the pressure of events and public opinion are tempted to blur the distinction. Our system promises to college students as to everyone else that they may have their say, and when it breaks that promise it gives aid and comfort to those who say that it is a sham.

No. 1538. BARTH *v.* CITY OF LOUISVILLE ET AL. Ct. App. Ky. Certiorari denied. Reported below: 449 S. W. 2d 24.

No. 1542. CANTOR ET UX. *v.* ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MADISON ET AL. Super. Ct. N. J. Certiorari denied.

No. 1543. IROQUOIS INDUSTRIES, INC. *v.* SYRACUSE CHINA CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 417 F. 2d 963.

No. 1545. PATE, WARDEN *v.* PERRY, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied.

No. 1546. MIRIANI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 2d 150.

No. 1548. MAIORANI *v.* KAWASAKI KISEN K. K., KOBE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 1162.

No. 1554. DAPPER *v.* MUNICIPAL COURT, SAN DIEGO JUDICIAL DISTRICT. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 276 Cal. App. 2d 982, 81 Cal. Rptr. 340.

No. 1561. FRIDENA *v.* ARIZONA OSTEOPATHIC MEDICAL ASSN. ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 105 Ariz. 291, 463 P. 2d 825.

No. 1570. BALLY CASE & COOLER, INC., OF DELAWARE *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 416 F. 2d 902.

No. 1584. INTRA BANK, S. A. *v.* WILLE, SUPERINTENDENT OF BANKS OF NEW YORK, ET AL.; and

No. 1595. AMERICAN INTERNATIONAL UNDERWRITERS CORP. ET AL. *v.* WILLE, SUPERINTENDENT OF BANKS OF NEW YORK, ET AL. Ct. App., N. Y. Certiorari denied.

No. 1075. PHILLIPS, REFORMATORY SUPERINTENDENT *v.* BOOKER. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 418 F. 2d 424.

No. 1646. COPINGER, WARDEN *v.* BLACKBURN. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 421 F. 2d 602.

No. 1654. Bendix Corp. et al. *v.* Balax, Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 421 F. 2d 809.

No. 1523. Mosca *v.* United States. Ct. Cl. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 189 Ct. Cl. 283, 417 F. 2d 1382.

No. 1558. Zimmerman *v.* United States et al. C. A. 3d Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 422 F. 2d 326.

No. 1560. Sommer et al. *v.* United States. C. A. 7th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 422 F. 2d 110.

No. 288, Misc. Reyes *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 567, Misc. Clayton *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 413 F. 2d 297.

No. 705, Misc. Whitted *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 411 F. 2d 107.

No. 788, Misc. Bradford *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 70 Cal. 2d 333, 450 P. 2d 46.

No. 909, Misc. McClain *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 254 La. 56, 222 So. 2d 855.

No. 1053, Misc. Terry *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 70 Cal. 2d 410, 454 P. 2d 36.

No. 1214, Misc. MONTGOMERY *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 414 F. 2d 552.

No. 1279, Misc. VALDES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 417 F. 2d 335.

No. 1295, Misc. GIBSON ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 76 Wash. 2d 814, 459 P. 2d 22.

No. 1336, Misc. DEJONG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 1385, Misc. AGNEW *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 184 Neb. 700, 171 N. W. 2d 542.

No. 1397, Misc. RHODES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 1496, Misc. WILLIAMS *v.* REINCKE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1514, Misc. JONES *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1563, Misc. PIGMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 414 F. 2d 767.

No. 1752, Misc. FRANKLIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 6 Md. App. 572, 252 A. 2d 487.

No. 1775, Misc. BLACKWELL *v.* BAKER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1830, Misc. WALLEN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 185 Neb. 44, 173 N. W. 2d 372.

No. 1819, Misc. CLINTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 1892, Misc. ROBINSON *v.* BOARD OF SUPERVISORS OF PIMA COUNTY ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 105 Ariz. 280, 463 P. 2d 536.

No. 1918, Misc. WILLIAMS *v.* OBERHAUSER, INSTITUTION SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1965, Misc. SCHLETTE *v.* ROSENSTOCK. C. A. 9th Cir. Certiorari denied.

No. 1974, Misc. NIPP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 422 F. 2d 509.

No. 1984, Misc. KENDALL *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1986, Misc. ADAMS, AKA OWENS, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 422 F. 2d 515.

No. 1987, Misc. GRACE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 2047, Misc. GOODMAN *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 2051, Misc. GLENNERSTER *v.* UNITED STATES; and

No. 2075, Misc. BENANTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 2062, Misc. DEVERS *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 1263.

No. 2068, Misc. SEOHNLEIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 1051.

No. 2063, Misc. SCOTT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 2070, Misc. DOUGHERTY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 2083, Misc. MARSHALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 2084, Misc. OSTERBURG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 704.

No. 2087, Misc. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 2089, Misc. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 334, 255 N. E. 2d 385.

No. 2098, Misc. PUPLAMPU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 870.

No. 2101, Misc. MOSBY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 422 F. 2d 72.

No. 2112, Misc. PICKLER *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 226 Ga. 109, 172 S. E. 2d 696.

No. 2116, Misc. WILLARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 2d 59.

No. 2119, Misc. THAXTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 424 F. 2d 942.

No. 2117, Misc. MILLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 688.

No. 2128, Misc. UNGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 416 F. 2d 558.

No. 2132, Misc. SEWELL *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 2135, Misc. VERSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 2137, Misc. WALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 422 F. 2d 374.

No. 2138, Misc. O'SHEA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 2140, Misc. WEBSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 422 F. 2d 290.

No. 2143, Misc. MCPARLIN *v.* RHODE ISLAND. C. A. 1st Cir. Certiorari denied. Reported below: 419 F. 2d 7.

No. 2147, Misc. STEWART *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 2150, Misc. ROLLINS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 449 S. W. 2d 585.

No. 2151, Misc. HOUSE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 134 U. S. App. D. C. 10, 411 F. 2d 725.

No. 2213, Misc. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 423 F. 2d 677.

No. 2228, Misc. McDORMAN ET AL. *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 422 F. 2d 214.

No. 2171, Misc. TEPLITSKY *v.* ASSOCIATED PRESS ET AL. C. A. 2d Cir. Certiorari denied.

No. 583, Misc. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 411 F. 2d 224.

No. 955, Misc. WRIGHT *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 1209, Misc. STEVENS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 1406, Misc. BEASLEY *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 184 Neb. 649, 171 N. W. 2d 177.

No. 1688, Misc. BOYDEN *v.* FEDERAL PRISON INDUSTRIES, INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 1788, Misc. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 834. GRAYSON *v.* UNITED STATES, 396 U. S. 1059, 397 U. S. 1003. Motion for leave to file second petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 156, Misc., October Term, 1968. ELLENBOGEN *v.* UNITED STATES, 393 U. S. 918. Petition for rehearing denied. MR. JUSTICE DOUGLAS is of the opinion that the petition should be granted. THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 476. SEARS, ROEBUCK & CO. *v.* CARPET, LINOLEUM, SOFT TILE, & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION No. 419, AFL–CIO, ET AL., 397 U. S. 655. Motion for leave to supplement petition for rehearing granted. Motion to defer consideration of petition for rehearing and petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these motions and petition.

No. 1374. BEATTY *v.* ELLINGS ET AL., 398 U. S. 904;

No. 1935, Misc. GOFF *v.* PFAU, TRUSTEE IN BANKRUPTCY, 398 U. S. 931; and

No. 2033, Misc. PENNEY ET AL. *v.* UNITED STATES, 398 U. S. 932. Petitions for rehearing denied. Mr. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Ninth Circuit beginning June 18, 1970, and ending October 31, 1970, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States District Court for the Northern District of California beginning June 18, 1970, and ending October 31, 1970, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JUNE 23, 1970

Certiorari Granted. (See Nos. 1507 and 1556, *ante,* p. 222.)

JUNE 26, 1970

Dismissal Under Rule 60

No. 2344, Misc. TRABUCCO *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 424 F. 2d 1311.

Miscellaneous Order

No. —. BERK *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. D. C. E. D. N. Y. Application for stay of deployment presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

JUNE 27, 1970

Miscellaneous Order

No. —. ROBINSON, COMMISSIONER OF EDUCATION OF RHODE ISLAND, ET AL. *v.* DICENSO ET AL. D. C. R. I. Application for stay of order of the United States District Court for the District of Rhode Island entered in Civil Action No. 4239 on June 17, 1970, which application was presented to MR. JUSTICE BRENNAN, and by him referred

to the Court, granted, and the said order is hereby stayed pending timely filing of appeal in this Court. Should appeal be so timely filed, the stay will remain in effect pending its disposition. In the event the appeal is dismissed, the stay is to terminate automatically. Should jurisdiction be noted or postponed in the case, the stay is to remain in effect pending issuance of judgment of this Court. MR. JUSTICE DOUGLAS dissents from the grant of stay. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this application. Reported below: 316 F. Supp. 112.

JUNE 29, 1970

Appeals Dismissed

No. 1371. READER'S DIGEST ASSN., INC. *v.* MAHIN, DIRECTOR OF REVENUE OF ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 44 Ill. 2d 354, 255 N. E. 2d 458.

No. 1670, Misc. MEARS *v.* HOCKER, WARDEN, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1310, Misc. LEE *v.* FAULKNER, SHERIFF. Appeal from Ct. Crim. App. Okla. dismissed for want of substantial federal question.

No. 1889, Misc. BETTENCOURT *v.* CALIFORNIA. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of substantial federal question.

No. 1925, Misc. DOBER *v.* ELKO ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 436 Pa. 243, 259 A. 2d 419.

No. 1525, Misc. SMITH *v.* SCOTLAND URBAN ENTERPRISES, INC. Appeal from Sup. Ct. La. dismissed for want of properly presented federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

*Vacated and Remanded on Appeal**

No. 1568. CARLOUGH *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Appeal from D. C. S. D. Fla. Judgment of United States District Court for the Southern District of Florida vacated and case remanded to that court so that it may enter a fresh judgment from which a timely appeal may be taken to the Court of Appeals.

Miscellaneous Orders

No. —. UNITED STATES *v.* TEN REELS OF A MOTION PICTURE, ENTITLED "QUIET DAYS IN CLICHY" (GROVE PRESS, CLAIMANT). D. C. C. D. Cal. Application to vacate stay heretofore issued by MR. JUSTICE BLACK denied, with leave to renew, however, if a trial on the obscenity *vel non* of this film has not commenced by August 3, 1970, unless any delay of the trial beyond that date has been occasioned by appellee Grove Press. MR. JUSTICE BLACK and MR. JUSTICE STEWART would vacate the stay. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

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*[REPORTER'S NOTE: This is a new category for summary dispositions on appeal. Cf. Reporter's Note, 398 U. S. 901.]

No. ——. FLORIDA EX REL. FAIRCLOTH, ATTORNEY GENERAL OF FLORIDA, ET AL. *v.* M & W THEATRES, INC., ET AL.; and

No. ——. FLORIDA EX REL. FAIRCLOTH, ATTORNEY GENERAL OF FLORIDA, ET AL. *v.* NEWTON ET AL. Applications for stays of preliminary injunction issued by the United States District Court for the Northern District of Florida presented to MR. JUSTICE BLACK, and by him referred to the Court, granted pending timely filing and disposition of appeals. Should such appeals not be filed, these stays are to expire automatically. Should such appeals be timely docketed, these stays are to continue pending this Court's action on the jurisdictional aspect of the cases. In the event the appeals are dismissed or judgments below summarily affirmed, these stays are to expire automatically. Should the Court note probable jurisdiction of the appeals or postpone further consideration of the questions of jurisdiction to hearings on the merits, these stays to remain in effect pending issuance of the judgments of this Court. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of these applications.

No. 2242, Misc. AUSTIN *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ET AL. Application for stay order or writ of injunction presented to MR. JUSTICE BLACK, and by him referred to the Court, granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 730. HILL *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, 396 U. S. 818.] Motion of *Keith C. Monroe* for leave to participate in oral argument as *amicus curiae* on behalf of the Orange County Criminal Courts Bar Assn. denied.

No. 4. YOUNGER, DISTRICT ATTORNEY OF LOS ANGELES COUNTY *v.* HARRIS ET AL. Appeal from D. C. C. D. Cal. [Probable jurisdiction noted, 393 U. S. 1013; restored to calendar, 395 U. S. 955];

No. 6. BOYLE, JUDGE, ET AL. *v.* LANDRY ET AL. Appeal from D. C. N. D. Ill. [Probable jurisdiction noted, 393 U. S. 974; restored to calendar, 395 U. S. 955];

No. 11. SAMUELS ET AL. *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 393 U. S. 975; restored to calendar, 395 U. S. 957];

No. 20. FERNANDEZ *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 393 U. S. 975; restored to calendar, 395 U. S. 957];

No. 265. BODDIE ET AL. *v.* CONNECTICUT ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, 395 U. S. 974];

No. 266. SANKS ET AL. *v.* GEORGIA ET AL. Appeal from Sup. Ct. Ga. [Probable jurisdiction noted, 395 U. S. 974];

No. 565. DYSON ET AL. *v.* STEIN. Appeal from D. C. N. D. Tex. [Probable jurisdiction noted *sub nom. Batchelor* v. *Stein*, 396 U. S. 954]; and

No. 1149. BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY, ET AL. *v.* KARALEXIS ET AL. Appeal from D. C. Mass. [Probable jurisdiction noted, 397 U. S. 985.] Cases restored to calendar for reargument.

No. 2130, Misc. HARDIE *v.* NEVILLE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 2217, Misc. MCCLENDON *v.* SMITH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 1198. WHITCOMB, GOVERNOR OF INDIANA *v.* CHAVIS ET AL. Appeal from D. C. S. D. Ind. [Probable jurisdiction noted, 397 U. S. 984.] Motion of ACLU Foundation, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 1155. UNITED STATES *v.* VUITCH. Appeal from D. C. D. C. [Probable jurisdiction postponed, 397 U. S. 1061.] In addition to the issues presented on the merits of this case, the parties are requested to brief and argue the following three questions:

1. Does this Court have jurisdiction under 18 U. S. C. § 3731 to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment on the ground of the invalidity of the statute on which the indictment is founded, where the statute, although an act of Congress, applies only in the District of Columbia?

2. Could the District Court's decision in this case have been appealed to the Court of Appeals for the District of Columbia Circuit pursuant to D. C. Code § 23–105?

3. If the decision could have been appealed to the District of Columbia Circuit, should this Court, as a matter of sound judicial administration, abstain from accepting jurisdiction pursuant to 18 U. S. C. § 3731 because the case involves the validity of a statute the application of which is confined to the District of Columbia?

No. 1189. LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 397 U. S. 1034.] Motion of Americans United for Separation of Church and State for leave to participate in oral argument as *amicus curiae* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 21. DUTTON, WARDEN *v.* EVANS. Appeal from C. A. 5th Cir. [Probable jurisdiction noted, 393 U. S. 1076; restored to calendar for reargument, 397 U. S. 1060];

No. 1632. MCGAUTHA *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, 398 U. S. 936]; and

No. 1633. CRAMPTON *v.* OHIO. Sup. Ct. Ohio. [Certiorari granted, 398 U. S. 936.] The Solicitor General is invited to file a brief in these cases expressing the views of the United States and to participate in the oral argument. Motion of petitioner for appointment of counsel in No. 1633 granted. It is ordered that *John J. Callahan, Esquire,* of Toledo, Ohio, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

Probable Jurisdiction Noted or Postponed

No. 837. PEREZ ET AL. *v.* LEDESMA ET AL. Appeal from D. C. E. D. La. Further consideration of question of jurisdiction in this case postponed to hearing of case on the merits. Case set to be argued with No. 4, *Younger* v. *Harris,* No. 6, *Boyle* v. *Landry,* No. 11, *Samuels* v. *Mackell,* No. 20, *Fernandez* v. *Mackell,* No. 565, *Dyson* v. *Stein,* and No. 1149, *Byrne* v. *Karalexis.* [Restored to calendar for reargument, *supra.*] In addition to questions presented in jurisdictional statement, parties requested to brief and argue the following questions:

(1) Was it an appropriate exercise of discretion for the three-judge court to grant the relief in paragraphs 1 and 2 of the judgment of August 14, 1969, in view of the pendency of the state prosecution charging violation of Louisiana Revised Statutes § 14:106?

(2) Was it an appropriate exercise of discretion for the three-judge court in paragraph 4 of said judgment to

declare the St. Bernard Parish Ordinance No. 21–60 unconstitutional?
Reported below: 304 F. Supp. 662.

No. 1658. SHAFFER *v.* VALTIERRA ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted and case set for oral argument with No. 1557 [probable jurisdiction noted, 398 U. S. 949]. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this matter. Reported below: 313 F. Supp. 1.

No. 2300, Misc. MCKEIVER ET AL. *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Case transferred to appellate docket and set for oral argument with No. 1441 [*In re Burrus,* certiorari granted, 397 U. S. 1036]. Reported below: 438 Pa. 339, 265 A. 2d 350.

Certiorari Granted. (See also No. 241, *ante,* p. 519; No. 672, *ante,* p. 526; No. 801, *ante,* p. 519; No. 936, *ante,* p. 520; No. 1195, *ante,* p. 521; No. 1532, *ante,* p. 522; No. 1544, *ante,* p. 524; No. 35, Misc., *ante,* p. 526; No. 88, Misc., *ante,* p. 526; No. 738, Misc., *ante,* p. 526; No. 1232, Misc., *ante,* p. 525; No. 1886, Misc., *ante,* p. 523; and No. 1969, Misc., *ante,* p. 523.)

No. 1170. GILLETTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 420 F. 2d 298.

No. 1873, Misc. TATE *v.* SHORT. Ct. Crim. App. Tex. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. Reported below: 445 S. W. 2d 210.

No. 1669, Misc. NEGRE *v.* LARSEN ET AL. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 1170, *supra.* Reported below: 418 F. 2d 908.

No. 1405. GRIGGS ET AL. *v.* DUKE POWER CO. C. A. 4th Cir. Motion of United Steelworkers of America, AFL–CIO, for leave to file a brief as *amicus curiae* granted. Certiorari granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion and petition.

No. 1713. SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. C. A. 4th Cir. Motion of National Education Association for leave to file a brief as *amicus curiae* granted. Motion of United Negro College Fund, Inc., et al. for leave to file a brief as *amici curiae* granted. Petition for writ of certiorari granted, provided the judgment of the Court of Appeals is left undisturbed insofar as it remands the case to the District Court for further proceedings, which further proceedings are authorized, and the District Court's judgment is reinstated and shall remain in effect pending those proceedings. Decision on motions to expedite deferred. MR. JUSTICE BLACK dissents from the Court's order which reinstates the District Court's judgment. He would grant motion to expedite action in this Court and set case for hearing at earliest possible date. Reported below: 431 F. 2d 138.

No. 1318, Misc. COOLIDGE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. Reported below: 109 N. H. 403, 260 A. 2d 547.

Certiorari Denied. (See also No. 1371, and Misc. Nos. 1670 and 1925, *supra.*)

No. 1115. WISNIESKI *v.* OHIO EX REL. KENDZIA ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 20 Ohio St. 2d 37, 252 N. E. 2d 639.

No. 516. MESSINGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 413 F. 2d 927.

No. 1414. TILTON ET AL. *v.* COWLES PUBLISHING CO. Sup. Ct. Wash. Certiorari denied. Reported below: 76 Wash. 2d 707, 459 P. 2d 8.

No. 1427. GARRETT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 418 F. 2d 1250.

No. 1440. OPIE *v.* MEACHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 419 F. 2d 465.

No. 1461. BERGMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 420 F. 2d 681.

No. 1536. IN RE GANTT. Sup. Ct. Ala. Certiorari denied. Reported below: 285 Ala. 753, 230 So. 2d 525.

No. 1551. LANIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 1552. BANKERS MORTGAGE CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 73.

No. 1562. LONGO ET AL. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1563. COPPOLINO *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 223 So. 2d 68.

No. 1566. MONROE AUTO EQUIPMENT CO., HARTWELL DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 2d 861.

No. 1567. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* BAKER. C. A. 5th Cir. Certiorari denied. Reported below: 422 F. 2d 145.

No. 1571. Anderson Federation of Teachers, Local 519 *v.* School City of Anderson et al. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. —— and ——, 251 N. E. 2d 15 and 254 N. E. 2d 329.

No. 1573. Metropolitan Life Insurance Co. *v.* Edwards et al. Super. Ct. Pa. Certiorari denied. Reported below: 215 Pa. Super. 390, 259 A. 2d 183.

No. 1585. Izzi *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 427 F. 2d 293.

No. 1592. Woodson, Trustee in Bankruptcy *v.* Gilmer. C. A. 4th Cir. Certiorari denied. Reported below: 420 F. 2d 378.

No. 1601. Riley et ux. *v.* State Farm Mutual Automobile Insurance Co. C. A. 6th Cir. Certiorari denied. Reported below: 420 F. 2d 1372.

No. 1606. Harsh Investment Corp. *v.* Danning, Receiver. C. A. 9th Cir. Certiorari denied.

No. 1638. Coppola *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 991.

No. 18. McLaurin *v.* Burnley. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 401 F. 2d 773.

No. 1619. Vasilj *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 425 F. 2d 1134.

No. 1618. Curran et al. *v.* Morrissey et al. C. A. 2d Cir. Motion to defer consideration of petition for certiorari denied. Certiorari denied. Mr. Justice White is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 393.

No. 508. HANNA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE HARLAN would grant the petition for certiorari, vacate the judgment below, and remand case for the reasons stated in his separate opinion in *Chambers* v. *Maroney, ante,* p. 55. Reported below: 42 Ill. 2d 323, 247 N. E. 2d 610.

No. 683. ICHORD ET AL. *v.* STAMLER ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 415 F. 2d 1365.

No. 1600. MARSTON ET AL. *v.* ANN ARBOR PROPERTY MANAGERS ET AL. C. A. 6th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 422 F. 2d 836.

No. 1753. SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL. *v.* BREWER ET AL. C. A. 4th Cir. Motion to dispense with printing petition granted. Motion to advance granted. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the case set for oral argument at earliest possible date.

No. 13, Misc. OLIVEROS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 398 F. 2d 349.

No. 373, Misc. PITTS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 389, Misc. GELHAAR *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 41 Wis. 2d 230, 163 N. W. 2d 609.

No. 907, Misc. HEARNS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 223 So. 2d 738.

No. 1304, Misc. MORGAN *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 1545, Misc. GUTIERREZ *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Ventura. Certiorari denied.

No. 1567, Misc. HOCK *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 54 N. J. 526, 257 A. 2d 699.

No. 1572, Misc. STACK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1592, Misc. WILSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1693, Misc. BAKER *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1829, Misc. STOUT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1955, Misc. BELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 1971, Misc. CALDERA ET AL. *v.* MITCHELL, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1981, Misc. SZIJARTO *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 2010, Misc. RICHBURG *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 253 S. C. 458, 171 S. E. 2d 592.

No. 2015, Misc. JOHNSON *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 2016, Misc. COX *v.* WINGO. C. A. 6th Cir. Certiorari denied.

No. 2020, Misc. CRAGG *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 2017, Misc. WALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 421 F. 2d 1298.

No. 2021, Misc. CLAYTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 418 F. 2d 1274.

No. 2029, Misc. JACKSON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: —— Iowa ——, 173 N. W. 2d 567.

No. 2030, Misc. ADAMS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 26 N. Y. 2d 129, 257 N. E. 2d 610.

No. 2040, Misc. MCGETTRICK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 2041, Misc. HOLLOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 420 F. 2d 377.

No. 2042, Misc. O'FIELDS *v.* RADER, INSTITUTIONS DIRECTOR, ET AL. C. A. 10th Cir. Certiorari denied.

No. 2043, Misc. LORENZANA *v.* DELGADO, WARDEN. Sup. Ct. P. R. Certiorari denied.

No. 2049, Misc. WANSLEY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. Reported below: 210 Va. 462, 171 S. E. 2d 678.

No. 2066, Misc. TAYLOR *v.* SUPERIOR COURT, COUNTY OF RIVERSIDE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 2072, Misc. WILLIAMS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 2079, Misc. SHARPE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 2080, Misc. CULLY *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 2090, Misc. KRUSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 2d 849.

No. 2092, Misc. HEADLEY ET AL. *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 415 F. 2d 277.

No. 2095, Misc. BASS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 2099, Misc. HORTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 474.

No. 2102, Misc. MAPYS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 409 F. 2d 964.

No. 2104, Misc. MOFFETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 2111, Misc. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 395.

No. 2115, Misc. HYLECK *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 286 Minn. 126, 175 N. W. 2d 163.

No. 2122, Misc. CLARKE *v.* UNITED STATES BOARD OF PAROLE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 2123, Misc. YANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 2127, Misc. GROVES *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 2133, Misc. LOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 2129, Misc. BROWN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 226 Ga. 114, 172 S. E. 2d 666.

No. 2131, Misc. MANUEL-BACA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 2d 781.

No. 2141, Misc. WOOTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 420 F. 2d 376.

No. 2146, Misc. COHEN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 418 F. 2d 565.

No. 2157, Misc. BRIONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 742.

No. 2163, Misc. HYNES, AKA BURNS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 754.

No. 2175, Misc. NELSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 2d 189.

No. 212, Misc. GILLIAM *v.* RESOR, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant the petition, vacate the judgment, and remand the case for reconsideration in light of *Welsh* v. *United States*, 398 U. S. 333 (1970). Reported below: 407 F. 2d 281.

No. 908, Misc. MORGAN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari and reverse the judgment below for the reasons stated in his separate opinion in *Williams* v. *Florida*, *ante*, p. 116. Reported below: 223 So. 2d 801.

No. 105, Misc. JACKSON *v.* GEORGIA. Sup. Ct. Ga.; No. 219, Misc. TURLEY *v.* MISSOURI. Sup. Ct. Mo.; and

No. 509, Misc. WETZEL *v.* NORTH CAROLINA. C. A. 4th Cir. Motion of Emory Community Legal Services Center for leave to file a brief as *amicus curiae* in No. 105, Misc., granted. Petitions for writs of certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, being of the view that *Coleman* v. *Alabama, ante,* p. 1, should be retroactive in all cases (see *Desist* v. *United States,* 394 U. S. 244, 255 (DOUGLAS, J., dissenting)) would grant the petitions, vacate the judgments, and remand the cases for reconsideration in light of *Coleman.* MR. JUSTICE HARLAN would grant the petitions for writs of certiorari, vacate judgments of the courts below, and remand cases to those courts for further consideration in light of his concurring opinion in *Coleman* v. *Alabama, ante,* p. 19. See *Desist* v. *United States,* 394 U. S. 244, 256 (1969) (HARLAN, J., dissenting). Reported below: No. 105, Misc., 225 Ga. 39, 165 S. E. 2d 711; and No. 219, Misc., 442 S. W. 2d 75.

No. 603, Misc. SATTERFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 410 F. 2d 1351.

No. 878, Misc. GREGG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 414 F. 2d 943.

No. 1342, Misc. SARABIA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 S. W. 2d 231.

No. 1201, Misc. COLLIER *v.* WINGO, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE HARLAN would grant certiorari, vacate the judgment below, and remand for the reasons stated in his separate opinion in *Chambers* v. *Maroney, ante,* p. 55. MR. JUSTICE MARSHALL would grant certiorari, vacate the judgment, and remand for further consideration in the light of *Chambers* v. *Maroney, ante,* p. 42.

No. 1399, Misc. CARTER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari on the question whether a witness before a grand jury has standing in light of *Blair* v. *United States,* 250 U. S. 273, to challenge the constitutionality of a statute concerning violations of which he is compelled to testify. Reported below: 417 F. 2d 384.

No. 1668, Misc. FERGUSON ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 1964, Misc. SATERY *v.* TEXAS. Ct. Crim. App. Tex. Motion to dissolve stay granted. Certiorari denied.

No. 2113, Misc. NEWMAN *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 421 F. 2d 1377.

No. 2114, Misc. WHITNEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 425 F. 2d 169.

No. 1978, Misc. RUSSELL *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 33 App. Div. 2d 592, 304 N. Y. S. 2d 415.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Appellate Division of the New York Supreme Court has interpreted § 593 of the New York Labor Law as requiring an applicant for unemployment benefits, as a condition to receiving those benefits, to stand ready to accept suitable employment when tendered, even though acceptance of the employment would compel him to join a union as to which he has "conscientious objections." The decision of the New York courts places a burden on the petitioner's freedom of association—a freedom we have placed on a high, if indeed not a "preferred" plane. See *NAACP* v. *Alabama,* 357 U. S. 449 (1958). Consequently, this case may well present important issues that ought to be decided, particularly if the result of the New York holding is that a worker must decide between a deeply felt belief that falls in the First Amendment area, and crucial unemployment benefits.

The Industrial Commissioner, if we are to place any weight on his response here, has shown that he considers the petitioner bound to accept a job tender even when his acceptance requires union membership that is repugnant to him. It may be that on plenary consideration we would conclude that the Constitution requires the respondent to provide employment that does not conflict with the worker's freedom of association, as might be indicated under *Sherbert* v. *Verner,* 374 U. S. 398 (1963). In that case we held unemployment benefits could not be denied because of refusal to accept employment that required a member of the Seventh

Day Adventists to work on her Sabbath. See also *NAACP* v. *Button*, 371 U. S. 415, 438 (1963).

I would grant the writ because I believe that the petitioner has presented a substantial question and possibly one of important constitutional dimensions that warrants plenary—not summary—consideration.

No. 2384, Misc. McLucas et al. *v.* Palmer, Judge. C. A. 2d Cir. Motion to expedite consideration of petition granted. Certiorari denied. Reported below: 427 F. 2d 239.

Rehearing Denied

No. 776, October Term, 1968. Utah Public Service Commission *v.* El Paso Natural Gas Co. et al., 395 U. S. 464. All petitions for rehearing, motions, and other petitions filed in this case denied. Mr. Justice Harlan and Mr. Justice Stewart would call for responses to petitions for rehearing and to other motions and petitions referred to in this Court's order. Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall took no part in the consideration or decision of this order.

No. 1409. Bell *v.* Government of the Virgin Islands, 398 U. S. 937;

No. 1442. Dean Foods Co., Inc. *v.* National Labor Relations Board, 398 U. S. 939;

No. 2, Misc. Chandler, U. S. District Judge *v.* Judicial Council of the Tenth Circuit, 398 U. S. 74;

No. 1665, Misc. Evans *v.* United States, 397 U. S. 1058;

No. 1822, Misc. Peterson *v.* Missouri, 398 U. S. 931; and

No. 2037, Misc. Carrigan *v.* Erich P. Karlsson Builders, Inc., 398 U. S. 953. Petitions for rehearing denied. Mr. Justice Marshall and Mr. Justice Blackmun took no part in the consideration or decision of these petitions.

No. 1345. SULLIVAN *v.* CHOQUETTE ET AL., 398 U. S. 904; and

No. 1804, Misc. CUSHWAY *v.* STATE BAR OF GEORGIA, 398 U. S. 910. Petitions for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.

No. 1488. MARCELLO *v.* UNITED STATES, 398 U. S. 959. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 1622, Misc. OLIVER *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT, 397 U. S. 1050. Motion for leave to file petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1967, 1968, AND 1969

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1967	1968	1969	1967	1968	1969	1967	1968	1969	1967	1968	1969
Number of cases on dockets	10	9	15	1,540	1,559	1,758	2,036	2,350	2,429	3,586	3,918	4,202
Number disposed of during terms	2	0	5	1,338	1,288	1,433	1,633	1,863	1,971	2,973	3,151	3,409
Number remaining on dockets	8	9	10	202	271	325	403	487	458	613	767	793

	TERMS		
	1967	1968	1969
Distribution of cases disposed of during terms:			
Original cases	2	0	5
Appellate cases on merits	359	305	312
Petitions for certiorari	979	983	1,121
Miscellaneous docket applications	1,633	1,863	1,971

	TERMS		
	1967	1968	1969
Distribution of cases remaining on dockets:			
Original cases	8	9	10
Appellate cases awaiting argument	65	72	94
Appellate cases pending	137	199	231
Miscellaneous docket applications	403	487	458

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ABANDONMENT OF PROPERTIES. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

ACQUITTALS. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 4.

ADDED DEDUCTIONS. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

ADDICTS. See **Constitutional Law**, III, 2, 4.

ADMISSIBILITY OF EVIDENCE. See **Constitutional Law**, III, 1, 3; IV, 1; **Evidence**; **Procedure**, 2.

ALABAMA. See **Constitutional Law**, IV, 2; **Procedure**, 6.

ALIBI DEFENSES. See **Constitutional Law**, II, 2; **Procedure**, 5.

AMBIGUOUS RECORD. See **Appeals**, 2.

AMMUNITION. See **Constitutional Law**, III, 1, 3; IV, 1; **Evidence**; **Procedure**, 2.

ANTICOMPETITIVE EFFECTS. See **Bank Merger Act of 1966**, 1–3.

ANTITRUST ACTS. See also **Attorneys' Fees**; **Bank Merger Act of 1966**, 1–3.

Clayton Act—Successful private antitrust suit—Attorneys' fees.—Allowance in § 4 of the Clayton Act for attorneys' fees includes fees for appellate legal services rendered in successful antitrust suit, and amount of fees should generally be fixed by District Court after a hearing. Failure to mention fees in this Court's mandate in *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, left the matter open for consideration by the District Court. Perkins v. Standard Oil Co., p. 222.

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1. *Criminal Appeals Act—Acquittal.*—Legislative history of the Act shows legislative policy to provide review in only certain cases and to restrict it to those instances. A primary concern of the

APPEALS—Continued.

Act is that no appeal be taken by the Government from an acquittal, no matter how erroneous the underlying legal theory. United States v. Sisson, p. 267.

2. *Eviction judgments—Posting of bonds—Indigent tenants.*—Appeal, involving issue whether Connecticut statutory requirement that tenants wishing to appeal from eviction judgment must post bond offends Due Process or Equal Protection Clause if applied to foreclose appellate review for indigent tenants, is dismissed, as record is ambiguous regarding underlying reason appellants were denied opportunity to appeal. Simmons v. West Haven Housing, p. 510.

3. *Motion in bar—Jeopardy—Criminal Appeals Act.*—Appeal from motion in bar cannot be granted after jeopardy attaches, and in light of compromise origins of the Act and the long-time consistent interpretation by the Government, jeopardy attaches when the jury is sworn. United States v. Sisson, p. 267.

APPELLATE LEGAL SERVICES. See **Antitrust Acts; Attorneys' Fees.**

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APPROVAL OF BONDS. See **Constitutional Law,** I, 1.

ARIZONA. See **Constitutional Law,** I, 1.

ARMED FORCES. See **Appeals,** 1, 3; **Criminal Appeals Act,** 1; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4.

ARREST OF JUDGMENT. See **Appeals,** 1, 3; **Criminal Appeals Act,** 1; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4.

ARRESTS. See **Constitutional Law,** III, 1–4; IV, 1; **Evidence; Procedure,** 2.

ASSETS. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

ASSISTANCE OF COUNSEL. See **Constitutional Law,** III, 1, 3; IV, 1–2; **Evidence; Procedure,** 2, 6.

ATTORNEY GENERAL. See **Bank Merger Act of 1966,** 1–3.

ATTORNEYS. See **Constitutional Law,** III, 1, 3; IV, 1–2; **Evidence; Procedure,** 2, 6.

ATTORNEYS' FEES. See also **Antitrust Acts.**

Successful private antitrust suit—Appellate legal services—District Courts.—Allowance in § 4 of the Clayton Act for attorneys' fees includes fees for appellate legal services rendered in successful antitrust suit, and amount of fees should generally be fixed by District Court after a hearing. Failure to mention fees in this Court's mandate in *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, left the matter open for consideration by the District Court. Perkins v. Standard Oil Co., p. 222.

AUTHORIZATION FOR BONDS. See **Constitutional Law,** I, 1.

AUTOMOBILE SEARCHES. See **Constitutional Law,** III, 1, 3; IV, 1; **Evidence; Procedure,** 2.

BAILABLE OFFENSES. See **Constitutional Law,** IV, 2; **Procedure,** 6.

BANK MERGER ACT OF 1966.

1. *Anticompetitive effects of merger—Community needs—Alternative methods.*—District Court's errors require re-examination of its conclusion under the Act that anticompetitive effects of merger would be outweighed by contribution to community needs. Re-examination must be in terms of area as a whole, and should explore alternative methods of serving area needs and consider whether merger will benefit all banking customers, small and large, in the area. U. S. v. Phillipsburg Nat. Bank, p. 350.

2. *Commercial banks—Submarkets—Small banks.*—It is the *cluster* of products and services offered by full-service banks that makes commercial banking a distinct line of commerce. While submarkets would be relevant in analyzing effect on competition between commercial bank and another type of financial institution, they cannot be basis for disregarding broader line of commerce that has economic significance, with respect to small as well as large banks. U. S. v. Phillipsburg Nat. Bank, p. 350.

3. *Relevant geographic market—Localized business—Economically significant area.*—Commercial realities in the banking industry make clear that small banks generally have a very localized business, and the Phillipsburg-Easton area, a geographic market in which the merger's effect would be "direct and immediate," and where the merging banks' customers must, or will, do their banking, is a market that is economically significant for the purposes of § 7 of the Clayton Act. U. S. v. Phillipsburg Nat. Bank, p. 350.

BANKRUPTCY. See also **Constitutional Law**, II, 1; **Jurisdiction**, 2.

1. *Inclusion of bankrupt New Haven in Penn-Central railroad—Price to be paid for assets.*—Three-judge court, reviewing the inclusion report (in its aspect as a condition of the merger), erred in not granting Government's motion to dismiss to the extent of deferring to the reorganization court in proceedings ultimately involving only the price to be paid for assets of the debtor's estate. New Haven Inclusion Cases, p. 392.

2. *Inclusion of New Haven in Penn-Central railroad—Compensation for assets—"Underwriting plan."*—"Underwriting plan" of the reorganization court added to assessment of present worth of Penn Central stock both reasonable assurance of realization of such worth and opportunity of additional gain, and on basis of record at that time the package constituted full compensation for the assets transferred to Penn Central. In view of recent events, further proceedings will be needed to reassess the consideration that Penn Central must give for the assets. New Haven Inclusion Cases, p. 392.

3. *Inclusion of New Haven in Penn-Central railroad—"Going-concern" value—Liquidation value.*—Bondholders' contention that Penn Central should pay an added amount for New Haven's "going-concern" value is without merit, being entirely at odds with the liquidation hypothesis on which appraisal of New Haven's assets was predicated. New Haven Inclusion Cases, p. 392.

4. *Inclusion of New Haven in Penn-Central railroad—Interim operating losses—Bondholders.*—Payment made by Penn Central for New Haven's interim operating losses between effective date of merger and date of New Haven's inclusion, was in accordance with a formula devised by the ICC in its inclusion report that constituted a pragmatic compromise between the competing interests of the Penn Central and the New Haven's bondholders. The reorganization court's acceptance of that disposition is affirmed. New Haven Inclusion Cases, p. 392.

5. *New Haven inclusion in Penn-Central railroad—Losses to bondholders.*—Substantial losses to bondholders that occurred during course of reorganization proceedings did not result in unconstitutional taking of property of bondholders, whose rights are not absolute and who will be receiving best price for debtor's assets as of valuation date. Moreover, bondholders did not petition court to dismiss proceedings and thereby permit foreclosure on the mortgage liens until well after the valuation date. New Haven Inclusion Cases, p. 392.

BANKRUPTCY—Continued.

6. *Reorganization court—Interstate Commerce Commission—Sale of railroad assets.*—Reorganization court is empowered by Congress to review the inclusion plan to determine whether the ICC has followed the statutory mandate that the plan be "fair and equitable" and whether there was material evidence to support the agency's conclusion. New Haven Inclusion Cases, p. 392.

BONDHOLDERS. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

BONDS. See **Appeals**, 2; **Constitutional Law**, I, 1.

BRONX FREIGHT YARDS. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

BULK DISCOUNT. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

BULLETS. See **Constitutional Law**, III, 1, 3; IV, 1; **Evidence**; **Procedure**, 2.

CALIFORNIA. See **Constitutional Law**, IV, 3–5; **Jurisdiction**, 1; **Procedure**, 3; **Remedies.**

CARS. See **Constitutional Law**, III, 1, 3; IV, 1; **Evidence**; **Procedure**, 2.

CERTIFICATE OF ABANDONMENT. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

CERTIFIED APPEALS. See **Criminal Appeals Act**, 2; **Procedure**, 7.

CERTIORARI BEFORE JUDGMENT. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

CLAYTON ACT. See **Antitrust Acts**; **Attorneys' Fees**; **Bank Merger Act of 1966**, 1–3.

CLUSTER OF PRODUCTS AND SERVICES. See **Bank Merger Act of 1966**, 1–3.

COLLATERAL ATTACK. See **Jurisdiction**, 1; **Procedure**, 3; **Remedies.**

COMMERCIAL BANKS. See **Bank Merger Act of 1966**, 1–3.

COMMON STOCK. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

COMMUNITY NEEDS. See **Bank Merger Act of 1966**, 1–3.

COMMUTER TRAFFIC. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

COMPENSATION. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

COMPETITION. See **Bank Merger Act of 1966**, 1–3.

COMPTROLLER OF THE CURRENCY. See **Bank Merger Act of 1966**, 1–3.

CONDITIONS OF MERGER. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

CONFRONTATION CLAUSE. See **Constitutional Law**, IV, 3–5.

CONNECTICUT. See **Appeals**, 2; **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

CONNECTING RAIL LINK. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

CONSCIENTIOUS OBJECTORS. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

CONSECUTIVE SENTENCES. See **Jurisdiction**, 1; **Procedure**, 3; **Remedies.**

CONSTITUTIONAL LAW. See also **Appeals**, 1–3; **Bankruptcy**, 1–6; **Criminal Appeals Act**, 1; **Evidence**; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 2, 4; **Procedure**, 1–2, 4–6, 8; **Sentences**, 1–2.

I. Equal Protection of the Laws.

1. *General obligation bonds—Franchise restricted to property owners.*—Equal Protection Clause does not permit State to restrict franchise to real property taxpayers in elections to approve issuance of general obligation bonds, as differences between interests of property owners and nonproperty owners are not sufficiently substantial to justify excluding latter from voting. Decision will apply only to authorizations that are not final as of this date. Phoenix v. Kolodziejski, p. 204.

2. *Maximum sentences—Nonpayment of fines and costs.*—Though State has considerable latitude in fixing punishment for state crimes and may impose alternative sanctions, it may not under the Equal Protection Clause subject a certain class of convicted defendants to period of imprisonment beyond the statutory maximum solely by reason of their indigency, for nonpayment of fines and costs. Williams v. Illinois, p. 235.

3. *Maximum sentences—Nonpayment of fines and costs.*—Case remanded for reconsideration in light of intervening Maryland legislation and decision in *Williams* v. *Illinois, ante,* p. 235, holding that

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an indigent may not be imprisoned beyond maximum term specified by statute solely for failure to pay fine and court costs. Morris v. Schoonfield, p. 508.

II. Fifth Amendment.

1. *Deprivation of property—Bondholders.*—Substantial losses to bondholders that occurred during course of reorganization proceedings did not result in unconstitutional taking of property of bondholders, whose rights are not absolute and who will be receiving best price for debtor's assets as of valuation date. Moreover, bondholders did not petition court to dismiss proceedings and thereby permit foreclosure on the mortgage liens until well after the valuation date. New Haven Inclusion Cases, p. 392.

2. *Fifth Amendment—Self-incrimination—Notice-of-alibi rule.*—Florida's notice-of-alibi rule does not violate the Fifth Amendment, as made applicable to the States by the Fourteenth, as the rule at most accelerated the timing of petitioner's disclosure of an alibi defense and thus did not violate the privilege against compelled self-incrimination. Williams v. Florida, p. 78.

III. Search and Seizure.

1. *Probable cause—Search of automobile.*—If there is probable cause to search an automobile, it may, because of its mobility, be searched without a warrant in circumstances that would not justify a warrantless search of a house or an office. Chambers v. Maroney, p. 42.

2. *Search of house—Narcotics.*—Even if *Chimel* v. *California,* 395 U. S. 752, holding that warrantless search of house can be justified as incident to lawful arrest only if confined to area within arrestee's reach, were given retroactive effect (a question not decided here), there is no precedent to sustain validity of this search of house where petitioner was arrested outside. If search of house is to be upheld as incident to arrest, arrest must take place *inside* the house. Vale v. Louisiana, p. 30.

3. *Warrantless search of automobile—Probable cause.*—Given probable cause, there is no difference under the Fourth Amendment between (1) seizing and holding a car before presenting issue of probable cause to a magistrate, and (2) carrying out an immediate warrantless search. Chambers v. Maroney, p. 42.

4. *Warrantless search of house—Narcotics.*—Warrantless search of dwelling is constitutionally valid only in "a few specifically established and well-delineated exceptions," none of which Louisiana

CONSTITUTIONAL LAW—Continued.

has shown here; and the search cannot be justified solely because narcotics, which are easily destroyed, are involved. Vale v. Louisiana, p. 30.

IV. Sixth Amendment.

1. *Assistance of counsel—Adequacy of representation.*—Based on careful examination of state court record, the Court of Appeals' judgment denying hearing as to adequacy of petitioner's representation by counsel is not disturbed. Chambers v. Maroney, p. 42.

2. *Assistance of counsel—Harmless error.*—Convictions of petitioners, who argue that the in-court identifications that were made of them were fatally tainted by a prejudicial station-house lineup and that Alabama's failure to provide them with appointed counsel at their preliminary hearing unconstitutionally denied them assistance of counsel, vacated and case remanded to determine whether such denial of counsel was harmless error. Coleman v. Alabama, p. 1.

3. *Confrontation Clause—Admissibility of preliminary hearing testimony.*—Even in absence of opportunity for full cross-examination at trial, admission of preliminary hearing testimony would not violate the Constitution. For the preliminary hearing here was not significantly different from actual trial as far as purposes of Confrontation Clause are concerned, and it has long been held that admitting prior testimony of an unavailable witness does not violate that clause. Different result should not follow where, as here, the witness was actually produced. California v. Green, p. 149.

4. *Confrontation Clause—Admission of out-of-court statements.*—Confrontation Clause is not violated by admitting declarant's out-of-court statements as long as he is testifying as witness at trial and is subject to full cross-examination. Purposes of Sixth Amendment are satisfied at time of trial, even if not before, since witness is under oath, subject to cross-examination, and his demeanor can be observed by trier of fact. California v. Green, p. 149.

5. *Confrontation Clause—Cross-examination.*—Question whether witness' claimed lapse of memory at trial about important events described in earlier statement to police officer so affected respondent's right to cross-examine as to make critical difference in application of Confrontation Clause is an issue that should be first resolved by state court. California v. Green, p. 149.

6. *Trial by jury—One year's imprisonment.*—Appellant's conviction in New York City for misdemeanor for which he was given maximum sentence of one year's imprisonment after trial in New

CONSTITUTIONAL LAW—Continued.

York City Criminal Court, which by statute conducts all trials without jury, is reversed. Baldwin v. New York, p. 66.

7. *Trial by jury—Six-man jury.*—Constitutional guarantee of jury trial does not require a jury of 12, a historically accidental figure. Although accepted at common law, the Framers did not explicitly intend to forever codify as a constitutional requirement a feature not essential to the Amendment's purpose of interposing between defendant and prosecution the commonsense judgment of his peers. Williams v. Florida, p. 78.

CONSTRUCTIVE CUSTODY. See **Jurisdiction,** 1; **Procedure,** 3; **Remedies.**

CONVENIENCE AND NEEDS OF COMMUNITY. See **Bank Merger Act of 1966,** 1–3.

COSTS. See **Constitutional Law,** I, 2–3; **Sentences,** 1–2.

COUNSEL. See **Constitutional Law,** III, 1, 3; IV, 1–2; **Evidence; Procedure,** 2, 6.

COURT COSTS. See **Constitutional Law,** I, 2–3; **Sentences,** 1–2.

COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. See **Criminal Appeals Act,** 2; **Procedure,** 7.

COURTS. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Criminal Appeals Act,** 2; **Jurisdiction,** 2; **Procedure,** 7.

CRIMINAL APPEALS ACT. See also **Appeals,** 1, 3; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4, 7.

1. *Appeals—Acquittal—Legislative history.*—Legislative history of the Act shows legislative policy to provide review only in certain cases and to restrict it to those instances. A primary concern of the Act is that no appeal be taken by the Government from an acquittal, no matter how erroneous the underlying legal theory. United States v. Sisson, p. 267.

2. *Transfer of case as certified appeal—Court of Appeals for the District of Columbia Circuit.* — Transfer of case from Court of Appeals for the District of Columbia Circuit to this Court under certification provisions of the Act is improper where appeal from District Court to Court of Appeals was pursuant to D. C. Code § 23–105, which does not provide for transfer to this Court. Moreover, Court of Appeals has not determined that it lacked jurisdiction to hear the appeal under § 23–105, which is not affected by the Act. United States v. Sweet, p. 517.

CRIMINAL LAW. See **Appeals**, 1, 3; **Constitutional Law**, I, 2–3; II, 2; III, 1–4; IV, 1–7; **Criminal Appeals Act**, 1–2; **Evidence**; **Federal Rules of Criminal Procedure**; **Injunctions**; **Jurisdiction**, 1, 4; **Procedure**, 1–8; **Remedies**; **Sentences**, 1–2.

CRITICAL STAGE. See **Constitutional Law**, IV, 2; **Procedure**, 6.

CROSS-EXAMINATION. See **Constitutional Law**, IV, 3–5; **Procedure**, 5.

CUSTODY. See **Jurisdiction**, 1; **Procedure**, 3; **Remedies**.

DECLARATORY JUDGMENTS. See **Injunctions**; **Jurisdiction**, 3.

DEDUCTIONS. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

DELAY. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

DEMEANOR. See **Constitutional Law**, IV, 3–5.

DEPOSITIONS. See **Constitutional Law**, II, 2; IV, 7; **Procedure**, 5.

DEPRIVATION OF PROPERTY. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

DETAINERS. See **Jurisdiction**, 1; **Procedure**, 3; **Remedies**.

DISCLOSURE. See **Constitutional Law**, II, 2; **Procedure**, 5.

DISCOUNT TO PRESENT WORTH. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

DISCOVERY. See **Constitutional Law**, II, 2; **Procedure**, 5.

DISMANTLING EQUIPMENT. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

DISTRICT COURTS. See **Antitrust Acts**; **Appeals**, 1, 3; **Attorneys' Fees**; **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Criminal Appeals Act**, 1–2; **Federal Rules of Criminal Procedure**; **Injunctions**; **Jurisdiction**, 2–4; **Procedure**, 1, 4, 7; **Remedies**.

DISTRICT OF COLUMBIA CODE. See **Criminal Appeals Act**, 2; **Procedure**, 7.

DISTURBING THE PEACE. See **Injunctions**; **Jurisdiction**, 3.

DRAFT BOARDS. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

DRUGS. See **Constitutional Law**, III, 2, 4; IV, 3–5.

DUE PROCESS. See **Appeals**, 1–3; **Constitutional Law**, II, 2; IV, 7; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4–5.

DUMDUM BULLETS. See **Constitutional Law**, III, 1, 3; **Evidence**; **Procedure**, 2.

DWELLINGS. See **Constitutional Law**, III, 1–4; IV, 1; **Evidence**; **Procedure**, 2.

EASTON, PENNSYLVANIA. See **Bank Merger Act of 1966**, 1–3.

ECONOMICALLY SIGNIFICANT AREA. See **Bank Merger Act of 1966**, 1–3.

ELECTIONS. See **Constitutional Law**, I, 1.

EMPANELING OF JURY. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

ENCLAVES. See **Injunctions**; **Jurisdiction**, 3.

EQUAL PROTECTION OF THE LAWS. See **Appeals**, 2; **Constitutional Law**, I; **Sentences**, 1–2.

ERROR. See **Constitutional Law**, III, 1, 3; IV, 1–2; **Evidence**; **Procedure**, 2, 6.

ESTABLISHMENT CLAUSE. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

EVICTION JUDGMENTS. See **Appeals**, 2.

EVIDENCE. See also **Appeals**, 1, 3; **Constitutional Law**, II, 2; III, 1, 3; IV, 1, 3–5, 7; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1–2, 4–5.

Harmless error—Search and seizure.—Findings of courts below that, if there was error in admitting in evidence ammunition seized from petitioner's house, it was harmless error beyond a reasonable doubt, are affirmed on basis of Court's review of the record. Chambers v. Maroney, p. 42.

EXCESS INCOME. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

EXHAUSTION OF REMEDIES. See **Jurisdiction**, 1; **Procedure**, 3; **Remedies.**

EXPERT WITNESSES. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

EXTENDED SENTENCES. See **Constitutional Law,** I, 2–3; **Sentences,** 1–2.

FACE OF THE RECORD. See **Appeals,** 1, 3; **Criminal Appeals Act,** 1; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4.

FAILING TO REPORT FOR INDUCTION. See **Appeals,** 1, 3; **Criminal Appeals Act,** 1; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4.

FAIR PRICE. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

FEDERAL DEPOSIT INSURANCE CORPORATION. See **Bank Merger Act of 1966,** 1–3.

FEDERAL RESERVE BOARD. See **Bank Merger Act of 1966,** 1–3.

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Appeals,** 1, 3; **Criminal Appeals Act,** 1; **Jurisdiction,** 4; **Procedure,** 1, 4.

Motion in arrest of judgment—Face of record.—In granting motion in arrest of judgment under Rule 34 a district court must not look beyond the face of the record, and a decision based on evidence adduced at trial cannot be one arresting judgment. United States v. Sisson, p. 267.

FEDERAL-STATE RELATIONS. See **Injunctions; Jurisdiction,** 3.

FEES. See **Antitrust Acts; Attorneys' Fees.**

FIFTH AMENDMENT. See **Appeals,** 1, 3; **Bankruptcy,** 1–6; **Constitutional Law,** II; IV, 7; **Criminal Appeals Act,** 1; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4–5.

FINDINGS OF FACT. See **Appeals,** 1, 3; **Criminal Appeals Act,** 1; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4.

FINES. See **Constitutional Law,** I, 2–3; **Sentences,** 1–2.

FIRST AMENDMENT. See **Appeals,** 1, 3; **Criminal Appeals Act,** 1; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4.

FIXING FEES. See **Antitrust Acts; Attorneys' Fees.**

FLORIDA. See **Constitutional Law,** II, 2; IV, 7; **Procedure,** 5.

FOREIGN PENAL JUDGMENTS. See **Jurisdiction**, 1; **Procedure**, 3; **Remedies.**

FORMULA. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

FOURTEENTH AMENDMENT. See **Appeals**, 2; **Constitutional Law**, I; II, 2; III–IV; **Evidence**; **Procedure**, 2, 5–6, 8; **Sentences**, 1–2.

FOURTH AMENDMENT. See **Constitutional Law**, III; IV, 1; **Evidence**; **Procedure**, 2.

FRANCHISE RESTRICTIONS. See **Constitutional Law**, I, 1.

FREE EXERCISE CLAUSE. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

FREIGHT YARDS. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

FULL-SERVICE BANKS. See **Bank Merger Act of 1966**, 1–3.

GENERAL ISSUE. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

GENERAL OBLIGATION BONDS. See **Constitutional Law**, I, 1.

GEOGRAPHIC MARKET. See **Bank Merger Act of 1966**, 1–3.

GOING-CONCERN VALUE. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

GRAND CENTRAL TERMINAL PROPERTIES. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

GUNS AND BULLETS. See **Constitutional Law**, III, 1, 3; IV, 1; **Evidence**; **Procedure**, 2.

HABEAS CORPUS. See **Jurisdiction**, 1; **Procedure**, 3; **Remedies.**

HARMLESS ERROR. See **Constitutional Law**, III, 1, 3; IV, 1; **Evidence**; **Procedure**, 2.

HEARINGS. See **Antitrust Acts**; **Attorneys' Fees**; **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

HEARSAY RULE. See **Constitutional Law**, IV, 3–5.

HEROIN. See **Constitutional Law**, III, 2, 4.

HOMES. See **Constitutional Law**, III, 1–4; IV, 1; **Evidence**; **Procedure**, 2.

HOUSE SEARCHES. See **Constitutional Law**, III, 1–4; IV, 1; **Evidence**; **Procedure**, 2.

IDENTIFICATION. See **Constitutional Law**, IV, 2; **Procedure**, 6.

ILLINOIS. See **Constitutional Law**, I, 2; **Sentences**, 2.

IMPANELING OF JURY. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

IMPEACHING WITNESSES. See **Constitutional Law**, II, 2; IV, 7; **Procedure**, 5.

IMPRISONMENT. See **Constitutional Law**, I, 2–3; IV, 6; **Procedure**, 8; **Sentences**, 1–2.

INCIDENT TO ARREST. See **Constitutional Law**, III, 1–4; IV, 1; **Evidence**; **Procedure**, 2.

INCLUSION OF NEW HAVEN. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

INCONSISTENT STATEMENTS. See **Constitutional Law**, IV, 3–5.

IN-COURT IDENTIFICATION. See **Constitutional Law**, IV, 2; **Procedure**, 6.

INDECISIVE ACTION. See **Injunctions**; **Jurisdiction**, 3.

INDICTMENTS. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

INDIGENTS. See **Constitutional Law**, I, 2–3; **Sentences**, 1–2.

INDIGENT TENANTS. See **Appeals**, 2.

INDUCTION. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

INJUNCTIONS. See also **Jurisdiction**, 3.

Supreme Court—Jurisdiction—Indecisive three-judge court action.—Since District Court has issued neither an injunction nor an order granting or denying one in this action seeking to enjoin enforcement of Texas' disturbing-the-peace statute, this Court has no jurisdiction under 28 U. S. C. § 1253, which provides for review of orders granting or denying interlocutory or permanent injunctions. Gunn v. University Committee, p. 383.

INSTRUCTIONS TO JURY. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

INTERIM OPERATING EXPENSES. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

INTERSTATE COMMERCE COMMISSION. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

INTERVENING LEGISLATION. See **Constitutional Law**, I, 3; **Sentences**, 1.

ISSUANCE OF BONDS. See **Constitutional Law**, I, 1.

JAIL SENTENCES. See **Constitutional Law**, I, 2–3; **Sentences**, 1–2.

JEOPARDY. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

JUDICIAL REVIEW. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

JURIES. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

JURISDICTION. See also **Appeals**, 1–3; **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Criminal Appeals Act**, 1–2; **Federal Rules of Criminal Procedure**; **Injunctions**; **Procedure**, 1, 4, 7; **Remedies.**

1. *Habeas corpus—North Carolina detainer against California prisoner—Relief.*—Federal District Court should retain jurisdiction of petition for writ of habeas corpus pending application of respondent California prisoner to California courts for appropriate relief if he establishes his claim that the North Carolina detainer interferes with relief that California might grant in absence of detainer. Nelson v. George, p. 224.

2. *Inclusion of New Haven in Penn-Central railroad—Price to be paid for assets—Reorganization court.*—Three-judge court, reviewing the inclusion report (in its aspect as a condition of the merger), erred in not granting Government's motion to dismiss to the extent of deferring to the reorganization court in proceedings ultimately involving only the price to be paid for assets of the debtor's estate. New Haven Inclusion Cases, p. 392.

3. *Supreme Court—Injunctions—Indecisive three-judge court action.*—Since District Court has issued neither an injunction nor an order granting or denying one in this action seeking to enjoin enforcement of Texas' disturbing-the-peace statute, this Court has no jurisdiction under 28 U. S. C. § 1253, which provides for review of orders granting or denying interlocutory or permanent injunctions. Gunn v. University Committee, p. 383.

JURISDICTION—Continued.

4. *Supreme Court—Motions in bar—Appeals.*—Supreme Court does not have jurisdiction in this case under motion in bar provision of the Criminal Appeals Act as motion in bar cannot be granted on basis of facts that would necessarily be tried with the general issue, and here the District Judge based his findings on evidence presented in trial of the general issue. Appeal from motion in bar cannot be granted after jeopardy attaches, which occurs when jury is sworn. United States v. Sisson, p. 267.

JURY TRIAL. See **Constitutional Law,** IV, 6–7; **Procedure,** 5, 8.

JUST COMPENSATION. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

KNOWN ADDICTS. See **Constitutional Law,** III, 2, 4.

LANDLORD AND TENANTS. See **Appeals,** 2.

LAPSE OF MEMORY. See **Constitutional Law,** IV, 3–5.

LEGAL AID SOCIETY. See **Constitutional Law,** III, 1, 3; IV, 1; **Evidence; Procedure,** 2.

LEHIGH VALLEY. See **Bank Merger Act of 1966,** 1–3.

LINEUPS. See **Constitutional Law,** IV, 2; **Procedure,** 6.

LIQUIDATION VALUE. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

LOCALIZED BUSINESS. See **Bank Merger Act of 1966,** 1–3.

LOSSES FROM OPERATIONS. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

LOUISIANA. See **Constitutional Law,** III, 2, 4.

MANDATES. See **Antitrust Acts; Attorneys' Fees.**

MARIHUANA. See **Constitutional Law,** IV, 3–5.

MARYLAND. See **Constitutional Law,** I, 3; **Sentences,** 1.

MAXIMUM SENTENCES. See **Constitutional Law,** I, 2–3; **Sentences,** 1–2.

MERGERS. See **Bank Merger Act of 1966,** 1–3; **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

MILITARY ENCLAVES. See **Injunctions; Jurisdiction,** 3.

MILITARY SERVICE. See **Appeals,** 1, 3; **Criminal Appeals Act,** 1; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4.

MINORS. See **Constitutional Law,** IV, 3–5.

MISDEMEANORS. See **Constitutional Law**, IV, 6; **Procedure**, 8.

MONETARY OBLIGATIONS. See **Constitutional Law**, I, 2–3; **Sentences**, 1–2.

MOTIONS IN ARREST. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

MOTIONS IN BAR. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

MOTIONS TO DISMISS. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

MUNICIPAL FOOD MARKET. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

MUNICIPAL IMPROVEMENTS. See **Constitutional Law**, I, 1.

NAMES OF WITNESSES. See **Constitutional Law**, II, 2; **Procedure**, 5.

NARCOTICS. See **Constitutional Law**, III, 2, 4; IV, 3–5.

NEW ENGLAND. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

NEW HAVEN RAILROAD. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

NEW JERSEY. See **Bank Merger Act of 1966**, 1–3.

NEW YORK. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

NEW YORK CITY. See **Constitutional Law**, IV, 6; **Procedure**, 8.

NONPAYMENT OF FINES AND COSTS. See **Constitutional Law**, I, 2–3; **Sentences**, 1–2.

NORTH CAROLINA. See **Jurisdiction**, 1; **Procedure**, 3; **Remedies.**

NOTICE-OF-ALIBI RULE. See **Constitutional Law**, II, 2; **Procedure**, 5.

ONE YEAR'S IMPRISONMENT. See **Constitutional Law**, IV, 6; **Procedure**, 8.

OPERATING EXPENSES. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

OPERATING LOSSES. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

ORDERS. See **Injunctions; Jurisdiction,** 3.

OUT-OF-COURT STATEMENTS. See **Constitutional Law,** IV, 3–5.

PAROLE POTENTIAL. See **Jurisdiction,** 1; **Procedure,** 3; **Remedies.**

PAUPERS. See **Appeals,** 2; **Constitutional Law,** I, 2–3; **Sentences,** 1–2.

PAYMENTS. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

PENN-CENTRAL MERGER. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

PETTY CRIMES. See **Constitutional Law,** IV, 6; **Procedure,** 8.

PHILLIPSBURG. See **Bank Merger Act of 1966,** 1–3.

PHOENIX. See **Constitutional Law,** I, 1.

PLAN OF REORGANIZATION. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

POLICE OFFICERS. See **Constitutional Law,** IV, 3–5.

POOR PERSONS. See **Appeals,** 2; **Constitutional Law,** I, 2–3; **Sentences,** 1–2.

POSTING BONDS. See **Appeals,** 2.

POVERTY. See **Constitutional Law,** I, 2–3; **Sentences,** 1–2.

PRELIMINARY HEARINGS. See **Constitutional Law,** IV, 2–5; **Procedure,** 6.

PRESIDENT JOHNSON. See **Injunctions; Jurisdiction,** 3.

PRETRIAL MOTIONS. See **Constitutional Law,** II, 2; IV, 7; **Procedure,** 5.

PRETRIAL PROCEEDINGS. See **Constitutional Law,** IV, 2; **Procedure,** 6.

PRIMARY JURISDICTION. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

PRISONERS. See **Constitutional Law,** I, 2–3; **Jurisdiction,** 1; **Procedure,** 3; **Remedies; Sentences,** 1–2.

PRIVATE ANTITRUST SUITS. See **Antitrust Acts; Attorneys' Fees.**

PROBABLE CAUSE. See **Constitutional Law,** III, 1, 3; IV, 1; **Evidence; Procedure,** 2.

PROCEDURE. See also **Antitrust Acts; Appeals,** 1–3; **Attorneys' Fees; Constitutional Law,** I, 2–3; II, 2; III, 1, 3; IV, 1–7; **Criminal Appeals Act,** 1–2; **Evidence; Federal Rules of Criminal Procedure; Injunctions; Jurisdiction,** 1, 3–4; **Remedies; Sentences,** 1–2.

1. *Acquittal—Arrest of judgment.*—Since disposition below was based on factual conclusions not found in the indictment but resulting from evidence adduced at trial, the decision was in fact an acquittal rendered after jury's verdict of guilty, and not, as characterized by trial judge, an arrest of judgment. United States v. Sisson, p. 267.

2. *Evidence—Search and seizure—Harmless error.*—Findings of courts below that, if there was error in admitting in evidence ammunition seized from petitioner's house, it was harmless error beyond a reasonable doubt, are affirmed on basis of Court's review of the record. Chambers v. Maroney, p. 42.

3. *Foreign penal judgment—North Carolina detainer against California prisoner—Custody.*—Since California courts, which are not required to enforce foreign penal judgments, have not been presented with question of what effect, if any, they will give North Carolina detainer in terms of present custody of respondent California prisoner, respondent has not exhausted his California remedies. Nelson v. George, p. 224.

4. *Motion in arrest of judgment—Fed. Rule Crim. Proc. 34—Face of record.*—In granting motion in arrest of judgment under Rule 34 a district court must not look beyond the face of the record, and a decision based on evidence adduced at trial cannot be one arresting judgment. United States v. Sisson, p. 267.

5. *Notice-of-alibi rule — Self-incrimination.* — Florida's notice-of-alibi rule does not violate the Fifth Amendment, as made applicable to the States by the Fourteenth, as the rule at most accelerated the timing of petitioner's disclosure of an alibi defense and thus did not violate the privilege against compelled self-incrimination. Williams v. Florida, p. 78.

6. *Preliminary hearings—Assistance of counsel—Harmless error.*—Convictions of petitioners, who argue that the in-court identifications that were made of them were fatally tainted by a prejudicial station-house lineup and that Alabama's failure to provide them with appointed counsel at their preliminary hearing unconstitutionally denied them assistance of counsel, vacated and case remanded to determine whether such denial of counsel was harmless error. Coleman v. Alabama, p. 1.

PROCEDURE—Continued.

7. *Transfer of case as certified appeal—Criminal Appeals Act—D. C. Code.*—Transfer of case from Court of Appeals for the District of Columbia Circuit to this Court under certification provisions of the Act is improper where appeal from District Court to Court of Appeals was pursuant to D. C. Code § 23–105, which does not provide for transfer to this Court. Moreover, Court of Appeals has not determined that it lacked jurisdiction to hear the appeal under § 23–105, which is not affected by the Act. United States v. Sweet, p. 517.

8. *Trial by jury—One year's imprisonment.*—Appellant's conviction in New York City for misdemeanor for which he was given maximum sentence of one year's imprisonment after trial in New York City Criminal Court, which by statute conducts all trials without jury, is reversed. Baldwin v. New York, p. 66.

PRODUCT MARKET. See **Bank Merger Act of 1966,** 1–3.

PROPERTY TAXPAYERS. See **Constitutional Law,** I, 1.

PROSPECTIVITY. See **Constitutional Law,** I, 1.

PUNISHMENT. See **Constitutional Law,** I, 2–3; **Sentences,** 1–2.

RAIL LINK. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

RAILROADS. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

REALTY APPRAISALS. See **Bankruptcy,** 1–6; **Constitutional Law,** II, 1; **Jurisdiction,** 2.

REALTY OWNERS. See **Constitutional Law,** I, 1.

REBUTTAL EVIDENCE. See **Constitutional Law,** II, 2; **Procedure,** 5.

RECORD. See **Appeals,** 1–3; **Criminal Appeals Act,** 1; **Federal Rules of Criminal Procedure; Jurisdiction,** 4; **Procedure,** 1, 4.

REHEARINGS. See **Jurisdiction,** 1; **Procedure,** 3; **Remedies.**

RELIEF. See **Jurisdiction,** 1; **Procedure,** 3; **Remedies.**

REMAND. See **Constitutional Law,** I, 3; **Sentences,** 1.

REMEDIES. See also **Jurisdiction,** 1; **Procedure,** 3.

North Carolina detainer against California prisoner—Custody—Exhaustion of remedies.—Since California courts, which are not required to enforce foreign penal judgments, have not been presented with question of what effect, if any, they will give North Carolina detainer in terms of present custody of respondent California prisoner, respondent has not exhausted his California remedies. Nelson v. George, p. 224.

REORGANIZATION COURTS. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

RES JUDICATA. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

RESTRICTIONS ON VOTING. See **Constitutional Law**, I, 1.

RETROACTIVITY. See **Constitutional Law**, I, 1.

RIGHT TO COUNSEL. See **Constitutional Law**, III, 1, 3; IV, 1–2; **Procedure**, 2, 6.

ROBBERY. See **Constitutional Law**, III, 1, 3; IV, 1; **Evidence**; **Procedure**, 2.

RULES OF CRIMINAL PROCEDURE. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

RULES OF EVIDENCE. See **Constitutional Law**, IV, 3–5.

SALE OF ASSETS. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

SALE OF PROPERTIES. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

SEARCH AND SEIZURE. See **Constitutional Law**, III; **Evidence**; **Procedure**, 2.

SELECTIVE SERVICE ACT. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

SELF-INCRIMINATION. See **Constitutional Law**, II, 2; **Procedure**, 5.

SENTENCES. See also **Constitutional Law**, I, 2–3; IV, 6; **Jurisdiction**, 1; **Procedure**, 3, 8; **Remedies.**

1. *Maximum sentences—Nonpayment of fines and costs—Intervening legislation.*—Case remanded for reconsideration in light of intervening Maryland legislation and decision in *Williams* v. *Illinois, ante,* p. 235, holding that an indigent may not be imprisoned beyond maximum term specified by statute solely for failure to pay fine and court costs. Morris v. Schoonfield, p. 508.

2. *Maximum sentences—Nonpayment of fines and costs—Working off fines.*—Though State has considerable latitude in fixing punishment for state crimes and may impose alternative sanctions, it may not under the Equal Protection Clause subject a certain class of convicted defendants to period of imprisonment beyond the statutory maximum solely by reason of their indigency, for nonpayment of fines and costs. Williams v. Illinois, p. 235.

SERIOUS CRIMES. See **Constitutional Law**, IV, 6; **Procedure**, 8.

SERVICE STATION ROBBERIES. See **Constitutional Law**, III, 1, 3; **Evidence**; **Procedure**, 2.

SHARES OF STOCK. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

SINCERITY. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

SIX-MAN JURY. See **Constitutional Law**, II, 2; IV, 7; **Procedure**, 5.

SIX MONTHS' IMPRISONMENT. See **Constitutional Law**, IV, 6; **Procedure**, 8.

SIXTH AMENDMENT. See **Constitutional Law**, IV; **Evidence**; **Procedure**, 2, 5–6, 8.

SMALL BANKS. See **Bank Merger Act of 1966**, 1–3.

STATEMENTS. See **Constitutional Law**, IV, 3–5.

STATE STATUTES. See **Injunctions**; **Jurisdiction**, 3.

STATION-HOUSE LINEUPS. See **Constitutional Law**, IV, 2; **Procedure**, 6.

STIPULATIONS. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

STOCK. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

SUBMARKETS. See **Bank Merger Act of 1966**, 1–3.

SUPREME COURT. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

1. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Ninth Circuit, p. 917.

2. Assignment of Mr. Justice Clark (retired) to the United States District Court for the Northern District of California, p. 918.

SUPREME COURT MANDATES. See **Antitrust Acts**; **Attorneys' Fees.**

TAINTED EVIDENCE. See **Constitutional Law**, IV, 2; **Procedure**, 6.

TAXPAYERS. See **Constitutional Law**, I, 1.

TENANTS. See **Appeals**, 2.

TERMS OF PAYMENT. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

TESTIMONY. See **Constitutional Law**, IV, 2; **Procedure**, 6.

TEXAS. See **Injunctions**; **Jurisdiction**, 3.

THREE-JUDGE COURTS. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Injunctions**; **Jurisdiction**, 2–3.

TRANSFER OF CASES. See **Criminal Appeals Act**, 2; **Procedure**, 7.

TRANSPORTATION. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

TRIAL BY JURY. See **Constitutional Law**, II, 2; IV, 6–7; **Procedure**, 5, 8.

TRIALS. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 1, 4.

TRIAL TESTIMONY. See **Constitutional Law**, IV, 3–5.

TRIER OF FACT. See **Constitutional Law**, IV, 3–5.

TWELVE-MAN JURY. See **Constitutional Law**, II, 2; IV, 7; **Procedure**, 5.

UNCONSTITUTIONALITY OF STATUTE. See **Injunctions**; **Jurisdiction**, 3.

UNDERCOVER AGENTS. See **Constitutional Law**, IV, 3–5.

UNDERVALUATION. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

UNDERWRITING FORMULA. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

VALUATION OF RAILROAD. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

VALUE OF STOCK. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.

VIETNAM CONFLICT. See **Appeals**, 1, 3; **Criminal Appeals Act**, 1; **Federal Rules of Criminal Procedure**; **Injunctions**; **Jurisdiction**, 3–4; **Procedure**, 1, 4.

VOTING. See **Constitutional Law**, I, 1.

WARRANTLESS SEARCHES. See **Constitutional Law**, III, 1–4; IV, 1; **Evidence**; **Procedure**, 2.

WARRANTS. See **Constitutional Law**, III, 1–4; IV, 1; **Evidence; Procedure**, 2.

WITNESSES. See **Constitutional Law**, II, 2; IV, 3–5, 7; **Procedure**, 5.

WORDS.

1. *"Fair and equitable."* § 77 (e)(1) Bankruptcy Act, 11 U. S. C. § 205 (e)(1). New Haven Inclusion Cases, p. 392.

2. *"Just and reasonable."* § 5 (2)(b) Interstate Commerce Act, 49 U. S. C. § 5 (2)(b). New Haven Inclusion Cases, p. 392.

WORKING OFF FINES. See **Constitutional Law**, I, 2–3; **Sentences**, 1–2.

WORTHLESS STOCK. See **Bankruptcy**, 1–6; **Constitutional Law**, II, 1; **Jurisdiction**, 2.