

9-1-1978

# United States Supreme Court 1977-1978 Term : Criminal Law Decisions

B. J. George Jr.

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), and the [Criminal Law Commons](#)

---

## Recommended Citation

B. J. George Jr., *United States Supreme Court 1977-1978 Term : Criminal Law Decisions*, 1978 BYU L. Rev. 497 (1978).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1978/iss3/1>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# United States Supreme Court 1977-1978 Term: Criminal Law Decisions

*B. J. George, Jr.\**

The Supreme Court last Term issued several interesting and highly controversial decisions relating to criminal law and procedure. The Court directed much of its attention to three areas: investigative activities under the fourth amendment, administration of the double jeopardy clause, and the scope of the Federal Civil Rights Act. In retrospect, however, there has been no massive restructuring of fundamental constitutional doctrine. The outlines of protection afforded by certain constitutional guarantees have been somewhat clarified and, particularly in several search and seizure cases, efforts by some states to exploit recent so-called law and order decisions have been firmly squelched.

In some contexts, notably the capital penalty decisions and the Court's ruling on press access to jails, the absence of a solid majority of the Justices supporting any one doctrine gives little guidance in the resolution of important cognate questions. This may reflect the want of a doctrinaire majority (which cannot be altered short of changes in the Court's personnel) or perhaps a tacit acceptance of the premise that sweeping statements of constitutional theory should be left to academicians. In any event, the Term saw many fascinating criminal cases disposed of in highly intriguing fashion. This Article surveys and synthesizes the Court's grappling in the criminal law area. For convenience, the discussion has two major divisions: the first dealing with procedure from investigation through posttrial processing; the second with substantive criminal law.

## I. CONSTITUTIONAL CRIMINAL PROCEDURE

### A. *Investigation*

#### 1. *Search warrants*

States have been about evenly divided on the question of whether the veracity of affidavits tendered in support of a search warrant application can be impeached after execution of the warrant in an effort to invalidate it. In *Franks v. Delaware*,<sup>1</sup> the

---

\* President, Southwestern Legal Foundation, Richardson, Texas

1. 98 S. Ct. 2674 (1978).

Supreme Court aligned itself on the side of impeachability. In an effort to void a search warrant which had resulted in seizure of evidence that was possibly crucial in later jury deliberations the defense brought forward two informants named in the search warrant application who were prepared to testify that the officers had significantly distorted their statements. Defense counsel averred that misstatements in the affidavit were not inadvertent, but rather were submitted in bad faith. The state courts ruled that the credibility of search warrant affidavits could not be attacked after a warrant had been issued; rather, an issuing magistrate was to be the sole arbiter of credibility. The Supreme Court disagreed.

The Court outlined procedure whereby the defense can overcome the presumption of judicial regularity that extends to search warrant affidavits. First, a defendant must allege deliberate falsehood or reckless disregard for truth on the part of an affiant officer. Assertions of negligence or innocent mistake are insufficient, and the requisite deliberate or reckless falsehood must be that of the affiant, not a third-party nongovernmental informant. Second, an offer of proof must be tendered in support of a suppression motion. Conclusory terms are insufficient, as is a mere desire on the part of the defense to cross-examine the source of information in an affidavit. Allegations must identify specifically the aspect of an affidavit claimed to be false, and must be documented by a statement of supporting reasons. Affidavits, sworn statements, or otherwise reliable declarations of witnesses must be appended, or their absence suitably explained.

If the defense meets these pleading and proof requirements, the Court held that a fullblown hearing must be held on the matter. If at that hearing the defense establishes by a preponderance of the evidence that perjury or reckless disregard for truth has tainted one or more affidavits, then the court must determine whether, after the data in the false affidavits are set aside, enough other valid material remains to justify issuance of the warrant. If it does, the warrant is valid. If it does not, the warrant must be voided and the evidence seized on its authority excluded exactly as if probable cause were absent on the face of the affidavits.

The majority opinion contains several interesting doctrinal asides bearing on the state's policy arguments favoring admissibility of the evidence. First, it was argued that invocation of the exclusionary rule in the context of veracity of search warrant affidavits would have too little deterrent effect to justify the ex-

clusion of otherwise valid evidence.<sup>2</sup> The Court, however, felt that forbidding all impeachment of affidavits would render the constitutional requirement of probable cause essentially a nullity. Even deliberately false affidavits would be unimpeachable, and ensuing phases of a criminal prosecution are not well designed to expose intentional falsehoods perpetrated during *ex parte* warrant proceedings.

Next, the prosecution contended that magistrates themselves are sufficiently independent to protect fourth amendment rights. The Court disagreed for several reasons. Warrant proceedings are *ex parte*, and are usually conducted in haste to forestall destruction or removal of desired evidence; deliberation is only moderate. Moreover, magistrates rarely have a close enough acquaintance with the case or claimed sources of information to generate suspicion about the sufficiency or adequacy of affidavits. In theory, magistrates can conduct fairly vigorous inquiries into the reliability of supporting data, but in practice they do not. The Court did not, however, believe that its holding diminished the importance and solemnity of the warrant issuance process. The underlying problem is the *ex parte* nature of the proceeding, not the integrity or capacity of the magistrate who conducts it. In any event, because the Court required that misstatements be intentional or based on reckless disregard for the truth,<sup>3</sup> magistrates' determinations will be final in most instances.

The Court also noted that there was no other adequate remedy for official misconduct in making false affidavits. Drawing from its original exclusionary rule holding,<sup>4</sup> the Court stressed the unreasonableness of expecting prosecutors to lodge criminal charges, or supervisory police personnel to initiate disciplinary proceedings, against officers who deliberately or recklessly falsify affidavits.

The state also contended that to permit inquiries into the veracity of search warrant affidavits would confuse the issue of defendant guilt or innocence with that of whether official misconduct underlay the affidavits. This in turn would affect already crowded dockets, especially because defense counsel might use affidavit hearings as a discovery device. Once more, the majority

---

2. This premise was drawn from the Court's statement in such decisions as *Stone v. Powell*, 428 U.S. 465 (1976), and *United States v. Peltier*, 422 U.S. 531 (1975).

3. The Court did not define recklessness, but presumably one may look to modern penal code usage, of which the Model Penal Code is the prototype. MODEL PENAL CODE § 2.02(2)(c) (proposed official draft, 1962).

4. *Mapp v. Ohio*, 367 U.S. 643 (1961).

disagreed. Hearings on the issue are not before a jury, and the Court's requirement of a showing of intentional or reckless misstatement sufficiently protects against use of a suppression hearing for discovery purposes.<sup>5</sup>

Finally, the prosecution asserted that the defense position would extend the fourth amendment exclusionary rule into an area in which control of misconduct is difficult because of the traditional use in affidavits of hearsay statements based on fleeting observations and tips from anonymous, transient sources of information. The Court also rejected that premise, reasoning that inquiry into the integrity of affidavits does not differ substantially from the examination of their sufficiency, which has long been required under the fourth amendment. Moreover, the Court has not yet withdrawn from its position that the exclusionary rule can always be used to reach "substantial and deliberate" official misconduct.<sup>6</sup>

It is difficult to fault the *Franks* decision on theoretical grounds or to disagree with the majority conclusion that a nonimpeachment rule would leave official perjury unchecked. The Court's desire to limit the number of cases in which impeachment can be attempted is evident in its delineation of the procedures to be followed and in the clear placement of the burden of persuasion on the defense. Despite those limits, however, the judicial system must now contend with what the dissenters denominate the "natural tendency of ingenious lawyers charged with representing their client's cause to ceaselessly undermine the limitations which the Court has placed on impeachment of the affidavits offered in support of a search warrant."<sup>7</sup>

## 2. *Search incident to arrest*

Supreme Court decisions that law enforcement officials find burdensome are sometimes the product of relentlessly pursuing cases that ought to have been written off by prosecuting authorities at a much earlier stage.<sup>8</sup> Hardnosed cases make bad law for

---

5. The Court left open, however, the issue whether an underlying informer's identity must be revealed once a preliminary showing has been made that an affidavit containing information allegedly so derived is false. 98 S. Ct. at 2684. That question is not necessarily governed by the Court's earlier holding that informer identity need not routinely be disclosed during suppression or other pretrial proceedings. *McCray v. Illinois*, 386 U.S. 300 (1967).

6. 98 S. Ct. at 2684.

7. *Id.* at 2692 (Rehnquist, J., dissenting).

8. *E.g.*, *Brewer v. Williams*, 430 U.S. 387 (1977) (interrogation of counseled defendant in the face of specific commitments to counsel not to interrogate); *Brown v. Illinois*, 422

prosecutors. An example in the last Term is *Mincey v. Arizona*.<sup>9</sup>

During a narcotics arrest precipitating a volley of gunfire, an officer was killed and Mincey seriously injured. Officers participating in the raid aided the injured but otherwise left the scene uninvestigated. Homicide detectives arrived shortly afterward and remained on the scene four days, searching the premises with minute care and removing between 200 and 300 pieces of evidence. No search warrant was ever obtained. On the strength of a "murder scene" exception to the fourth amendment warrant requirement,<sup>10</sup> state courts rejected defense efforts to suppress the evidence. The Supreme Court reversed.

The Court found that the facts of *Mincey* fell within none of the special circumstances which have been held to justify warrantless searches.<sup>11</sup> The Court rejected the contention that citizens lose all reasonable expectations of privacy by committing crimes<sup>12</sup> because such reasoning "would impermissibly convict the suspect even before the evidence against him was gathered."<sup>13</sup> The prosecution also asserted that the invasion of privacy occasioned by the initially lawful entry justified additional or continued intrusion in the form of a search. This, the Court believed, was not so; although arrest brings about reduced personal privacy,<sup>14</sup> it does not mean that an arrested person has "a lessened right of privacy in his entire house."<sup>15</sup>

The majority opinion then considered the legitimacy of the "murder scene exception" to the fourth amendment warrant requirement as delineated by the Arizona courts. The Court held that a limited exception indeed exists: officers may make warrantless entries and searches "when they reasonably believe that a person within is in need of immediate aid," and when arriving at a homicide scene "they may make a prompt warrantless search

---

U.S. 590 (1975) (protracted interrogation following unlawful entry and arrest); *Mapp v. Ohio*, 367 U.S. 643 (1961) (ransacking search after patently unlawful entry into residence).

9. 98 S. Ct. 2408 (1978). The interrogation aspect of this case is discussed in the text accompanying notes 99-103 *infra*.

10. The "murder scene" exception applied to situations where the circumstances of a homicide or serious personal injury suggested foul play, and where officers were already legally on the premises. 98 S. Ct. at 2412.

11. The Court canvassed the authorities. *Id.* at 2412-13.

12. The same contention had been considered and set aside in the Court's arson investigation ruling, *Michigan v. Tyler*, 98 S. Ct. 1942 (1978) (discussed in text accompanying notes 28-37 *infra*).

13. 98 S. Ct. at 2413.

14. The Court cited decisions regarding searches incident to custodial arrest, *United States v. Robinson*, 414 U.S. 218 (1973), and deferred booking searches, *United States v. Edwards*, 415 U.S. 800 (1974). See also *Gustafson v. Florida*, 414 U.S. 260 (1973).

15. 98 S. Ct. at 2413.

of the area to see if there are other victims or if a killer is still on the premises."<sup>16</sup> During that action, "the police may seize any evidence that is in plain view during the course of their legitimate emergency activities."<sup>17</sup> But the Court refused to characterize a search of the length and intensity manifested in *Mincey* as falling within that limited exception.

In essence, the Court rejected the idea that every murder case justifies an exception to the warrant requirement. Anything advanced in favor of such an exception could be used to support investigations of other forcible felonies. The fact that criminal investigations might be more efficiently conducted under such a sweeping exception carries no weight; a true emergency justification must be found. On the facts of *Mincey* there was no exigency beyond the fact of homicide; there was no indication that evidence would be lost, destroyed, or removed while a search warrant was obtained. "Indeed, the police guard at the apartment minimized that possibility."<sup>18</sup> Fundamentally, the Arizona "murder scene" exception was not strictly circumscribed. The so-called guidelines which the state courts had developed "confer unbridled discretion upon the individual officer to interpret such terms as 'reasonable . . . search,' 'serious personal injury with likelihood of death where there is reason to suspect foul play,' and 'reasonable period.'"<sup>19</sup> In the court's view, these are terms a neutral and detached magistrate, not a police officer, ought to interpret and apply if fourth amendment values are to be safeguarded.

### 3. *Administrative searches*

The Court last Term thoroughly explained, but did not substantially revise, the doctrines governing administrative searches set forth in its earlier jurisprudence.<sup>20</sup> *Marshall v. Barlow's, Inc.*<sup>21</sup> dealt with the provision of the Federal Occupational Safety and Health Act of 1970 that allows Department of Labor inspectors

---

16. *Id.* at 2414.

17. *Id.*

18. *Id.* at 2415. The Court had earlier held that packages could be withheld from postal delivery while a search warrant was obtained. *United States v. Van Leeuwen*, 397 U.S. 249 (1970). Similarly, the Court had indicated that a footlocker containing a controlled substance could be retained in police custody pending application for a search warrant. *United States v. Chadwick*, 433 U.S. 1 (1977). The quoted *Mincey* language assumed a like power to control premises while a warrant is sought.

19. 98 S. Ct. at 2415.

20. The prototype decisions are *See v. Seattle*, 387 U.S. 541 (1967) (commercial premises), and *Camara v. Municipal Court*, 387 U.S. 523 (1967) (residential property).

21. 98 S. Ct. 1816 (1978).

to enter commercial or industrial premises covered by the statute during reasonable times.<sup>22</sup> Barlow refused to allow an OSHA inspector to enter his plumbing business unless he showed a search warrant. The official then obtained a federal court order requiring Barlow to admit him, but Barlow again refused to admit the inspector and commenced his own action for federal injunctive relief against warrantless OSHA searches. A three-judge federal court ruled in his favor, and the Supreme Court affirmed.

The Court held that OSHA inspections constitute no special exception to the rule that the fourth amendment warrants clause governs searches of commercial as well as private premises. The Court had recognized earlier that "pervasively regulated" enterprises are subject to warrantless inspections conducted during working hours standard for the class of enterprise,<sup>23</sup> but industries and businesses falling within OSHA legislation do not thereby become pervasively regulated enterprises.<sup>24</sup> Nor did the Court's rulings allowing solicitation of union membership on employer premises<sup>25</sup> justify the government's warrantless search since in those cases the employer had voluntarily opened its premises to employees who had statutory organizational rights.

Essentially, the Court disbelieved the government contention that OSHA administrative procedures provided as much protection of individual privacy as a search or inspection warrant. In the Court's view, *ex parte* warrant proceedings safeguard against the possibility of altered circumstances in premises to be inspected to the same extent agency administrative authorization might. The Court was also unconcerned over additional strain a warrant requirement might impose on the agency and on federal courts. Most business owners will consent to inspection, the Court assumed, and delay will not be excessive in the instances in which they do not.

The majority opinion then turned to the requisites for an administrative inspection order. Such an order does not require a probable cause showing that an OSHA violation exists; the criminal prosecution standard does not govern.

---

22. 29 U.S.C. § 657(a) (1976).

23. *United States v. Biswell*, 406 U.S. 311 (1972) (firearms dealer); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor business).

24. The Court had taken a similar position during the preceding Term when the government argued that taxpayer premises were subject to warrantless entries by IRS officials. *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977).

25. *E.g.*, *Beth Israel Hosp. v. NLRB*, 98 S. Ct. 2463 (1978); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).



A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.<sup>26</sup>

The protections given to employers' privacy, in the Court's view, are not marginal. A warrant gives "assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria."<sup>27</sup> A warrant also sets limits on the scope and objectives of a search, compliance with which can be observed and enforced. Hence, the Court held the injunction against OSHA search practices was properly issued. *Barlow's, Inc.* did not determine whether other forms of federal regulatory inspections are under precisely the same controls. One may assume, however, that the fourth amendment principles discussed in *Barlow's, Inc.* will govern inspection practice under other federal and state regulatory legislation as well, notwithstanding the Court's disclaimer.

Some administrative inspections are close to the borderline between civil and criminal law enforcement. In *Michigan v. Tyler*,<sup>28</sup> the Court decisively dealt with the form of investigation that has caused the greatest amount of litigation in recent years: arson investigations. While fire personnel were extinguishing a nighttime blaze on Tyler's premises, they discovered and seized evidence of arson. After daybreak, arson investigators returned to the location and found other evidence of arson that had not been visible at night; this, too, they appropriated. About three weeks later, state police fire marshals came back once again and discovered additional evidence. None of the entries and seizures had been given advance judicial authorization. The state supreme court ruled that a search warrant was required for any entry onto premises and for any seizure or evidence once a fire actually had been extinguished. The Supreme Court agreed with much, but not all, of the state court analysis.

The Court's administrative search cases, including *Barlow's, Inc.*, establish the principle that the fourth amendment safeguards citizens against arbitrary invasions by government offi-

---

26. *Marshall v. Barlow's, Inc.*, 98 S. Ct. at 1825.

27. *Id.* at 1826.

28. 98 S. Ct. 1942 (1978).

cials, including fire inspectors, irrespective of whether an entry is intended to locate and abate a public nuisance or to perform a routine periodic inspection. The state argued, however, that an occupant who sets fire to his or her premises has no reasonable expectation of privacy, while an occupant who is a victim of arson will not object to official entries. The first premises, left open in *Tyler*, was later rejected in *Mincey v. Arizona*<sup>29</sup> under analogous circumstances. The Court in *Tyler* reasoned that even if the concept of abandonment of privacy through criminal activity were theoretically correct, it would be of no help when arson has not been established at the time of official entry. The second premise was also rejected in *Tyler*: victims indeed have reasonable expectations of privacy in fire-ravaged premises that forestall warrantless, nonconsensual entries, for on occasion they continue to live or work there, and often have personal property that can be salvaged.

Consequently, the Court reasoned, searches by firefighters and arson investigators are within the coverage of the fourth amendment; there is no basis to differentiate their activities from those of others engaged in administrative inspections. Moreover, the Court rejected the argument that a warrant requirement would be meaningless because nothing need be shown in support of a warrant application beyond the fact that a fire had occurred.

To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other. . . . The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors.<sup>30</sup>

A magistrate "can perform the important function of preventing harassment by keeping that invasion to a minimum,"<sup>31</sup> and a warrant serves to reassure property owners of the legality of an entry.

Evidence discovered in the course of fighting a fire may, the Court assured, be used to support the issuance of a search or inspection warrant. A burning building clearly presents an exi-

---

29. 98 S. Ct. 2408 (1978) (discussed in text accompanying notes 8-19 *supra*).

30. 98 S. Ct. at 1949.

31. *Id.*

agency rendering an entry reasonable in fourth amendment terms; "it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze."<sup>32</sup> Once lawfully on the premises, firemen may seize evidence in plain view. The Court disagreed, however, with the state court position that the need for a warrant arises "with the dousing of the last flame."<sup>33</sup> Fire officials are under a duty to find the causes of fire, to prevent recurrences, to identify dangerous conditions, and to preserve evidence from intentional or accidental destruction. The sooner they discharge these duties, the less will be their later interference with privacy and recovery efforts. "For these reasons," the Court announced, "officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished,"<sup>34</sup> although the nature of the premises and the conflagration governs reasonableness.<sup>35</sup>

Similarly, the Court found no objection under the circumstances to the fire officials' return a few hours later during daylight, since they could have remained constantly on the premises until that hour. It would have been but an idle formality to require a warrant for such a return. Consequently, the inspection and seizure of evidence on the morning after the fire were constitutional. All later entries, however, required a warrant.

In effect, *Tyler* delineated a spectrum of investigative powers. Fire prevention activities seem to be within the scope of routine regulatory inspections governed by *Barlow's, Inc.*; these can no doubt be handled programmatically.<sup>36</sup> Firefighters and investigators may enter premises without obtaining either a warrant or consent during a fire; and once there, they may remain in, or return to, the premises for a reasonable time to investigate the cause of a fire. After that period expires, entries for further investigation must be pursuant to an investigative order or warrant authorizing administrative inspection. If evidence is discovered during either phase, it may be seized and is admissible under the plain view doctrine. If by the time judicial authorization is sought, however, investigative personnel have probable cause to

---

32. *Id.* at 1950.

33. *Id.*

34. *Id.*

35. *Id.* at 1950 n.6.

36. Compare the *Tyler* quotation at note 30 *supra*, with that from *Barlow's, Inc.* at note 26 *supra*.

believe arson has occurred, then the standards to be applied are those governing search warrants in criminal cases.<sup>37</sup>

#### 4. *Process against third parties*

The position of the Court is clear that third parties must comply with lawfully issued process, even though innocent of criminal activity. In the controversial decision of *Zurcher v. Stanford Daily*,<sup>38</sup> the Court rejected lower federal court endeavors to create hierarchies of process under the fourth amendment. *Zurcher* arose from the aftermath of a student demonstration during which several police officers were injured. There were indications student newspaper photographers had taken pictures that might identify the assailants; one photograph taken on the occasion already had been published. Accordingly, the district attorney's office sought a search warrant to be executed in the offices of the newspaper, specifying negatives, films, and pictures showing the identified event. There was no allegation that any newspaper staff member was involved in the unlawful acts. The warrant was executed, and nothing in the ensuing testimony showed that officers read documents or searched other than for the specified material; the officers left without taking anything.

Thereafter, newspaper staff members filed a Federal Civil Rights Act suit seeking declaratory and injunctive relief against the state officials responsible for the search. The federal district court granted declaratory relief. It held that a search warrant should not issue under the fourth amendment against one not suspected of criminal activity unless probable cause exists to believe that the use of a subpoena duces tecum would be impracticable. Moreover, it held that if the innocent object of a search were a newspaper, a search would be allowable under the first amendment only on a clear showing that important material would be destroyed or taken from the jurisdiction and that a restraining order would be futile to prevent it. The federal court of appeals affirmed per curiam. The Supreme Court reversed.

To the Court majority, nothing on the face or in the history of the fourth amendment supported the lower courts' sweeping revision of practice under its terms. Since the amendment is concerned only with where and for what purpose search warrants may issue, not with the character of persons subjected to service, process clearly may issue against a third party. Culpability of an

---

37. 98 S. Ct. at 1951.

38. 98 S. Ct. 1970 (1978).

owner or possessor of property to be searched for or seized is not a condition to issuance of a warrant. To illustrate the principle, the Court noted its contraband vehicle search doctrine,<sup>39</sup> which requires no preliminary arrest. Administrative searches and inspections also require no advance showing of criminality.<sup>40</sup> Rule 41 of the Federal Rules of Criminal Procedure makes no reference to arrest as a condition to execution of an otherwise properly issued search warrant. In short, there is nothing "in the Fourth Amendment indicating that absent probable cause to arrest a third party, resort must be had to a subpoena."<sup>41</sup> Searches and seizures are independent of, not ancillary to, arrest and the procedures which follow.

History aside, the majority Justices found unpersuasive the reasons advanced by the district court to support its reconstruction of the fourth amendment. One who knows culpable evidence is secreted on his or her property and continues to hold it is culpable enough for purposes of a search warrant. Even absent that knowledge, service of a search warrant is sufficient in itself to create awareness of the fact, or to demonstrate a likelihood of the fact, that evidence has been secreted. When such an awareness exists, the Court reasoned, there is no basis to allow resistance to execution of a search warrant on the ground that a subpoena duces tecum could have been used instead.

Moreover, even assuming the use of a subpoena protects the personal privacy of third parties to some extent, that does not justify the risk that evidence will be recovered by its owner or otherwise lost or destroyed. Good faith on the part of a third party (who may or may not in fact be innocent of criminal wrongdoing) does not lessen the risk that evidence will be lost. Thus, nothing but the district court's unsubstantiated assumptions supported a change in tradition. Finally, in the Court's analysis, a search warrant affords more protection to individual privacy than does a subpoena because the latter issues with no supporting data and without a judicial order while relatively concrete information must support a search warrant application.

The Court also rejected the proposition that newspaper or other media premises are governed by a special standard. The lower courts had built a special rule on several first-amendment-related concerns: (1) searches are sufficiently disruptive to inter-

---

39. *Carroll v. United States*, 267 U.S. 132 (1925).

40. *See, e.g.*, statements of the Court quoted at notes 26, 30 *supra*.

41. 98 S. Ct. at 1978.

fere with timely publication; (2) confidential sources of information will dry up and press investigations taper off when sources fear that media files will be available for official inspection; (3) reporters will not record or preserve their recollections if later inspection is possible; (4) editorial processes will be impeded by a fear of disclosure of internal deliberations; and (5) the media will resort to self-censorship to conceal the possession of information of possible interest to the police. The majority opinion, however, noted that magistrates can, by applying traditional fourth amendment requirements, control the issuance and the scope of warrants to prevent the consequences feared by the newspapers. In *Zurcher* itself the limits were precise and were observed by the police. The paucity of federal search warrants issued against the media suggested to the Court a present lack of abuse;<sup>42</sup> if abuse should appear, however, the majority concluded that the courts would be competent to deal with it at that time.

Finally, the Court disagreed with the newspaper's contention that issuance of search warrants for evidence to be used in a criminal trial works a prohibited prior restraint. No such effect occurred or was threatened on the facts of *Zurcher*. Accordingly, the Court declined to approve any doctrinal system that would require the use of subpoenas as a general rule if evidence is held by the media or that would demand notice and a hearing before search warrants could issue.

A like philosophy informs the Court's decision in *United States v. LaSalle National Bank*<sup>43</sup> that third parties cannot resist IRS civil process that may turn up evidence supporting either civil or criminal tax fraud liability. In *LaSalle Bank*, an IRS agent conducted a fraud investigation which supported a suspicion that criminal conduct was present, but the case had not yet been submitted to the Department of Justice with a request for prosecution. An IRS summons covering some of the taxpayer's records under investigation issued against the bank, which resisted on advice of counsel. During subsequent district court proceedings to enforce the summons, the bank and the taxpayer asserted that the IRS agent had admitted the summons was strictly related to criminal investigation, so that no civil investigatory purpose underlay it. On that basis the district court refused to compel compliance with the summons. The court of appeals affirmed, but found that the district court had reached a

---

42. *Id.* at 1982.

43. 98 S. Ct. 2357 (1978).

factual determination, not a legal conclusion, in deciding that the process was for a criminal investigatory purpose, so that review was limited to application of a clearly erroneous legal standard. The Supreme Court reversed.

The 1978 decision elaborates on an earlier holding<sup>44</sup> where the Court rejected a contention that an IRS summons was unlawful because a criminal prosecution might have ensued, on the basis that Congress had authorized the use of such process to investigate potentially criminal conduct. Under the *LaSalle Bank* facts, there was a clear possibility of criminal penalties, but the agency could have opted to pursue civil fraud penalties as well. The Court noted that "Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined."<sup>45</sup> Therefore, IRS summonses may be used in connection with either form of investigation regardless of the particular agent's subjective intent. The Court held, however, that after a recommendation of criminal prosecution to the Department of Justice (when there begins an identifiable separation, although not a complete divorce, between criminal and civil proceedings), it would be improper to use IRS summons machinery to secure evidence useful in prosecution since that would essentially convert the administrative system into a form of criminal discovery. Moreover, until that moment, IRS authority must be exercised in good faith; a recommendation of prosecution cannot be delayed for the purpose of gathering evidence to be used by the government prosecutor. The motivation of a particular IRS intelligence agent does not control, however, because of the administrative review required by IRS regulations before a recommendation of prosecution can be transmitted. Neither the intelligence agent's entry into the investigation nor his or her subjective intent signals that there has been abuse.

As a result, the question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the IRS . . . . [T]his means that those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service . . . .

Without doubt, this burden is a heavy one.<sup>46</sup>

But such an inquiry can and should be made because the Court

---

44. *Donaldson v. United States*, 400 U.S. 517 (1971).

45. 98 S. Ct. at 2363.

46. *Id.* at 2367.

will "not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution."<sup>47</sup> On the *LaSalle Bank* record, there had been no recommendation and no showing of delay for the purpose of gathering criminal evidence; therefore, the Court held, the district court should have enforced the summons.

As in *Franks v. Delaware*,<sup>48</sup> the dissent was most concerned over the procedural implications of the majority ruling. In the dissenting Justices' thinking, it would have been sufficient to rest with the question of whether a referral to the Department of Justice had occurred by the time process issued. The dissenters feared that the Court had opened up "endless discovery proceedings and ultimate frustration of the fair administration" of the tax laws.<sup>49</sup>

In addition to *Zurcher* and *LaSalle Bank*, a third conceptually related holding is found in the *United States v. New York Telephone Co.*<sup>50</sup> decision that telephone communication carriers can be required by court order to aid in the installation of pen registers.<sup>51</sup> The Court concluded that pen register devices are not within the coverage of the federal eavesdropping statute,<sup>52</sup> that under the fourth amendment a search warrant may issue authorizing the installation of such a device, and that under the so-called All Writs Act<sup>53</sup> a court can issue to federal law enforcement agents any order necessary to effectuate the issuance of a search warrant. Absolute necessity is not a prerequisite, the Court reasoned, but simply the fact that an order is "appropriate to effectuate and prevent the frustration of orders . . . previously issued in [a court's] exercise of jurisdiction otherwise obtained."<sup>54</sup> Judicial power may be exercised against persons who are not parties to litigation or not otherwise engaged in wrongdoing if they can

---

47. *Id.* at 2367-68.

48. 98 S. Ct. 2674 (1978) (discussed in text accompanying notes 1-7 *supra*); see text accompanying note 7 *supra*.

49. 98 S. Ct. at 2369 (Stewart, J., dissenting).

50. 434 U.S. 159 (1977).

51. In the words of the Court, "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electric impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." *Id.* at 161 n.1.

52. 18 U.S.C. § 2518(1) (1976) (discussed further in text accompanying notes 59-64 *infra*).

53. 28 U.S.C. § 1651(a) (1976).

54. 434 U.S. at 172.



frustrate the implementation of a court order. Under the circumstances, the telephone company had few equities, since without the meager use of its resources required under the district court order the purpose of the warrant would have been entirely frustrated. The company, as a "highly regulated public utility with a duty to serve the public,"<sup>55</sup> had, in the Court's view, no substantial interest in not providing assistance. Moreover, the company admitted that it regularly used the same kind of device to check on billing operations and detect fraud, and indeed had offered to supply the FBI with sufficient information to allow the Bureau to install its own pen registers. The company was to be reimbursed at standard rates, so that it would sustain no economic loss. Finally, since Congress has authorized orders directed to a communications common carrier to furnish facilities for an interception,<sup>56</sup> the company could hardly resist a like order under the All Writs Act which would accomplish a far lesser invasion of privacy. To prohibit the district court order, the Court reasoned, would frustrate a clear indication by Congress that pen registers are lawful and would enable a public utility to prevent successful detection and conviction of those who use its facilities unlawfully.

Against the background of the Court's earlier rulings that holders of documents cannot resist warrants, subpoenas, or summonses on third-party privilege grounds,<sup>57</sup> *Zurcher*, *LaSalle Bank*, and *New York Telephone Co.* make it clear that those on whom judicial process is served have only the most narrow basis<sup>58</sup> on which to justify noncompliance. If this phalanx of rulings is to be broken, it will have to be through legislative amendments or the construction of a more beneficent rule for defendants under state law.

### 5. *Electronic surveillance*

As indicated above, the Court ruled in *United States v. New York Telephone Co.*<sup>59</sup> that pen registers are not within the coverage of federal eavesdropping law. This was clear, in the Court's view, from the preenactment history<sup>60</sup> as well as the language of

---

55. *Id.* at 174.

56. 18 U.S.C. § 2518(4) (1976).

57. *Andresen v. Maryland*, 427 U.S. 463 (1976); *Fisher v. United States*, 425 U.S. 391 (1976); see George, *United States Supreme Court Term 1975-76: Criminal Law Decisions*, 23 WAYNE L. REV. 1, 12-17 (1976).

58. Essentially, the only available challenge is to the regularity of the process on its face.

59. 434 U.S. 159 (1977).

60. See *id.* at 167-68.

the statute itself. Pen registers do not intercept, because they neither capture the contents of a communication nor determine that a call has been completed; they merely record the fact of dialing and the number dialed. They do not achieve "aural acquisition"<sup>61</sup> of anything, since they merely detect changes in electrical current created by dialing or pressing telephone buttons. Any challenge, therefore, to the use of pen registers must come directly under the fourth amendment. Federal Rule of Criminal Procedure 41(b) in its enumeration of possible objects of warrant issuance<sup>62</sup> does not, the Court said, exhaust all possibilities. The Court's decision in *Katz*<sup>63</sup> that telephone conversations are within the ambit of the fourth amendment confirmed that Rule 41 can extend to "seizures of intangible items such as dial impulses recorded by pen registers as well as tangible items."<sup>64</sup>

In *Scott v. United States*,<sup>65</sup> the Court dealt with a somewhat more recondite, although hardly unimportant, aspect of federal eavesdropping legislation, namely the minimization requirement.<sup>66</sup> A federal district court suppressed all wiretap and derivative evidence relating to a narcotics conspiracy because the agents failed to minimize interference with noncriminal communications, as evidenced by the fact that almost all calls were intercepted while only forty percent were actually narcotics related. The court of appeals reversed, ruling that the district court should not have used a percentage test to ascertain minimization; instead, the agents' efforts to minimize under the particular circumstances were the key to whether their conduct was reasonable. On remand, the district court again suppressed the evidence because it found the agents had not sufficiently endeavored to minimize. Once more the court of appeals reversed. The defendant was convicted at the trial which followed, and the appellate court and the Supreme Court affirmed.

The defendant argued that a finding of a good faith effort to comply with warrant requirements is essential to a holding of

---

61. Interception under the federal statute is defined as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (1976).

62. The rule covers "(1) property that constitutes evidence of the commission of a criminal offense; (2) contraband, the fruits of crime, or things otherwise criminally possessed; [and] (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense." FED. R. CRIM. P. 41(b).

63. *Katz v. United States*, 389 U.S. 347 (1967).

64. 434 U.S. at 170.

65. 98 S. Ct. 1717 (1978).

66. See 18 U.S.C. § 2518(5) (1976).

actual compliance, so that a failure to make good faith attempts at minimizing interference violates an underlying judicial order authorizing eavesdropping. The Court, however, endorsed the government analysis that a finding of noncompliance must be made in light of objective circumstances; subjective intent is significant only in determining whether the exclusionary rule is to be invoked after a violation has been established. Thus, in *Terry v. Ohio*<sup>67</sup> the key issue was whether, by an external standard, the frisk was reasonable. Similarly in *United States v. Robinson*,<sup>68</sup> as long as the search incident to custodial arrest was objectively justifiable, it did not matter that the searching officer's state of mind did not correspond to the abstract assumption underlying the rule (that is, that the arrestee might be armed and dangerous, or in possession of evidence of crime). The Court reasoned that the minimization requirement does not require a different result. Congressional use of the word "conducted" in the statute<sup>69</sup> "made it clear that the focus was to be on the agents' actions not their motives."<sup>70</sup>

On the *Scott* facts, the trial court's use of a percentage test to determine minimization was improper. Some calls were very brief, and others were from persons not earlier identified to be innocent callers. The tapped telephones also were in a private apartment believed to be the hub of a narcotics network; they were not public telephones from which only occasional unlawful transactions might be conducted. Furthermore, the Court noted that the time during the course of interception at which a call is recorded is significant; at an early stage all calls may need to be intercepted to establish "categories of nonpertinent calls which will not be intercepted thereafter."<sup>71</sup> On balance, the majority found no basis upon which to overturn the court of appeals' determination from the trial court record that the minimization requirement had been met.

## 6. Stop-and-frisk

In *Pennsylvania v. Mimms*,<sup>72</sup> the only stop-and-frisk decision of the Term, the Supreme Court overturned a state supreme court

---

67. 392 U.S. 1 (1968) (leading stop-and-frisk decision).

68. 414 U.S. 218 (1973).

69. 18 U.S.C. § 2518(5) (1976). The statute requires that any interception "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." *Id.*

70. *Scott v. United States*, 98 S. Ct. at 1724.

71. *Id.* at 1725.

72. 434 U.S. 106 (1977) (per curiam, with three Justices dissenting).

ruling that officers violated the fourth amendment when they ordered vehicle occupants to alight after valid traffic arrests. After Mimms had left his vehicle, officers observed a suspicious bulge which, on further investigation, proved to be an unlawfully possessed handgun. Mimms was prosecuted and convicted of carrying a concealed weapon. The state supreme court reversed the conviction under the derivative evidence rule because the officer did not have probable cause to order Mimms from the automobile. All observations and the physical search, in the state court's view, were tainted by the unlawful order. The Supreme Court reversed.

Reasonableness, the Court observed, always involves a balance between public interest and individual personal security. There was nothing improper in the inception of the transaction, the Court reasoned, for the officers had observed a clear criminal violation in their presence. Even though nothing suggested that Mimms himself posed an apparent danger to officers, it was not an unreasonable practice to order all drivers thus stopped from their vehicles, since that would render them fully visible and help forestall assaults on officers. The Court felt that although not all assaults on officers approaching vehicles occur in connection with traffic arrests, enough do occur to render the practice in such a setting reasonable. The majority also noted that there is physical danger to officers if they are required to stand at or near the driver's side of vehicles where traffic may be passing, a danger that can be obviated by requiring drivers to move to the shoulder of a road. In contrast to this enhancement of officers' safety, the Court found the inconvenience to drivers to be minimal, and thus suitably ignored by legal doctrine. The Court concluded that "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety."<sup>73</sup>

#### 7. *The fourth amendment exclusionary rule*

Mention has already been made about the Court's asides on the exclusionary rule: for example, that it extends to "substantial and deliberate" violations;<sup>74</sup> and that officers' subjective states of mind are not to control in determining whether an IRS summons properly issued<sup>75</sup> or whether minimization has occurred during

---

73. *Id.* at 111.

74. *Franks v. Delaware*, 98 S. Ct. 2674, 2684 (1978).

75. *United States v. LaSalle Nat'l Bank*, 98 S. Ct. 2357 (1978) (discussed in text accompanying notes 43-49 *supra*).

eavesdropping,<sup>76</sup> but only in deciding whether the exclusionary rule should be invoked after a violation has been established under objective criteria. The Court, however, dealt directly with one aspect of the rule—its applicability to witnesses whose identity is discovered through an unreasonable search or seizure.

In *United States v. Ceccolini*,<sup>77</sup> a local police officer, during a social visit to a clerk in defendant's shop, casually looked in an envelope beside the cash register and discovered gambling memoranda. He asked the clerk its source and was informed that defendant had left it to be delivered to a named person. Afterward, the officer's discovery was reported to an FBI agent without full mention of the circumstances of that discovery. Four months later, the FBI agent interviewed the clerk at her home and obtained an offer from her to cooperate with investigating officers. The defendant thereafter gave sworn testimony before a federal grand jury that he had never taken policy bets in his shop. In an ensuing perjury prosecution the clerk was called as a principal government witness. The district court found, on the strength of the clerk's testimony, that perjury had been committed, but subsequently granted a defense motion to suppress the testimony and set aside the guilty verdict. The government appealed unsuccessfully to the court of appeals, which affirmed because the causal connection between the unlawful search and the witness' testimony was "both straight and uninterrupted,"<sup>78</sup> with no indication that discovery of her identity was inevitable. The Supreme Court reversed.

The majority Justices agreed, contrary to the government's assertion, that the *Wong Sun* test<sup>79</sup> applies to live witnesses. However, the statement in *Wong Sun* that there is no difference between physical and verbal evidence<sup>80</sup> has been substantially qualified by later decisions of the Court. *Wong Sun* involved a putative defendant, while *Ceccolini* was concerned with a prosecution witness. Thus, the court of appeals "was simply wrong in concluding that if the road were uninterrupted, its length was immaterial." Length, the Court held, "is material, as are certain other

---

76. *Scott v. United States*, 98 S. Ct. 1717 (1978) (discussed in text accompanying notes 65-71 *supra*).

77. 435 U.S. 268 (1978).

78. *Id.* at 273 (quoting 542 F.2d 136, 142 (2d Cir. 1976)).

79. *Wong Sun v. United States*, 371 U.S. 471 (1963). Under *Wong Sun*, the test is whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" *Id.* at 487 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

80. *Id.* at 486.

factors . . . to which the court gave insufficient weight.”<sup>81</sup>

The Court then reviewed its statements as to the limitations on application of the exclusionary rule in grand jury proceedings<sup>82</sup> and its use for impeachment purposes,<sup>83</sup> reiterating that the rule does not bar all evidence against all persons.<sup>84</sup> Controls on standing to invoke the rule also are relevant.<sup>85</sup> All these principles supported the Court’s conclusion that there is no per se exclusionary rule under the fourth amendment.

Under the Court’s analysis, the degree of free will exercised by a witness is important in determining the extent to which “the basic purpose of the exclusionary rule will be advanced by its application.”<sup>86</sup> The greater a witness’ willingness to testify, the greater the likelihood he or she will be discovered by legal means, and the smaller the incentive to use illegal means. The Court noted, however, that a contrary analysis might govern if police had acted unlawfully specifically to discover potential witnesses.<sup>87</sup> Nevertheless, in most instances, illegality of discovery may well play no role in a witness’ decision to cooperate with the prosecution.

Moreover, the Court recognized that “[r]ules which disqualify knowledgeable witnesses from testifying at trial are . . . ‘serious obstructions to the ascertainment of truth.’”<sup>88</sup> Under the standards laid down in *Michigan v. Tucker*,<sup>89</sup> courts ought not readily prevent witnesses from testifying; rather, “a closer, more direct link between the illegality and that kind of testimony is required.”<sup>90</sup> The Court did not intend to suggest that witness testimony is better than demonstrative evidence (the converse may well be true); but “[a]ttenuation analysis, appropriately concerned with the differences between live-witness testimony and inanimate evidence, can consistently focus on [the voluntariness and knowledgeability of witnesses] with respect to the former, but on different factors with respect to the latter.”<sup>91</sup>

In so holding, the Court reaffirmed a somewhat hoary state-

---

81. 435 U.S. at 275 (emphasis in original).

82. *United States v. Calandra*, 414 U.S. 338 (1974).

83. *Walder v. United States*, 347 U.S. 62 (1954).

84. *Stone v. Powell*, 428 U.S. 465 (1976).

85. *Alderman v. United States*, 394 U.S. 165 (1969).

86. *United States v. Ceccolini*, 435 U.S. at 276.

87. *Id.* at 276 n.4.

88. *Id.* at 277 (quoting C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 71 (1954)).

89. 417 U.S. 433 (1974).

90. 435 U.S. at 278.

91. *Id.* at 278-79.

ment that "[a] criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule."<sup>92</sup> Thus, "[t]he penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve."<sup>93</sup> There was overwhelming evidence in *Ceccolini* that the witness exercised free will in deciding to testify and was in no way coerced to that decision by the local officer's discovery of the policy memoranda: substantial time elapsed between illegal discovery and an official approach to the witness, FBI agents were already aware of the clerk's relationship to the defendant, there was no indication of an improper motive on the local officer's part in entering the shop and examining the envelope, and there was no evidence of an intent to discover the witness. "Application of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as [this]," the Court reasoned, and the burden of permanently silencing the witness "is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect."<sup>94</sup> Thus, the Court majority confirmed its analytical premise, evident for the past four Terms, that the exclusionary rule is no longer an automatic or mechanical process, but rather a dynamic one that involves weighing the possible deterrent impact of excluding evidence against the need of the judicial system for as broad an array of probative evidence as possible to support a proper adjudication.

#### 8. *Eyewitness identification proceedings*

In *Moore v. Illinois*,<sup>95</sup> the Court reiterated its doctrine that identification procedures after commencement of formal proceedings are governed by more protective standards than those for earlier identification measures. A rape victim, who had had only a few seconds to view her assailant's face, was taken by an officer to a courtroom in which the defendant (whose photograph was one of two or three she had selected) was being preliminarily examined to determine detention or release pending indictment. Moore was not represented by counsel at the time. The victim

---

92. *Id.* at 279 (quoting *McGuire v. United States*, 273 U.S. 95, 99 (1927)).

93. *Id.* at 279.

94. *Id.* at 280.

95. 434 U.S. 220 (1977).

identified Moore as her assailant. After indictment, defense counsel moved to suppress the identification evidence, but the motion was denied on the basis that there was an independent source for the identification. An ensuing conviction was affirmed in the state supreme court. An application for federal habeas corpus also proved unsuccessful. In reviewing the action, however, the Supreme Court reversed.

The Court's position in its *Wade v. United States*<sup>96</sup> and *Gilbert v. California*<sup>97</sup> decisions is clear: After a criminal case has been commenced the right to counsel governs every critical stage, including identification proceedings. In *Kirby v. Illinois*,<sup>98</sup> the right to counsel did not attach to an identification proceeding because judicial criminal proceedings had not been initiated. In *Moore*, the Court held that the preliminary hearing marked the commencement of such proceedings and, therefore, the state's position that indictment is needed before the *Wade-Gilbert* rule governs was erroneous. The fact that the defendants in both *Wade* and *Gilbert* were the subjects of lineup proceedings while *Moore* involved a one-on-one confrontation failed to influence the Court because, if anything, a confrontation poses a greater risk of misidentification than a lineup.

The Court reasoned that the fact the identification was made during a judicial proceeding did not lessen the need for counsel. Thus, sixth amendment considerations under *Wade-Gilbert* operated fully in Moore's situation. The officer had told the victim she was to view a suspect, and she had previously had but a brief opportunity to see her attacker. Counsel might have forestalled some of this suggestiveness. The Court enumerated the following actions defense counsel might have taken at that time: (1) request a continuance until a proper lineup could be conducted; (2) seek to excuse the victim from the courtroom while evidence bearing on probable cause was received; (3) ask that the defendant be seated among spectators when the victim attempted an identification; and (4) cross-examine the complainant before her identification hardened. Of course, whether such requests are to be granted is a matter within trial court discretion, but none is improper per se.

The Court ruled that Moore's sixth amendment rights thus had been violated. Under the circumstances, the state courts erred in invoking the independent source test to justify the vic-

---

96. 388 U.S. 218 (1967).

97. 388 U.S. 263 (1967).

98. 406 U.S. 682 (1972).



tim's trial testimony. She testified not merely to the identity of defendant as her attacker, but also to the fact that she had so identified him at the preliminary hearing. This, the Court said, was the direct exploitation of an improper identification proceeding which *Gilbert* forbids. On remand, the state court was directed to determine whether the error was harmless beyond a reasonable doubt.

### 9. Interrogation

The search and seizure aspects of *Mincey v. Arizona*<sup>99</sup> have already been canvassed. The Court also considered a dimension of confessions law in that case. Mincey was questioned in a hospital intensive care unit. He had tubes in his throat so that all his responses to questions had to be written. He was in much pain, under sedation, and apparently slipped into unconsciousness at various times while the interrogating officer was present. *Miranda* warnings were given, but Mincey repeatedly indicated that he wanted to speak with an attorney before answering certain questions. The state courts drew upon *Harris v. New York*<sup>100</sup> and *Oregon v. Hass*<sup>101</sup> for the doctrine that statements violating *Miranda* rules can be used to impeach. Since they also found the confession to be voluntary, the state courts concluded that it was proper to allow the trial jury to hear Mincey's confession after he had testified in his own behalf. The Supreme Court disagreed.

Any use of an involuntary confession, the Court said, constitutes a per se denial of due process, irrespective of other valid evidence to support the conviction. Moreover, the Court was not bound to accept the state court determination that a confession was voluntary. Under the circumstances in *Mincey*, "[t]he statements at issue were . . . the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness,"<sup>102</sup> not the product of a free and rational choice. "[T]he undisputed evidence makes clear that Mincey wanted not to answer [the detective]. But Mincey was weakened by pain and shock, isolated from family, friends and legal counsel, and barely conscious, and his will was simply overborne."<sup>103</sup> Hence, the Court concluded, his statements could not be used even for purposes of impeachment.

99. 98 S. Ct. 2408 (1978) (discussed in text accompanying notes 9-19 *supra*).

100. 401 U.S. 222 (1971).

101. 420 U.S. 714 (1975).

102. *Mincey v. Arizona*, 98 S. Ct. at 2418.

103. *Id.* (emphasis in original).

## B. Pretrial Procedure

### 1. Plea negotiations

The stance of the Supreme Court in *Bordenkircher v. Hayes*<sup>104</sup> is clear: plea bargaining, or negotiating, is a legitimate process. Hayes was charged with forgery in state court. During plea negotiations the prosecutor indicated he would recommend a five-year sentence if Hayes would plea guilty, but that if no guilty plea were forthcoming on those terms he would seek a habitual criminal indictment against Hayes. Hayes ultimately refused to plead guilty and the prosecutor acted as he had said he would, properly within the terms of the state's recidivism law. Hayes' conviction and resulting life sentence under the charges were affirmed in the state appellate court, and a federal district court denied habeas corpus relief. The Sixth Circuit reversed, however, on the premise that the prosecutor's conduct violated the rule of *Blackledge v. Perry*,<sup>105</sup> which it interpreted to protect defendants "from the vindictive exercise of a prosecutor's discretion."<sup>106</sup> The Supreme Court reversed.

Hayes was well aware of the prosecutor's intentions before indictment under the recidivism law; hence, the case involved no additional charging after the defendant had refused to plead guilty to a single original charge. The situation was the same, the Court concluded, as if the habitual offender indictment were already pending and the prosecutor had promised to drop it if Hayes pleaded. Nevertheless, the court of appeals appeared to hold that due process is violated if a prosecutor's charging decision is governed by what he or she intends to gain during plea bargaining. The Supreme Court did not validate such doctrine.

The Court has already indicated that plea negotiation is important to the orderly functioning of the criminal justice system.<sup>107</sup> For this reason counsel plays a vital role in plea negotiations<sup>108</sup> and plea agreements will be enforced.<sup>109</sup> The court of appeals erred when it held the contents of a plea offer can directly violate due process. Vindictiveness under *North Carolina v. Pearce*<sup>110</sup> and *Blackledge v. Perry*<sup>111</sup> has to do with unilateral in-

---

104. 434 U.S. 357 (1978).

105. 417 U.S. 21 (1974).

106. *Hayes v. Cowan*, 547 F.2d 42, 44 (6th Cir. 1976), *rev'd sub nom. Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

107. *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

108. *Brady v. United States*, 397 U.S. 742, 758 (1970).

109. *Santobello v. New York*, 404 U.S. 257 (1971).

110. 395 U.S. 711 (1969).

111. 417 U.S. 21 (1974).

fliction of adverse consequences on defendants who have exercised a right of appeal; it bears no relationship, the Court asserted, to give-and-take negotiations during plea bargaining, in which no element of punishment or retaliation is present.

The Court recognized that each side has its own interests to promote in plea negotiations. "Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation."<sup>112</sup> Thus, to accept legitimate plea bargaining necessarily is to reject "any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process."<sup>113</sup> Consequently, although confronting a defendant with the alternative of more severe punishment if trial is sought may affect a decision to plead, "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."<sup>114</sup>

In sum, selectivity in law enforcement is not bad as long as it does not rest on an unjustifiable standard like race or religion. In the Court's view, to include a desire to induce a guilty plea within the concept of "unjustifiable standard" would "contradict the very premises that underlie the concept of plea bargaining itself."<sup>115</sup> Moreover, such a holding "could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged."<sup>116</sup> The Court recognized the potential for abuse in granting broad prosecutorial discretion, but noted that "there are undoubtedly constitutional limits upon its exercise."<sup>117</sup> Those due process limits were not, however, transgressed in Hayes' case.

## 2. *Federal jurisdiction*

The Court rendered three interesting decisions delineating the jurisdictional powers of Indian tribes, as well as the reach of

---

112. *Bordenkircher v. Hayes*, 434 U.S. at 363.

113. *Id.*

114. *Id.* at 364.

115. *Id.* at 365.

116. *Id.*

117. *Id.* This appears to be the first intimation by the Court that prosecutorial discretion can be attacked on due process grounds.

federal criminal laws in relationship to state legislation. In *United States v. John*,<sup>118</sup> the Court ruled that the Major Crimes Act,<sup>119</sup> which covers certain crimes committed in "Indian country," extends to a part of Mississippi where Choctaw Indians have lived for more than a century. John was convicted under the Act, but his federal conviction was reversed on the ground that the situs was not in Indian country. In the interim, Mississippi convicted John of a crime arising from the same transaction, and the state supreme court affirmed. The Supreme Court granted review in both cases. After an exhaustive inquiry into the history of the federal treatment of the Choctaws, the Court concluded that the area within the State of Mississippi indeed constituted "Indian country" within the meaning of the Act. Consequently, the Court held, the state's criminal jurisdiction was preempted by the federal statute.

The other two decisions dealt with in personam tribal jurisdiction. In the first, *Oliphant v. Suquamish Indian Tribe*,<sup>120</sup> non-Indian defendants charged with criminal and traffic violations on a tribal reservation sought federal habeas corpus based on the tribal court's lack of jurisdiction over non-Indians. Relief was denied. The Supreme Court reversed. It found nothing to indicate that criminal jurisdiction over non-Indians had been reserved under treaties with any Indian nation, including the Suquamish. And, since tribal courts were created by congressional action, they have only the jurisdiction specifically allocated to them, which does not extend to non-Indians. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."<sup>121</sup> Despite the facts that tribal courts have become more sophisticated and federal legislation guarantees defendants before them a number of basic procedural rights, the Court maintained that remedies must come from Congress even though crimes by non-Indians on tribal lands pose a real problem. Meanwhile, there is no tribal jurisdiction over the non-Indian defendant.

The second decision, *United States v. Wheeler*,<sup>122</sup> considered the correlative issue of criminal jurisdiction over tribal members. A Navajo Indian was first convicted in tribal courts of contribut-

---

118. 98 S. Ct. 2541 (1978).

119. 18 U.S.C. § 1153 (1976).

120. 435 U.S. 191 (1978).

121. *Id.* at 210.

122. 435 U.S. 313 (1978).

ing to the delinquency of a minor and later prosecuted in federal district court for statutory rape for the same act. The district court dismissed the prosecution on double jeopardy grounds, an action affirmed by the court of appeals because both courts were entities of the same sovereign. The Supreme Court reversed.

Indian tribes have always had sovereign power over their own members, and at least a limited sovereignty continues until either relinquished by treaty or abrogated by act of Congress. Neither event had occurred in the case of the Navajo Nation. The Court found no constitutional difficulty in the fact that, under *Oliphant*, tribal courts have no jurisdiction over non-Indians. Jurisdiction over tribal members has continued unabated, and with good reason, since tribes have a significant interest in maintaining orderly relationships among members and in preserving tribal customs. Federal preemption, the Court reasoned might well conflict with needs of tribal self-government. Accordingly, the concept of dual sovereignty continues to control; double jeopardy does not bar a subsequent federal prosecution.

### C. *Trial Proceedings*

#### 1. *Jury trial*

A jury cannot constitutionally number fewer than six persons. The Court's judgment to that effect in *Ballew v. Georgia*<sup>123</sup> was unanimous, but there was no majority opinion expressing a clearly controlling rationale. Justices Blackmun and Stevens pointed to a number of possible defects suggested by scholarly research in smaller juries: (1) they impede effective group deliberations; (2) the risk of erroneous convictions increases; (3) variances in results among different juries increase to the detriment of defendants; and (4) minority juror participation is reduced. Furthermore, they noted that research methodological problems may mask other potential disparities between verdicts of large and small juries. They perceived no differences in these phenomena based on the seriousness of the offense charged, and no remedy in the fact that unanimity of verdict is required. Absent empirical data to support the validity of five-person jury determinations and appreciable savings in court time, they would allow no reduction below six persons. Justice White concurred on the sole ground that juries of five or fewer fail to represent fairly a community.<sup>124</sup> Justice Powell, joined by Chief Justice Burger and

123. 435 U.S. 223 (1978).

124. *Id.* at 245 (White, J., concurring). This rationale is presumably derived from the

Justice Rehnquist, thought that a line had to be drawn somewhere and that six was as good as five, but he disagreed with the premise that states must follow all aspects of federal practice as Justice Blackmun assumed.<sup>125</sup> Justices Brennan, Stewart, and Marshall concurred in the Court's judgment, but would have barred retrial because of their belief that the Georgia obscenity statute under which Ballew had been tried was unconstitutionally broad.<sup>126</sup> Because only three states have allowed criminal trial juries smaller than six persons, the impact of the decision is not great, and the lack of a controlling doctrinal statement of no particular moment.

## 2. *Double jeopardy*

The Term saw significant elaborations upon, and in some respects changes in the scope of, the double jeopardy rule. In *Crist v. Bretz*,<sup>127</sup> the Court held that the Constitution requires jeopardy to attach in jury cases when a jury is empaneled to begin trial. Although in federal courts the point at which jeopardy attaches differs in bench and jury trials, the state had applied the same rule to both: jeopardy was deemed to attach when the first witness was sworn. Consequently, it had not barred retrial when, after the jury was sworn, a mistrial was granted upon motion of the prosecution to allow a proper information to be filed after amendment had been disallowed by the trial court. The Supreme Court thought no such variation from federal practice was constitutionally allowable even though its roots lay in the English common law. The Court found no room for a balancing test turning on how far trial has advanced, as the federal government had argued as *amicus curiae*.<sup>128</sup> Since the federal doctrine "protects the defendant's interest in retaining a chosen jury," the Court reasoned that "the federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy."<sup>129</sup> Thus, defendants have a right to their original jury unless they waive it.

The *Wheeler* case<sup>130</sup> is an exotic invocation of the dual sover-

---

constitutional standard for obscenity upon which the petitioner's conviction depended. *Miller v. California*, 413 U.S. 15 (1973).

125. *Id.* at 245-46 (Powell, J., concurring).

126. *Id.* at 246 (Brennan, J., concurring).

127. 98 S. Ct. 2156 (1978).

128. *Id.* at 2162 n.16.

129. *Id.* at 2162.

130. *United States v. Wheeler*, 435 U.S. 313 (1978) (discussed in text accompanying note 122 *supra*).

eignty concept within double jeopardy, extending the doctrine to sequential federal and tribal prosecutions. The same approach applies between the states and the federal government; each sovereign may prosecute an act or transaction which violates its criminal laws.<sup>131</sup> As an administrative matter, however, the Department of Justice has instructed federal prosecutors not to replicate a state prosecution unless there are compelling federal reasons to do so. The 1977-1978 Term saw a more formal endorsement of the so-called *Petite* policy,<sup>132</sup> although not to the extent of rejecting the fundamental dual sovereignty doctrine.

In *Rinaldi v. United States*,<sup>133</sup> the federal prosecutor told the trial court that he had been instructed to pursue vigorously a federal prosecution, despite a state conviction already entered in the same transaction, seemingly for fear that the state conviction might be overturned in the state appellate courts. On appeal of the federal conviction, the government acknowledged that the *Petite* policy in fact had been ignored and the court of appeals remanded so that the government might move to dismiss under Federal Rule of Criminal Procedure 48(a). On remand the trial court refused to grant the motion because it came after completion of trial and the prosecutor had shown bad faith in the original prosecution of the case. The Fifth Circuit, sitting en banc, affirmed. The Supreme Court reversed.

The *Petite* policy, the Court reasoned, promotes "efficient management of limited Executive resources and encourages local responsibility in law enforcement."<sup>134</sup> Moreover, the executive policy underlying the *Petite* regulation protects interests which would be of constitutional significance were it not for the dual sovereignty doctrine.

In the Court's view, the trial court's concern with the prosecution's bad faith was misplaced in the setting of a Rule 48(a) motion. There was no bad faith at the time of the motion to dismiss, even though there might have been when trial was commenced. The motion to dismiss could not be viewed as "clearly contrary to manifest public interest."<sup>135</sup> There was nothing to suggest that the defendant would have been prejudiced by

---

131. *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

132. This policy is referred to by the Court as the *Petite* policy, named after an earlier decision in which its existence was acknowledged. *Petite v. United States*, 361 U.S. 529 (1960).

133. 434 U.S. 22 (1977).

134. *Id.* at 27.

135. *Id.* at 30 (quoting *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975)).

the government's motion as might have occurred, for example, if the underlying purpose were to harass through charging, dismissing, and recharging.<sup>136</sup> Since no proper societal interest would be served by punishing the defendant a second time, the trial court abused its discretion when it refused to grant the prosecution's motion to dismiss.

The constitutional concern over double punishment also impacts on statutory construction. Even though there may not be a direct constitutional infringement in treating two offenses arising from the same set of operative facts as different crimes,<sup>137</sup> congressional intent to allow repeated punishment based on a single occurrence or series of related occurrences must be clear, the Court said in *Simpson v. United States*.<sup>138</sup> Following the canons of statutory construction that ambiguities are to be resolved in favor of defendants and that special statutes are to be preferred over general, the Court ruled that the penalties for using firearms to commit felonies<sup>139</sup> and those for committing aggravated bank robbery<sup>140</sup> could not be imposed cumulatively if they are based upon the same events. Under the circumstances, dual prosecution seemed to the Court to have violated published Department of Justice interpretations of these statutes. Even if the government's position had changed, the original version was consonant with congressional purpose, the Court wrote, while the new one was not.

If a trial court acquits a defendant who has been placed in jeopardy, retrial is barred even if the acquittal was erroneous, and no casuistical procedural analysis can be invoked to avoid that result. In *Sanabria v. United States*,<sup>141</sup> the defendant was charged in a single-court indictment with having participated in an illegal gambling business;<sup>142</sup> a section of state law was incorporated by reference to define the unlawful enterprise. At the close of the government's proof, the district court decided that the referenced state statute governed only horsebetting, not numbers, and on that basis alone erroneously ruled out evidence that the defendant had engaged in numbers transactions.<sup>143</sup> The court then ac-

---

136. *Id.* at 29 n.15.

137. *Brown v. Ohio*, 432 U.S. 161 (1977).

138. 435 U.S. 6 (1978).

139. 18 U.S.C. § 924(c) (1976).

140. 18 U.S.C. § 2113(a), (d) (1976).

141. 98 S. Ct. 2170 (1978).

142. 18 U.S.C. § 1955 (1976).

143. Another section of the state code, mistakenly omitted from the indictment, clearly prohibited numbers rackets. That error was subject to correction under Rule 7 of



quitted Sanabria because the prosecution had failed to prove the horsebetting charge. The government appealed on the theory that the trial court disposition amounted to dismissal of an indictment which came within the prosecutorial appeals statute.<sup>144</sup> The court of appeals interpreted the trial court action as a holding that discrete crimes had been charged in the same count, that they should be severed, and that one of the severed counts should be dismissed. Hence, the dismissal was not on the merits and prosecution appeal was possible under *Dinitz v. United States*.<sup>145</sup> The Supreme Court sharply disagreed with the circuit court analysis.

The constitutional issue arising from prosecutorial appeals is not the question of appellate powers as such, said the Court, but rather whether retrial on the merits would be a possibility if the government were successful on appeal. If that possibility exists, then double jeopardy bars appeal. The trial court action in *Sanabria* was clearly an acquittal on a single charge, not a severance and partial dismissal. The trial court had not found that the indictment failed to state an offense, as in *Lee v. United States*,<sup>146</sup> instead, it had held the allegations to be too narrow to admit certain evidence. Under the federal statute, properly interpreted, there was but one crime and it was independent of the number of potential state offenses committed at the same time. Indeed, it would have been improper to divide the charge into separate counts based on state law categories. Accordingly, the trial court had acquitted on the merits, barring retrial unless the case fell within two narrow exceptions: defense resistance to consolidation of separately charged offenses,<sup>147</sup> or defense delay in raising a known legal defense until jeopardy attaches in order to forestall retrial.<sup>148</sup> *Sanabria*, however, turned on an erroneous ruling on relevancy of evidence which the prosecution wished to overturn on appeal. That, the Court held, is exactly the type of prosecution appeal double jeopardy forbids.

A similar policy underlay the Court's holding in *Burks v. United States*<sup>149</sup> that a defendant cannot be retried if the sole basis for appellate reversal is insufficiency of the evidence to sustain a conviction. There, the court of appeals had remanded

---

the Federal Rules of Criminal Procedure. Moreover, the evidence was admissible on other grounds. 98 S. Ct. at 2181 n.22.

144. 18 U.S.C. § 3731 (1976).

145. 424 U.S. 600 (1976).

146. 432 U.S. 23 (1977).

147. *Jeffers v. United States*, 432 U.S. 137 (1977).

148. *Serfass v. United States*, 420 U.S. 377, 394 (1975).

149. 98 S. Ct. 2141 (1978).

the case for the trial court to determine whether an acquittal should be entered or a new trial ordered. The Supreme Court ruled that no such option existed. If the district court had acquitted for insufficient evidence, clearly no retrial would have been possible. However, if a reversal turns even in part on trial error or other procedural flaw,<sup>150</sup> then another proceeding free from error is possible because reversal embodies no conclusion that the prosecution has failed to prove its case. "When this occurs," the Court reasoned "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished."<sup>151</sup> When the sole basis of reversal is insufficiency of evidence, however, then the prosecution cannot be given "the proverbial 'second bite at the apple.'"<sup>152</sup> Thus, the court of appeals should have directed entry of a judgment of acquittal in the case. The Court also held, in *Greene v. Massey*,<sup>153</sup> that *Burks* is binding on the states under the due process clause of the fourteenth amendment.

In *Arizona v. Washington*<sup>154</sup> the Court dealt definitively with the matter of retrial after mistrial, a problem that has surfaced periodically before it.<sup>155</sup> In opening remarks to the jury, Washington's counsel mentioned alleged prosecution misconduct in an earlier trial. When the prosecutor requested a mistrial, defense counsel asked for additional time to find law supporting the propriety of his comments. To save time, two prosecution witnesses were called to testify. The next day, after defense counsel had produced no precedent supporting his position, the prosecution once more urged a mistrial. The trial court, after mentioning its concern that a mistrial would bar retrial, granted the mistrial based on defense counsel's comments. After the state appellate court rejected the defense's interlocutory appeal against the order, the defendant obtained federal habeas corpus to prevent retrial. The district court noted in issuing the writ that the state court judge had made no specific finding of manifest necessity in granting the mistrial. The federal court of appeals affirmed although, like the district court, it found defense counsel's state-

---

150. *United States v. Ball*, 163 U.S. 662 (1896) (defective indictment).

151. 98 S. Ct. at 2149.

152. *Id.* at 2150.

153. 98 S. Ct. 2151 (1978).

154. 434 U.S. 497 (1978).

155. See, e.g., *United States v. Sanford*, 429 U.S. 14 (1976); *United States v. Dinitz*, 424 U.S. 600 (1976); *Illinois v. Sommerville*, 410 U.S. 458 (1973); *United States v. Jorn*, 400 U.S. 470 (1971).

ments to have been legally improper. The Supreme Court reversed.

For the reasons canvassed later in *Sanabria* and *Burks*, the Court recognized that retrial is impossible at state instance after either conviction or acquittal. If a proceeding is stopped before final adjudication, however, the same rule does not necessarily apply. The "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury."<sup>156</sup> Although the heavy burden of showing manifest necessity rests on the prosecution to justify a mistrial, the standard demanded by the Court is not a mechanical one: "there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate."<sup>157</sup>

The Court identified the easy cases. A mistrial to allow the prosecution to strengthen its evidence at retrial is an "abhorrent" practice.<sup>158</sup> "Thus," wrote the Court, "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused."<sup>159</sup> At the other extreme is the hung jury, where a mistrial and retrial are appropriate<sup>160</sup> to accord "recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws."<sup>161</sup>

On the spectrum of trial problems, the Court felt that Washington's case fell within the area of justified mistrials. Defense counsel acted wrongly in pointing out prosecution misconduct in the earlier trial, because such evidence is not admissible under Arizona law. While some trial courts might have contented themselves with cautionary instructions rather than mistrials, that did not mean that the trial judge acted improperly in the instant litigation. The Court itself in other settings had sustained a trial court conclusion that a fair trial could not be expected under the particular circumstances.<sup>162</sup> An error in an opening statement can

---

156. 434 U.S. at 505.

157. *Id.* at 506.

158. *Id.* at 507-08.

159. *Id.*

160. *United States v. Sanford*, 429 U.S. 14 (1976).

161. 434 U.S. at 509.

162. *See, e.g., Thompson v. United States*, 155 U.S. 271 (1894) (jury dismissed after start of trial when court discovered that one juror had served on the grand jury that indicted the defendant); *Simmons v. United States*, 142 U.S. 148 (1891) (jury dismissed

bias an entire jury panel; discipline or removal of erring counsel will not necessarily dispel such a taint, and cautionary instructions are not necessarily effective. Thus, the Court reasoned, a trial court decision on such matters is entitled to great deference. In *Washington*, the necessary high degree of manifest necessity was present. "Neither party has a right to have his case decided by a jury which may be tainted by bias."<sup>163</sup>

Finally, the Court ruled that the absence of a specific trial court finding on manifest necessity does not mean appellate or federal courts must conclude none existed. If the state court record contains enough to justify such a ruling, "the failure to explain that ruling more completely does not render it constitutionally defective."<sup>164</sup> Specific findings may be helpful but are not constitutionally mandated. On the *Washington* record, the Court found sufficient support for the trial court order of mistrial.

*Washington* principles also governed *United States v. Scott*<sup>165</sup> later in the Term. In that case, the defendant attacked a federal controlled substances prosecution on the basis of preindictment delay. The trial court dismissed two counts after all the evidence had been received; the jury acquitted on the other. When the government sought to appeal the dismissal, the court of appeals rejected the appeal on the strength of *United States v. Jenkins*.<sup>166</sup> The Supreme Court reversed.

According to the Court, the key issue in determining whether prosecution appeal is compatible with double jeopardy restrictions is whether a reevaluation of a case on the merits is possible. If a second trial would not entail such a reevaluation, a court must then inquire whether a defendant has been deprived unfairly of his or her right to a judgment on the merits by the trier of fact first convened. When the defense moves for a mistrial, the Court reasoned, the argument in favor of retrial is that the motion embodies a considered decision to forgo the judgment of the jury already sworn to try the case.

In reconsidering *Jenkins*, the Court opined that the operative principle ought to be that retrial is constitutionally permissible whenever "the defendant is responsible for the second prosecution."<sup>167</sup> In *Scott*, the defendant chose not to submit the issue of

---

after possible acquaintance of one juror and the defendant came to light after trial had begun).

163. 434 U.S. at 516.

164. *Id.* at 517.

165. 98 S. Ct. 2187 (1978).

166. 420 U.S. 358 (1975).

167. 98 S. Ct. at 2196.

guilt or innocence to the jury, but rather invoked a legal claim designed to forestall prosecution despite adequate government evidence to convict. *Burks* was obviously distinguishable because it turned on a judicial holding of insufficiency of prosecution proof; *Sanabria* was similarly distinguished. The grounds relied upon by the lower court in *Scott*, however, were independent of guilt or innocence. The Court said that in other contexts courts encounter "no difficulty in distinguishing between those rulings which relate to 'the ultimate question of guilt or innocence' and those which serve other purposes."<sup>168</sup> Thus, "the dismissal of an indictment for preindictment delay represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation."<sup>169</sup>

In essence, the underlying theory allowing retrial in *Scott* is not waiver by the defendant, as it is in the *Green* context<sup>170</sup> where the inquiry is into the scope of permissible retrial under an original indictment or information following reversal of a conviction on appeal. Rather when no determination on the merits has been sought or allowed, the Court believes the double jeopardy policy of preventing harassment does not apply to an appeal by the prosecution aimed at setting aside trial court action taken at defense instance. Such a defendant, in the Court's view, "has not been 'deprived' of his valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.'"<sup>171</sup> Consequently, *Jenkins* was overruled after an unusually brief lifespan.

The last of the Court's 1978 double jeopardy decisions, *Swisher v. Brady*,<sup>172</sup> dealt with juvenile delinquency adjudications. The litigation arose concerning a Maryland rule (which underwent a process of modification in the course of the litigation) that provided for an initial hearing before a master who submitted proposed findings to a juvenile court judge. The judge could not conduct de novo hearings without consent of both parties, but could accept, reject, or modify the master's proposed findings on both the fact of delinquency and disposition of an adjudicated respondent. A three-judge federal court concluded that this form of review by a juvenile court constituted double

---

168. *Id.* at 2197 n.11.

169. *Id.* at 2197.

170. *Green v. United States*, 355 U.S. 184 (1957).

171. 98 S. Ct. at 2198 (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)).

172. 98 S. Ct. 2699 (1978).

jeopardy and enjoined state officials from taking exception to masters' findings of nondelinquency or disposition. The Supreme Court reversed.

It was clear to the Court that hearings before a master place a juvenile respondent in jeopardy;<sup>173</sup> but the controlling issue, under the rationale of *Arizona v. Washington*,<sup>174</sup> was whether the state procedure allowed the prosecution an additional chance to bolster its case. The Court concluded that it did not. The state had but a single opportunity to make its presentation before a master, and could adduce no additional evidence before a juvenile court unless the defense consented.

The *Swisher* plaintiffs also contended that to place the same matter before both master and judge increased the risk that an innocent respondent might be adjudicated a delinquent. The majority, however, thought that only the judge was an adjudicator under Maryland law, so that there was but one adjudication, not a succession of adjudications. Nor did the Maryland procedure make possible a second trial, barred by *Green*, since the juvenile court reviews only documents without supplementary briefs or arguments and without the presence of the respondent or counsel. And, even if these procedural attributes were present, the Court reasoned that the result would be no different since this would be similar to briefing and arguments following bench trial, not to a second fullblown proceeding. Consequently, if a juvenile court judge pursuant to local rule makes supplementary findings sua sponte, in response to a state motion, or based on a defense exception to the record before the master (or that record as supplemented by evidence to which neither party objects), there is no double jeopardy violation.

### 3. *Right to Counsel*

The problem of representing multiple defendants is not easily solved, but the Court tried. In *Holloway v. Arkansas*,<sup>175</sup> a public defender assigned to represent three defendants in a robbery and rape case indicated to the trial court, before trial, the probability of a conflict of interest. The trial court refused to pursue the question then or later at trial when the possibility of conflict

---

173. In *Breed v. Jones*, 421 U.S. 519 (1975), the Court outlawed adult proceedings after a delinquency adjudication notwithstanding a subsequent finding that respondent was unfit for treatment as a juvenile. As far as attachment of jeopardy is concerned, the issue in *Swisher* was practically indistinguishable.

174. See text accompanying notes 154-56 *supra*.

175. 435 U.S. 475 (1978).

became even more real. Ultimately, counsel was limited to placing each defendant on the witness stand to relate his own story in his own words. The ensuing conviction of all three was affirmed in a state appellate court because the record showed no substantial support for the defendants' claim of conflict of interest. The Supreme Court disagreed.

The *Glasser v. United States*<sup>176</sup> decision is still the controlling law. To allow a single attorney to represent two or more clients does not in itself violate the sixth amendment, since proper representation is possible, and may even be advantageous in many instances. Defendants also can waive a constitutional objection. And, even if a conflict exists, two important procedural issues would normally face a court assessing a sixth amendment claim: What showing must be made to reverse a conviction if counsel failed to raise the possibility of conflict? And what is the extent and nature of a trial court's duty to inquire on its own into possible conflicts? *Holloway* involved neither of these questions, however, because counsel actually advanced the issue. "The judge then failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel."<sup>177</sup>

Counsel might have urged his requests for appointment of other counsel "more vigorously and in greater detail," but "the trial court's responses hardly encouraged pursuit of the separate-counsel claim; and as to presenting the basis for that claim in more detail, defense counsel was confronted with a risk of violating, by more disclosure, his duty of confidentiality to his clients."<sup>178</sup> An attorney representing multiple clients is usually in the best position to know whether there is a conflict; misstatements or other dilatory tactics would place an attorney in danger of sanctions by the court for misconduct. A trial court can explore the adequacy of the basis urged "without improperly requiring disclosure of the confidential communications of the client."<sup>179</sup> The trial court did not do that in *Holloway*.

An additional issue was whether reversal was required in the absence of a showing of actual prejudice. The Court read *Glasser* "as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic."<sup>180</sup>

---

176. 315 U.S. 60 (1942).

177. 435 U.S. at 484.

178. *Id.* at 485.

179. *Id.* at 487.

180. *Id.* at 488.

The right to counsel is basic, to the point that any infringement in a capital case means automatic reversal. That counsel was physically present during the proceeding does not justify a departure from the general rule, since the refusal to appoint separate counsel may well have handicapped counsel in exploring possible plea agreements, including leniency in return for turning prosecution evidence. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."<sup>181</sup> A contrary rule requiring a showing of specific prejudice, the Court reasoned, "would not be susceptible of intelligent, evenhanded application."<sup>182</sup> Some trial records may reveal prejudice, others may not. "Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation."<sup>183</sup> Accordingly, reversal was required. Three dissenting Justices, however, opposed the Court's per se reversal rule, and would have preferred a requirement that a conflict be shown to have "hampered a potentially effective defense."<sup>184</sup>

#### 4. *Jury instructions*

The Court dealt with two rather troublesome standard jury instructions. One was an instruction on a defendant's right of silence delivered over defense objections. The other was an instruction on the presumption of innocence.

*Lakeside v. Oregon*<sup>185</sup> continues unimpaired the Court's precedent that adverse comment on a claim of privilege, whatever the source, impairs privilege, and that no pressure at all can be put on defendants to testify in their own behalf. The defense, however, was wrong in suggesting that an instruction on privilege can never be given over defense objection. Such a position rests on two doubtful propositions; first, that jurors will not have noticed the failure of a defendant to testify and thus will draw no adverse inference from that fact, and second, that the jury will disregard a specific judicial instruction. "Federal constitutional law cannot rest on speculative assumptions so dubious as these."<sup>186</sup> Instructions of this sort are necessary, the Court said, to "flag the jurors' attention to concepts that must not be misun-

---

181. *Id.* at 490.

182. *Id.*

183. *Id.* at 491.

184. *Id.* at 496 (Powell, J., dissenting).

185. 435 U.S. 333 (1978).

186. *Id.* at 340.



derstood, such as reasonable doubt and burden of proof."<sup>187</sup> States can decree otherwise by local rule, but a neutral instruction given over defense objection does not infringe federal constitutional rights.

The failure to accede to a defense objection also does not deny the sixth amendment right to counsel. Counsel does not control otherwise legitimate decisions of a trial court. The right to counsel is important, "[b]ut that right has never been understood to confer upon defense counsel the power to veto the wholly permissible actions of the trial judge. It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial."<sup>188</sup> Thus, the sixth amendment cannot "operate to prevent a court from instructing a jury in the basic constitutional principles that govern the administration of criminal justice."<sup>189</sup>

The Court long ago had held that the presumption of innocence is "axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."<sup>190</sup> In *Taylor v. Kentucky*,<sup>191</sup> a trial court rejected a defense instruction on the presumption and gave no equivalent of its own; its only cognate instruction was on the prosecution burden to prove guilt beyond a reasonable doubt. Taylor's conviction was sustained in the state appellate courts, but the Supreme Court reversed.

Even though the presumption may not be conceptually separate from the prosecution's ultimate burden of persuasion, there has long been agreement that it should be the subject of an independent instruction of law to juries. Due process may not require use of the phrase "presumption of innocence" or of any particular formula, but, the Court said, it does dictate that nothing dilute "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."<sup>192</sup> A presumption-of-innocence instruction "simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial."<sup>193</sup>

On the facts of *Taylor*, the Court held that omission of an instruction on the presumption of innocence violated the defendant's due process rights. Trial court instructions in the case were

---

187. *Id.*

188. *Id.* at 341-42.

189. *Id.* at 342.

190. *Coffin v. United States*, 156 U.S. 432, 453 (1895).

191. 98 S. Ct. 1930 (1978).

192. *Id.* at 1935 (quoting *Estelle v. Williams*, 425 U.S. 501, 503 (1976)).

193. *Id.* at 1935.

"rather Spartan,"<sup>194</sup> and the prosecution's closing argument had tied the defendant to every other convicted defendant and had intimated that every accused person is guilty. Additionally, at other points the prosecutor had invited the jury to consider adversely the defendant's procedural status and to draw adverse inferences from the fact of arrest and indictment. Although the prosecutor's statements were not necessarily reversible error standing alone, they created the need for careful countering instructions, requested by the defense but not given. The Court reasoned that where trial was essentially a swearing match between defendant and complainant, there was real danger that a jury would convict on the basis of Taylor's status as defendant rather than the weight of legal evidence.

The state argued that an instruction on burden of persuasion was sufficient to alleviate the problem. The Court, however, found that the trial court's instruction was no "model of clarity,"<sup>195</sup> using a formula criticized as confusing, though not of itself constituting reversible error. Even if the instruction had been clearer, it could not replace an instruction on the presumption of innocence. Nor did oral argument on the matter, even if correct in content, substitute for an instruction: "It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably."<sup>196</sup>

*Taylor* is offered by the majority as an ad hoc application of due process concepts to peculiar circumstances, and not as a general rule of constitutional procedure. In light of the Court's decision, however, there seems little reason to withhold a properly drawn instruction on the presumption of innocence requested by the defense, if for no other reason than to avoid latent federal constitutional problems.

##### 5. *Jury deliberations*

A trial court must be extremely cautious about conversations with a jury foreperson out of the presence of counsel. During jury deliberations in *United States v. United States Gypsum Co.*,<sup>197</sup> an antitrust case, with the reluctant consent of counsel, the trial judge spoke privately with the jury foreperson to determine the physical condition of the jurors after five months of trial and

---

194. *Id.*

195. *Id.* at 1936.

196. *Id.* at 1937.

197. 98 S. Ct. 2864 (1978).

seven days of sequestered deliberation. In the process, the judge likely conveyed an expectation that the jury would reach a verdict one way or another, and the jury convicted the following day. This, the Supreme Court held, amounted to reversible error.

In effect, the trial judge delivered a modified *Allen* charge<sup>198</sup> without affording counsel an opportunity to counter its impact. "Any *ex parte* meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error."<sup>199</sup> There is no way, the Court reasoned, to be sure of the direction such a conversation will take; unexpected questions can produce "unintended and misleading impressions of the judge's subjective personal views which have no place in his instruction to the jury—all the more so when counsel are not present to challenge the statements."<sup>200</sup> Counsel were led to believe that only the condition of the jury would be discussed, whereas something else was mentioned, suggesting a possibly deadlocked jury in need of clarifying instructions given in the presence of counsel. The error, therefore, was not solely the *ex parte* discussion, as undesirable as that may have been, but also the ensuing consequences. There was a risk that innocent misstatements or misinterpretations of legal points occurred when the foreperson reported the conversations with the court to the entire panel, and there was no way to determine later what was said at that time. The foreperson could have understood the judge to be insisting on a verdict, which would have been reversible error if stated in an instruction. Hence, the Court concluded, it amounted to reversal grounds in this setting as well.

#### D. Sentencing and Punishment

##### 1. Probation conditions

In *Durst v. United States*,<sup>201</sup> the Court held that the payment of fines and restitution may properly be a condition of probation under the Federal Youth Corrections Act.<sup>202</sup> The decision turns on an interpretation of the special legislation in light of the general federal probation statute,<sup>203</sup> but the analysis clearly accepts the

---

198. See *Allen v. United States*, 164 U.S. 492 (1896); AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 5.4 and commentary at 149-56 (Approved Draft, 1968).

199. 98 S. Ct. at 2885.

200. *Id.*

201. 434 U.S. 542 (1978).

202. 18 U.S.C. § 5010(a) (1976).

203. 18 U.S.C. §§ 3651-3656 (1976).

underlying constitutionality of such sanctions. Fines imposed as a condition of probation are not necessarily punitive rather than rehabilitative; they avoid "the harsh treatment of incarceration, while assuring that the offender accepts responsibility for his transgression."<sup>204</sup>

## 2. *Capital punishment*

In two related cases,<sup>205</sup> the Court (eight Justices sitting) invalidated Ohio's death penalty statute because it severely limited the mitigating factors used in determining whether to impose the ultimate sanction. The defendant in *Lockett v. Ohio*<sup>206</sup> was convicted as an accomplice to a felony murder based on armed robbery; there was evidence suggesting either that she did not know violence was to be used, or that she did not know a crime was contemplated. Ohio law allowed consideration of only three mitigating factors: (1) inducement or facilitation of the crime by a victim; (2) duress, coercion, or strong provocation without which commission of the offense would have been unlikely; and (3) psychosis or mental deficiency of which the defendant's act was the primary product. Presentence information did not trigger any of these in Lockett's case, but other elements present might well have made a difference.

The plurality opinion by the Chief Justice drew from the Court's principal 1976 decisions<sup>207</sup> a holding by six Justices that statutes must allow for an unlimited range of mitigating circumstances. Justice Marshall concurred in the judgment because, to him, the capital penalty under any circumstances violates the eighth amendment. Justice Blackmun was concerned about imposing the death penalty without consideration of the defendant's mens rea and extent of involvement where vicarious liability principles are used.<sup>208</sup> Mens rea was also the principal concern of Justice White, who preferred "a finding that the defendant engaged in conduct with the conscious purpose of producing death"<sup>209</sup> before the capital penalty could be exacted. Only Justice Rehnquist would have sustained the statute because of his view that the fairness of the proceeding imposing a death penalty is the only issue of constitutional dimension. A similar division

---

204. 434 U.S. at 554 (quoting the unpublished district court opinion).

205. *Bell v. Ohio*, 98 S. Ct. 2977 (1978); *Lockett v. Ohio*, 98 S. Ct. 2954 (1978).

206. 98 S. Ct. 2954 (1978).

207. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

208. See MODEL PENAL CODE § 2.06 (Proposed Official Draft, 1962).

209. 98 S. Ct. at 2985 (White, J., dissenting in part).

in analysis governs *Bell v. Ohio*,<sup>210</sup> the other challenge to the Ohio statute last Term.

One can but hope that a majority rationale will soon emerge to guide state legislatures, since there is much to support Justice White's belief that the plurality rationale so undercuts the probable theoretical underpinnings of the 1976 decisions that the death penalty will be as erratically imposed, when defense counsel have unlimited freedom to submit possibly mitigating data, as it was before *Furman v. Georgia*.<sup>211</sup>

### 3. *Sentencing in noncapital cases*

In sentencing decisions, federal trial courts may take account of perjury committed by defendants during trial. In *United States v. Grayson*<sup>212</sup> the trial judge candidly admitted considering defendant's perjury, which he thought had been amply demonstrated at trial; the court of appeals reversed for that reason. The Supreme Court reversed again, agreeing with the majority position among federal courts of appeal that perjury is a legitimate factor bearing on the sentencing process.

The Court surveyed penal theory and concluded that aggravating and mitigating factors bearing on an offense as such, and not exclusively on rehabilitation, may be taken account of in sentencing. Although presentence reports are important in providing background information for sentencing courts, both the Court and Congress<sup>213</sup> have confirmed that sentencing courts can consider information not in a presentence report. "A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing."<sup>214</sup> One circuit had indicated that defendants are under such pressure to lie on their own behalf that the fact should not be held against them, but the Court found this to be "a deterministic view of human conduct that is inconsistent with the underlying precepts of our criminal justice system."<sup>215</sup>

Grayson argued that to consider perjury in this way amounted to punishment without charge, trial, and conviction; but the reasons advanced in support of that argument were insuf-

---

210. 98 S. Ct. 2977 (1978).

211. 408 U.S. 238 (1972).

212. 98 S. Ct. 2610 (1978).

213. See 18 U.S.C. § 3577 (1976).

214. 98 S. Ct. at 2616.

215. *Id.* at 2617.

ficient to displace what the Court and Congress had previously approved. Sentencing courts may consider all aspects of a defendant's character and life, as illustrated by *Williams v. New York*,<sup>216</sup> in which the sentencing court was permitted to consider burglaries for which the defendant had not been formally charged. Moreover, the Court reasoned, a contrary rule simply would produce a lack of candor in judicial statements about factors used in support of sentence determinations, and thus would be unenforceable.

The Court also rejected Grayson's premise that defendants will not take the stand if they fear their testimony ultimately will be used to justify a more severe sentence. The witness oath, the Court countered, is not a meaningless ritual, and "[t]here is no protected right to commit perjury."<sup>217</sup> Moreover, *Grayson* does not allow "a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false."<sup>218</sup> Instead, a trial court must evaluate whether a defendant's testimony indeed contained "willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society."<sup>219</sup>

#### 4. Prisoner detainees

The issue of whether, by issuing writs of habeas corpus *ad prosequendum* to bring state prisoners to federal court, federal judges trigger the time for trial required under the Interstate Agreement on Detainers has troubled federal courts. The Court held in *United States v. Mauro*<sup>220</sup> that such a writ, standing alone, does not qualify as a detainer, but that if a true detainer has already been filed the writ constitutes a "written request for temporary custody" of the prisoner which requires commencement of federal trial within 120 days.

The Court held that the United States is bound by the agreement as both a sending and a receiving jurisdiction, and not simply as a sending entity when states request custody of federal prisoners. But analysis of habeas corpus *ad prosequendum* shows that it does not resemble a detainer. A detainer indicates only

---

216. 337 U.S. 241 (1949).

217. 98 S. Ct. at 2618.

218. *Id.*

219. *Id.*

220. 98 S. Ct. 1834 (1978).

that a prisoner ultimately is wanted; it has the practical impact of interfering with participation in rehabilitation programs and delaying parole consideration. For these reasons the agreement stresses prompt disposition of charges through transfer for trial. A writ of habeas corpus, in contrast, requires swift compliance and produces none of the adverse consequences wrought by a detainer. Consequently, it is not a detainer within the agreement, and the trial court improperly dismissed the pending federal prosecution of Mauro when he was returned to state custody before federal trial.

In a case heard concurrently with *Mauro* in which a detainer had been filed, however, a contrary result was indicated. There, a federal writ would alleviate none of the adverse impact of a previously filed detainer, so speedy disposition of the pending federal case was required. Any interpretation of the agreement permitting return of a prisoner without prompt trial as defined in the agreement "would allow the Government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action."<sup>221</sup> A prisoner does not have to spell out the details of a failure to comply; an objection to delayed trial after receipt of a detainer is enough.

##### 5. *Prison conditions*

The Court this past Term in effect approved federal court intervention in the operation of a state prison system if conditions are sufficiently oppressive. In *Hutto v. Finney*<sup>222</sup> the state appealed a lower federal court ruling that disciplinary segregation for more than thirty days under then-existing prison conditions constituted cruel and unusual punishment. The Supreme Court affirmed. The district court did not hold that such a limitation applies under all conditions, nor did the Supreme Court. Isolation for the duration of sentence might not be objectionable if "new conditions of confinement are not materially different from those affecting other prisoners."<sup>223</sup> Conversely, a "filthy, overcrowded cell and a diet of 'grue'<sup>224</sup> might be tolerable for a few days and intolerably cruel for weeks or months."<sup>225</sup> Length of confinement,

---

221. *United States v. Ford*, 98 S. Ct. 1834, 1849 (1978).

222. 98 S. Ct. 2565 (1978)

223. *Id.* at 2572.

224. Grue is "a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan." *Id.* at 2570.

225. *Id.* at 2572.

the Court wrote, is but one of many factors properly considered by a trial court in fashioning an order. The detailed order in Finney's case was appropriate, however, in light of the state's history of ignoring nonspecific federal mandates.

The matter of media access to jails and prisons is discussed below.<sup>226</sup>

### E. Remedies

#### 1. Interlocutory appeal

The Court has previously allowed interlocutory appeals in federal prosecutions, notably in instances of denial of bail reduction<sup>227</sup> and rejection of a claim of double jeopardy.<sup>228</sup> In both situations, trial would have produced the very evil the constitutional right at issue was designed to forestall. But in *United States v. McDonald*<sup>229</sup> the Court refused to lengthen that list by adding claimed denials of the right to a speedy trial.

McDonald, while in military service, was investigated in connection with the murders of his wife and children. Some months later, after no military charges had been filed, he was honorably discharged. Nevertheless, the investigation continued for another four years and nearly five years after the commission of the crimes a federal grand jury indicted McDonald. He moved to dismiss on combined grounds of double jeopardy and delayed institution of proceedings which violated his due process rights under *United States v. Marion*.<sup>230</sup> The district court rejected the claim on the merits but the court of appeals reversed. The Supreme Court reversed, holding that the court of appeals lacked jurisdiction to entertain an interlocutory appeal.

In contrast to the earlier contexts in which interlocutory appeal had been allowed the Court reasoned that whether delay has in fact prejudiced a defendant cannot be determined until after trial under the constitutional balancing test of *Barker v. Wingo*.<sup>231</sup> Although dismissal of prosecution is the only sanction which can be invoked under the sixth amendment,<sup>232</sup> this does not mean that an interlocutory appeal must be granted.

Moreover, the Court wrote, to allow such appeals itself im-

---

226. See text accompanying notes 278-86 *infra*.

227. *Stack v. Boyle*, 342 U.S. 1 (1951).

228. *Abney v. United States*, 431 U.S. 651 (1977).

229. 435 U.S. 850 (1978).

230. 404 U.S. 307 (1971); see also *United States v. Lovasco*, 431 U.S. 783 (1977).

231. 407 U.S. 514 (1972).

232. *Strunk v. United States*, 412 U.S. 434 (1973).



perils the objectives of the sixth amendment since (even though a defendant might wish to delay trial through appeal) the prosecution may be unable to prove its case later, costs increase through maintaining defendants in pretrial detention, and provisionally released defendants can commit other crimes. Finally, no showing is required of a defendant when submitting a claim of delayed proceedings, as there is in the case of a claim of double jeopardy; accordingly, any defendant could advance such a claim and tie up proceedings for a considerable time by taking an appeal against denial of the motion. Thus, the Court held, no federal appellate court can entertain an interim appeal based on a trial court determination of a speedy trial objection. State courts naturally are free to shape their own jurisprudence on the matter as they desire.

## 2. *Federal habeas corpus*<sup>233</sup>

In deciding whether a state prisoner has exhausted state remedies, a federal district court cannot rely on the failure of a state appellate court to refer to the matter in its opinion.<sup>234</sup> If the prisoner has indeed advanced in the state proceeding the federal constitutional grounds renewed in the federal habeas corpus proceeding and the state has answered, the exhaustion of remedies requirement<sup>235</sup> has been complied with whether or not the state appeals court elects to treat the legal issue in its opinion.

Federal habeas corpus is purely civil in character, and is governed by the Federal Rules of Appellate Procedure. In *Browder v. Director, Illinois Department of Corrections*<sup>236</sup> a federal district court granted habeas corpus to a state prisoner, but the state waited twenty-eight days to request a stay of the order on the ground the court should not have entered it. A stay was allowed and the trial court confirmed its order as proper. The state then appealed and received a favorable judgment despite the habeas corpus petitioner's contention that there was no appellate jurisdiction under the federal rules. Specifically, Browder urged that the state's notice of appeal was not filed within thirty days after entry of judgment as required in civil cases,<sup>237</sup> and that the period was not tolled during the ensuing proceedings because

---

233. The function of habeas corpus *ad prosequendum* under the Interstate Agreement on Detainers has been discussed in text accompanying notes 220-21 *supra*.

234. *Smith v. Digmon*, 434 U.S. 332 (1978).

235. Embodied in 28 U.S.C. § 2254(b) (1976).

236. 434 U.S. 257 (1978).

237. 28 U.S.C. § 2107 (1976); FED. R. APP. P. 4(a).

the state's motion for rehearing was not submitted within ten days of the habeas corpus order.<sup>238</sup> The state argued that the details of federal civil rules practice do not govern habeas corpus, but rather federal habeas corpus legislation, which contains no time limitations, alone controls. The Supreme Court confirmed Browder's position as the correct one.

The thirty-day period under the federal appellate rules is, the Court wrote, "mandatory and jurisdictional."<sup>239</sup> Therefore, the notice of appeal was untimely unless a state motion for a stay was submitted promptly enough to toll the appeal period. The habeas corpus order was a final one, however, and its finality was not affected by the fact that its enforcement remained to be accomplished. Even assuming the district court erred in issuing the writ, error is not the same as nonfinality; thus, any motion submitted under the civil rules should have been lodged within ten days. Since the federal habeas corpus statute is silent on matters of procedure, writ practice, being civil in nature, is governed by regular civil rules unless their invocation impedes rather than promotes the purposes of the extraordinary writ. Because speed of habeas corpus is vital, as is finality, the civil rules periods support rather than defeat the objectives of the statutory remedy. Accordingly, the Court held, because the state did not meet the jurisdictional and mandatory time limits, the appeal should have been dismissed on jurisdictional grounds.

### 3. *Section 1983<sup>240</sup> federal civil rights proceedings*

During the 1976-1977 Term, the Court's decisions served to constrict the availability of relief under the original Federal Civil Rights Act.<sup>241</sup> Last Term its decisions were somewhat a mixed bag, although in certain aspects the scope of relief was augmented.

It is most difficult to bring a state judicial officer within the scope of the federal legislation, as *Stump v. Sparkman*<sup>242</sup> demonstrates. There, a mother had petitioned a judge of a general jurisdiction court to authorize the tubal ligation of a "somewhat re-

---

238. The state had not been specific whether it relied on FED. R. CIV. P. 52(b) (motion to amend or enter additional findings), 59(a), (b) (motion for new trial), or 59(e) (motion to alter or amend judgment).

239. 434 U.S. at 264.

240. 42 U.S.C. § 1983 (1976).

241. See George, *Criminal Law: Foreword—Doctrinal Doldrums: The Supreme Court 1976 Term Criminal Law Decisions*, 68 J. CRIM. L. & CRIMINOLOGY 469, 485-86 (1977).

242. 435 U.S. 349 (1978).

tarded" daughter who, she claimed, was sexually delinquent. She had also stipulated to hold harmless the doctor and hospital involved in the operation. The judge, acting in his official capacity, subsequently approved the petition and signed the order without conducting a hearing. The daughter was told she was to have her appendix removed. When two years later she married and failed to conceive she discovered she had been sterilized and sued the judge and other officials involved under the federal statute. The trial court dismissed the complaint because the judge was immune to claims of federal liability and the acts of all other defendants were derivative from his action. The court of appeals reversed on the basis that the trial judge had exceeded his jurisdiction in entering the order and had forfeited immunity because of his failure to accord the present plaintiff procedural due process. The Supreme Court reversed.

The leading judicial immunity case<sup>243</sup> is still controlling in its grant of immunity to judges unless there is a "clear absence of all jurisdiction."<sup>244</sup> The Court held there was not that clear lack under state law in *Sparkman*; nothing specifically prohibited the exercise of the powers invoked by Judge Stump. Moreover, a failure to follow procedural requirements, even at the due process level, does not eliminate judicial immunity. Only if a judge discharges a nonjudicial function can immunity be lost. A function is judicial if "it is a function normally performed by a judge" and the parties "dealt with the judge in his judicial capacity."<sup>245</sup> That was clearly so in *Sparkman*. Informality of procedure, including a want of docket number and the like, does not render a matter nonjudicial within such a definition. Nor does tragedy of consequences produce that result, because the purpose of the immunity doctrine is to safeguard the ability of judges to function free from the threat of litigation. Thus, the Court reasoned, the trial court disposition of the matter was correct.

In *Procunier v. Navarette*,<sup>246</sup> however, the Court confirmed its position that officials other than judges are protected by only a qualified immunity: immunity does not lie if an official knew or reasonably should have known that an activity would violate the constitutional right at issue, or if an official acted with a

---

243. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).

244. *Stump v. Sparkman*, 435 U.S. at 357 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)). A like immunity protects administrative adjudicators. *Butz v. Economou*, 98 S. Ct. 2894 (1978).

245. 435 U.S. at 362.

246. 434 U.S. 555 (1978).

"malicious intention" to bring about a deprivation of known constitutional rights or other injury. *Navarette* involved prison administrators as federal defendants, but the scope of immunity had already been established in instances of a state governor,<sup>247</sup> school officials,<sup>248</sup> a mental hospital superintendent,<sup>249</sup> and police.<sup>250</sup> On the facts of *Navarette*, there was no clear establishment of the claimed constitutional right at the time the litigation began, the right having been established by the Supreme Court in litigation subsequent to the initiation of the lawsuit.<sup>251</sup> Consequently, there was no intentional or negligent violation of constitutional rights since defendants "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared."<sup>252</sup>

*Monell v. New York City Department of Social Services*<sup>253</sup> overruled the Court's earlier holding that municipalities are totally immune from Civil Rights Act suits,<sup>254</sup> holding that such governmental units are liable for "action pursuant to official municipal policy of some nature [that] caused a constitutional tort."<sup>255</sup> They cannot, however, be held liable under a respondeat superior theory simply because they employ tortfeasors; such a broad extension, in the Court's view, would bring about results the legislative history of the Civil Rights Act indicates Congress intended to avoid. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible . . . ."<sup>256</sup>

In *Alabama v. Pugh*,<sup>257</sup> however, the Court held that the eleventh amendment prevents suit against a state government or one of its state-level departments unless the state consents. The Alabama State Constitution forbade such a consent, and there-

---

247. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

248. *Wood v. Strickland*, 420 U.S. 308 (1975).

249. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

250. *Pierson v. Ray*, 386 U.S. 547 (1967).

251. The violation alleged in *Navarette* was improper interference with prisoners' outgoing correspondence which occurred before the Supreme Court had established a constitutional right to be free from such interference in *Procunier v. Martinez*, 416 U.S. 396 (1974).

252. *Procunier v. Navarette*, 434 U.S. at 565.

253. 98 S. Ct. 2018 (1978).

254. *Monroe v. Pape*, 365 U.S. 167 (1961).

255. 98 S. Ct. at 2036.

256. *Id.* at 2038.

257. 98 S. Ct. 3057 (1978).

fore the case was remanded with orders to dismiss the state and its department of corrections from the proceedings. The doctrine has the nature of a jurisdictional bar which need not be asserted in a trial court.<sup>258</sup>

*Carey v. Phipus*<sup>259</sup> teaches that a Federal Civil Rights Act plaintiff must prove actual injury caused by the denial of procedural due process or recover only the nominal sum of one dollar. The purpose of section 1983 is "to compensate persons for injuries caused by the deprivation of constitutional rights."<sup>260</sup> If a constitutional right parallels a tort claim the same damage rules govern, but otherwise a plaintiff must establish a measure for damages. In *Piphus*, students who had been suspended from school without administrative due process would have to prove actual emotional distress and its effect on them before compensatory damages could be awarded. Absent such proof only nominal damages were available; punitive damages were not merited since the lower court specifically found a lack of malicious intent on the part of the school board. The Court left open the question of whether punitive damages might be awarded to deter intentional deprivations of rights, since none was alleged in *Piphus*.<sup>261</sup>

Within limits, whether a Civil Rights Act proceeding survives the death of a plaintiff is determined by the law of the state in which the action complained of occurred. In *Robertson v. Wegmann*<sup>262</sup> the plaintiff died without leaving an heir qualified under Louisiana law to continue the action. His executor sought to pursue the federal action on the ground that federal common law governed the survival of actions; the lower federal courts agreed but the Supreme Court reversed.

The Civil Rights Act itself recognizes that if statutory language does not cover a matter, federal courts turn to "the common law, as modified and changed by the constitution and statutes of the [forum] State,"<sup>263</sup> if not inconsistent with the Constitution and laws of the United States. Federal law generally does not cover survival of actions, although state law does. Nothing in the Louisiana survivorship statutes in any way conflicted with the achievement of the basic purposes of section 1983. Since spouses, children, parents, and siblings could continue an action,

---

258. *Id.* at 3058 n.1.

259. 435 U.S. 247 (1978).

260. *Id.* at 254.

261. *Id.* at 257 n.11.

262. 98 S. Ct. 1991 (1978).

263. 42 U.S.C. § 1988 (1976).

denying a decedent's estate the right to do so was not unreasonable. Nothing in the federal law appears to require compensation of an estate as such, and the possibility of abatement of a federal civil rights action is unlikely to affect the conduct of state officials aware that unconstitutional conduct invites federal suit. The Court considered only the validity of Louisiana law; it did not resolve the issue presented by a state system allowing survival only for sharply limited classes of actions or recognizing no survival at all. The Court also reserved comment on the situation in which death itself resulted from a deprivation of federal civil rights. The fact that abatement can occur, however, is not a sufficient ground to find inconsistency with federal law. The three dissenters, in contrast, agreed with the lower courts and suggested the need for remedial federal legislation.

*Hutto v. Finney*<sup>264</sup> dealt significantly with recovery of counsel fees in civil rights actions. The Court had held in 1975 that, as a general rule, counsel fees could not be awarded under then-existing legislation, with the possible exception of cases involving bad faith on the part of defendants.<sup>265</sup> In *Finney* state officials objected to the award of \$20,000 in counsel fees but the Court sustained the award. The Court felt that bad faith on the part of state officials was evident throughout the litigation, and the district court clearly intended the fee award to be a sanction not unlike a remedial fine for civil contempt. That being so, the indication that the state department of corrections was to pay the fee did not render the order invalid, even though the order probably should not have contained that language.<sup>266</sup>

The state also objected to a further award by the court of appeals of \$2,500 to cover the costs and expenses of appeal, arguing that such awards would violate the eleventh amendment unless the Civil Rights Attorney's Fee Award Act of 1975<sup>267</sup> was specifically applicable to states as defendants. The Court disagreed. Inclusion of attorney's fees within costs is a matter of substantial history, so that "[i]t is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity."<sup>268</sup> The legislative purpose to

---

264. 98 S. Ct. 2565 (1978) (also discussed in text accompanying notes 222-25 *supra*).

265. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 258-59 (1975).

266. See *Alabama v. Pugh*, 98 S. Ct. 3057 (1978) (discussed in text accompanying notes 257-58 *supra*).

267. 42 U.S.C. § 1988 (1976) (enacted to overcome *Alyeska Pipeline*).

268. 98 S. Ct. at 2577-78.

allow this form of costs against defendants was clear.

The fact that neither the state nor the department of corrections was expressly named as a defendant was also undeterminative. An action for injunctive relief against named prison officials was in effect an action against the state itself and was treated by the latter as such, since the state attorney general defended the original action and lodged the appeal. The state attorney general could not argue that the individual defendants should bear the liability personally and then look to the state for whatever relief they could obtain. Finally, the Court reasoned, the named litigants were not responsible for the bad faith litigation in the federal court of appeals and thus the state should bear directly the burden of the award.

#### F. *The Police*

The Court rendered two decisions that impact on law enforcement officers as such, but not in the context of criminal procedural responsibilities. In *Commissioner v. Kowalski*<sup>269</sup> state police objected to inclusion by the IRS of meal allowances given to troopers as taxable income. The state police had abandoned the system of having troopers report to meal stations because it took them from patrol for too long a time. Therefore, the state legislature provided an annual meal allowance increased according to rank; troopers could eat anywhere they chose, including their homes if nearby, or carry their own meals with them on patrol. The Tax Court ruled that the meal allowance was income and not within the concept of meals furnished for an employer's convenience.<sup>270</sup> The Third Circuit reversed on the basis of an earlier decision that meal allowances were not taxable income. The Supreme Court agreed with the Tax Court's position.

Unless payments fall within a specific statutory exemption they must be viewed as income under the broad statutory definition of that term. The Court wrote that preenactment materials indicate clearly that the exemption of meals furnished for the convenience of the employer was not intended to cover cash payments of any kind, and Congress has never excluded from income cash allowances of any sort. The specific exemption in the Internal Revenue Code for military subsistence allowances cre-

---

269. 434 U.S. 77 (1977).

270. While I.R.C. § 119 provides that meals furnished for the convenience of the employer are exempt from taxation, the Tax Court held the patrolman's meal allowance to be income under the general rule of I.R.C. § 61(a).

ates no inequity to be removed through judicial construction of the statute. Congress had already rejected the state troopers' premise by repealing an earlier provision<sup>271</sup> that had allowed troopers to exclude subsistence allowances of up to five dollars per day. This was intended to take from them an advantage other taxpayers did not enjoy. The dissenters disagreed with the majority interpretation, noting that "state troopers the country over, not handsomely paid to begin with, will never understand today's decision."<sup>272</sup> In September 1978 Congress was considering overturning *Kowalski* by statutory amendment.<sup>273</sup>

In *Foley v. Connelie*<sup>274</sup> the Court ruled that states may consistently with equal protection exclude aliens from consideration for police employment. "The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens."<sup>275</sup> Police have substantial discretion to regulate citizen conduct, arrest, detain, search, and seize; this "calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals."<sup>276</sup> "In short, it would be as anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens."<sup>277</sup> Thus, in this instance citizenship bears a rational relationship to the special demands of the particular employment, and therefore the classification does not violate the dictates of equal protection.

## II. SUBSTANTIVE CRIMINAL LAW

### A. First Amendment Concerns

Attention has been given above to the first amendment implications of *Zurcher v. Stanford Daily*,<sup>278</sup> which has generated a wave of protest on the part of the communications industry. By

---

271. Int. Rev. Code of 1954, ch. 736, § 120, 68A Stat. 39 (repealed 1958).

272. 434 U.S. at 98 (Blackmun, J., dissenting).

273. See H.R. 13205, 95th Cong., 2d Sess. (1978). In *Massachusetts v. United States*, 435 U.S. 444 (1978), the Court refused to exempt state-owned police aircraft from the registration fee imposed on all private and civil governmental aircraft. User fees do not violate an implied immunity of state government against federal taxation.

274. 435 U.S. 291 (1978).

275. *Id.* at 297.

276. *Id.* at 298.

277. *Id.* at 299.

278. 98 S. Ct. 1970 (1978) (discussed in text accompanying notes 38-42 *supra*).



midyear 1978 several bills had been introduced in Congress to repudiate the holding, at least as far as premises owned by media corporations are concerned.<sup>279</sup> But, although *Zurcher* captured headlines, other decisions last Term also significantly delineated the interrelationships between the justice system and the media under the first amendment.

In *Houchins v. KQED, Inc.*<sup>280</sup> the Court dealt with the issue of press and public access to possibly substandard jail facilities—a question left undetermined by the Court's 1974 decisions denying a claimed right by reporters to interview prisoners of their choice.<sup>281</sup> *KQED* is difficult to analyze in terms of rationale and future impact, because two Justices did not sit, and the remaining members of the Court divided three-one-three.

The litigation arose when the radio station, joined by civil rights groups, sought access to parts of a local detention facility in which rapes and suicides reportedly had occurred. The defendant sheriff responded by instituting monthly tours by not more than twenty-five citizens. The tours involved neither interviews with nor observations of prisoners and apparently did not extend to the areas where the incidents allegedly had occurred. *KQED* and other media representatives went on the initial tour, but insisted on greater rights of access. A federal district court preliminarily enjoined the sheriff from denying news personnel access to all parts of the facility at reasonable times and hours and from preventing use of photographic and sound equipment to record conditions; it found no invasion of resident privacy in such an order. The court of appeals affirmed.

Four Justices voted to vacate the order as too broad. Chief Justice Burger's plurality opinion concluded that, absent a legislative determination to the contrary, "the media has no right, special [*sic*] of access to [a detention facility] different from or greater than that accorded the public generally."<sup>282</sup> To this group of Justices, the press is "not a substitute for or an adjunct of government,"<sup>283</sup> and is ill equipped, like the courts, to cope with problems of prison administration. Every jurisdiction has some public body with authority to inquire into prison and jail condi-

---

279. See, e.g., H.R. 12952, H.R. 13145, H.R. 13169, 95th Cong., 2d Sess. (1978). One may assume that such legislation, if enacted, would affect only federal proceedings.

280. 98 S. Ct. 2588 (1978).

281. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

282. 98 S. Ct. at 2597.

283. *Id.* at 2594.

tions and publish reports which become available to press and public. Moreover, in the Chief Justice's view, there is nothing to indicate that press investigations are more likely to uncover public malfeasance than official bodies; if anything, the latter are under more public pressure to report improper conditions than are private institutions like the media.

Thus, the media are relegated by the plurality to the same sources of information as members of the public. Officials cannot prevent correspondence with prisoners, conversations with legal representatives of inmates, and interviews with former inmates, visitors, and officials of many kinds. Otherwise, the first amendment mandates no right of access to government information or sources of information within public control.

Justice Stewart concurred in the judgment, but seems closer in philosophy to the three Justices who wished to affirm the lower court action. Thus, his rationale may be closest to a position which four of the seven sitting Justices might accept. He agreed with the Burger premise that

[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.<sup>284</sup>

To Justice Stewart, however, "equal access" requires differentiation between the media and the public, particularly, more ample access to facilities than participation in a brief monthly tour would afford. Therefore, the portion of the district court order requiring the sheriff to provide media access at reasonable hours and times was "both sanctioned by the Constitution and amply supported by the record."<sup>285</sup> But the order was too broad in allowing media access to portions of the jail not open to the public and permitting random interviews initiated by reporters. After reversal, Justice Stewart would have left it open to the trial court to "accommodate equitably the constitutional role of the press and the institutional requirements of the jail."<sup>286</sup>

The three dissenting Justices would have sustained the disposition below because it would have eliminated the broad restraint on access to information about jail operations that both

---

284. *Id.* at 2598 (Stewart, J., concurring).

285. *Id.* at 2599.

286. *Id.*

public and press ought to have had. In the dissent's view, media access would have ended the obvious policy of concealment the sheriff was invoking and would have opened to public view an aspect of governmental operations affecting the liberty of both convicts and preconviction detainees presumed to be innocent. Whether a majority of the full Court, including Justices Blackmun and Marshall, considering a similar factual situation would rest with Chief Justice Burger or Justice Stevens is a matter of speculation, as is the true holding of *KQED*. Meanwhile, prison authorities are under no particular inducement to facilitate investigative reporting on conditions within their institutions, although many state systems are much more open now to media access than was true a decade ago.

According to *Nixon v. Warner Communications, Inc.*,<sup>287</sup> even evidence forming a part of court records is not available to either the public or the press under all circumstances. There, a private corporation sought, for broadcast and commercial sale, copies of tapes introduced in evidence at the Watergate trials. During the Watergate trials themselves, Judge Gesell had ruled that, while a common law privilege of access to judicial records applied, there could be no copying until criminal trials had been completed and procedures to avoid overcommercialization submitted for judicial approval. After criminal proceedings were completed the subsidiary litigation reverted to Judge Sirica, who refused to grant immediate access because the convicted Watergate defendants might be prejudiced during appeal. He also thought the Presidential Recordings and Materials Preservation Act<sup>288</sup> forestalled a need for immediate release because of the administrative procedures it embodied. The court of appeals reversed because it found the mere possibility of prejudice to the rights of the Watergate defendants in the event of retrial insufficient to outweigh the common law privilege of access. The Supreme Court reversed in turn.

The Court recognized a "general right to inspect and copy public records and documents, including judicial records and documents."<sup>289</sup> The right does not turn on a proprietary interest in the documents or a need to use them in litigation, but can reflect a watchdog function. But, the Court reasoned, such a claim is not absolute, and any court can control access to records sought for an improper purpose such as promotion of public or

---

287. 435 U.S. 589 (1978).

288. 44 U.S.C. §§ 2107 note, 3315-3324 (Supp. V 1975)).

289. 435 U.S. at 597-99.

private scandal, dissemination of libelous statements, and release of business information of value to competitors.

The ex-President asserted a proprietary interest in the material and an infringement of privacy if the records were released. He also argued the confidentiality of the records based on the Court's 1974 *Nixon* decision on the Watergate tapes,<sup>290</sup> as well as the impropriety, granted the marginal addition to public knowledge which marketing would accomplish, of commercializing the tapes through private release. The Court, however, refused to engage in any balancing of interests because the Presidential Recordings Act, already sustained as valid,<sup>291</sup> had set forth an administrative procedure to determine release of such materials. The existence of this alternative mode of release resolved the litigation in the *Warner Communications* setting.

Warner Communications also urged that the first amendment required release. But the Court held only that there is a "right of the press to publish accurately information contained in court records open to the public,"<sup>292</sup> a premise also prominent in the plurality opinion in *KQED. Warner Communications* did not involve that form of public record, but rather copies of tapes to which the public had never been given direct access. The first amendment "generally grants the press no right to information about a trial superior to that of the general public."<sup>293</sup>

Nor, in the Court's view, did the right to a public trial govern. There is no right to have trial proceedings recorded and broadcast, and the sixth amendment confers no special rights on the press. Public trial rights are satisfied if members of the public and press alike are given an opportunity to attend trials and report what they observe.

Once a communications enterprise gains access to information about governmental operations, however, it cannot be punished for disseminating it. So held the Court in *Landmark Communications, Inc. v. Virginia*.<sup>294</sup> Virginia law made it a misdemeanor to divulge information about proceedings before a state judicial review commission inquiring into judicial misconduct. The defendant newspaper discovered the nature of an inquiry, including the name of a judge under investigation, and published

---

290. *United States v. Nixon*, 418 U.S. 683 (1974).

291. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977).

292. *Nixon v. Warner Communications, Inc.*, 435 U.S. at 609 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)).

293. *Id.*

294. 435 U.S. 829 (1978).

the information accurately. It was found guilty despite a claim of first amendment protection. The state supreme court affirmed. The state court reasoned that since punishment had occurred after publication rather than before there had been no prior restraint. The proper standard was the clear and present danger test, which the state court found to have been satisfied because of the policies of protecting a judge's reputation during initial investigation, maintaining public confidence in the state's judicial system, and safeguarding complainants and witnesses against recrimination. Furthermore, the state court reasoned that the enactment of the statute amounted to a legislative declaration that divulgence of commission proceedings constituted a clear and present danger to the administration of justice. The Supreme Court reversed.

The Court recognized that reliance on judicial tenure and disciplinary commissions is almost universal among the states. Confidentiality is important to commission effectiveness, in that it encourages complaint filing and protects judges and the judiciary as an institution from publication of charges that may prove unfounded. Confidentiality also facilitates the work of a judicial commission by encouraging retirement or resignation of respondent judges without a formal hearing, and by enabling minor matters to be corrected without formal proceedings. However, only Virginia and Hawaii among the forty-nine jurisdictions with such a procedure impose criminal penalties for disclosure of information obtained by a judicial commission.

*Landmark Communications* did not present the issue of criminality of someone who obtains information unlawfully and then publishes it. It also involved no claim of a media right of access<sup>295</sup> or of prior restraint. The newspaper, however, argued that truthful reporting about public officials in connection with official duties is always insulated from criminal sanctions. The Court did not find it necessary to endorse that sweeping general contention, but did find the paper's interest in publication so close to the "core of the First Amendment"<sup>296</sup> that nothing the state advanced as a protected interest outweighed it.

The first amendment was intended to protect free discussion of public affairs; judges and courts are not exempt from such scrutiny. There was, therefore, a legitimate public interest in the

---

295. Any claim to a media right of access was effectively foreclosed later in the Term in *Warner Communications* and *KQED*, discussed at notes 280-93 *supra*.

296. 435 U.S. at 838.

proceedings of the state judicial inquiry commission. The state advanced nothing to justify the use of criminal penalties under such circumstances, particularly in light of the fact that so many other jurisdictions have found it unnecessary to do so. Accordingly, the need to preserve the confidentiality of an inquiry system cannot legitimate infliction of criminal punishment after the fact of publication.

The Court also questioned whether the clear and present danger test applied in such a context; certainly, it had no mechanical application. A legislative declaration that a clear and present danger exists does not resolve the matter.<sup>297</sup> The state court should have gone behind the legislative statement; had it done so, the Court stated, it would have found nothing which could constitute *Landmark Communications*' publication a clear and present danger.

In short, in the Court's thinking, investigative reporting remains an element of free enterprise. Official barriers cannot be imposed against investigating in the general community, as *KQED* indicates. Lawbreaking media representatives are no more insulated from sanctions than other members of the public, or so *Landmark Communications* appears to intimate. However, if the public has access to something, so does the press. Media representatives cannot claim the affirmative support of government to acquire information unavailable to the public generally, and, as *Zurcher* holds, neither can they resist lawful judicial process for designated evidence. Thus, government and media organizations are not peers and are not to be made so through invocation of the first amendment. In short, the Term's decisions confirm Chief Justice Burger's notation that the media indeed "are not a substitute for or an adjunct of government."<sup>298</sup> Whether they should be is a matter open to debate.

---

297. Chief Justice Burger wrote:

A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

*Id.* at 844.

298. *Houchins v. KQED, Inc.*, 98 S. Ct. at 2594.

*B. Federal Obscenity Legislation*

The Court's earlier efforts to redefine constitutional limits on regulation of obscenity have not appreciably reduced the scope of litigation, as a perusal of federal and state appellate decisions reveals.<sup>299</sup> The Court dealt only with minor aspects of the problem this past Term in the case of *Pinkus v. United States*.<sup>300</sup>

Pinkus had been convicted of violating the primary federal statute prohibiting transmission of obscene matter through the mails,<sup>301</sup> on facts arising before the Court's key 1973 decisions.<sup>302</sup> It was stipulated that the defendant knowingly sent the material at issue to adults within California and elsewhere. Because the *Roth-Memoirs*<sup>303</sup> test governed at the time, the defense placed considerable reliance on expert testimony demonstrating that the materials did not appeal to prurient interest, conflict with community standards, or lack redeeming social value. The prosecution offered contrary expert data. Pinkus was convicted and the court of appeals affirmed. The Supreme Court reversed.

Pinkus' first objection was to the inclusion of "children" within the definition of "community standards" given by the trial court.<sup>304</sup> The court of appeals thought it would have been better to omit reference to children but did not reverse in the absence of Supreme Court authority on point. The Court noted that the matter might well have been ruled harmless in Pinkus' case, but recognized the legitimacy of the need to have Court clarification of the question. "[W]e elect to take this occasion to make clear that children are not to be included . . . as part of the 'community' as that term relates to the 'obscene materials' proscribed by [the statute]."<sup>305</sup> In the absence of proof that children were the intended recipients of the material in *Pinkus*, or reason

---

299. See generally George, *Obscenity Litigation: An Overview of Current Legal Controversies*, 3 NAT'L J. CRIM. DEF. 189 (1977).

300. 98 S. Ct. 1808 (1978). There is a cognate decision in *FCC v. Pacifica Foundation*, 98 S. Ct. 3026 (1978), which conforms the power of the FCC to invoke administrative sanctions for broadcasting indecent words to federal criminal coverage in 18 U.S.C. § 1464 (1976).

301. 18 U.S.C. § 1461 (1976).

302. Principally, *Miller v. California*, 413 U.S. 15 (1973).

303. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957).

304. The jury instruction read, "In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life." *Pinkus v. United States*, 98 S. Ct. at 1811 (emphasis in the original).

305. *Id.* at 1812. This holding had been signaled by the Court's decision in *Butler v. Michigan*, 352 U.S. 380 (1957), which disallowed the protection of minors as the sole basis for prohibiting the dissemination of allegedly obscene materials to adults.

on the defendant's part to know they might receive it, the jury should not have been instructed that children were part of the "community." The Court concluded that the giving of such an instruction was reversible error.

The defendant also objected to including "sensitive" persons within the standard, but the Court thought this not to be error. Even though statements in *Roth* and *Miller* had indicated that average rather than particularly susceptible and sensitive (or unsusceptible and insensitive) persons provide the standard, this does not mean that sensitive or insensitive persons, however defined, are to be excluded from the definition of community.

In the narrow and limited context of this case, the community includes all adults who comprise it, and a jury can consider them all in determining relevant community standards. The vice is in focusing upon the most susceptible or sensitive members when judging the obscenity of materials, not in including them along with all others in the community.<sup>306</sup>

The Court noted the difficulty in framing instructions on the point, particularly as to what "sensitive" and "insensitive" mean, but persons thus characterized are part of the community and may be properly referred to in jury instructions.

Pinkus also found fault with instructions about "deviant sexual groups" in defining prurient interest. In the Court's analysis, however, the materials at issue, or some of them, probably would have appealed to such a group. "Nothing prevents a court from giving an instruction on prurient appeal to deviant sexual groups as part of an instruction pertaining to appeal to the average person when the evidence, as here, would support such a charge."<sup>307</sup>

The Court reconfirmed that expert testimony is unnecessary to a decision that materials are obscene. The defendant argued, however, that the prosecution should be required to advance evidence to aid a jury in determining what will stimulate deviant groups. The Court rejected this contention, noting that the prosecution in this case had in fact presented expert testimony "which, when combined with the exhibits themselves, sufficiently guided the jury."<sup>308</sup> In *Pinkus*, therefore, the trial court instruction was proper.

The opinion also noted that a pandering instruction<sup>309</sup> is al-

---

306. 98 S. Ct. at 1813.

307. *Id.* at 1814.

308. *Id.* at 1815.

309. See George, *supra* note 299, at 202-03.



ways relevant to aid a jury in determining whether materials are obscene in light of the ways they were created, promoted, or disseminated. The government's evidence in *Pinkus* was adequate to support such an instruction, even though it was not extensive on "methods of production, editorial goals, if any, methods of operation, or means of delivery other than the mailings and the names, locations, and occupations of the recipients."<sup>310</sup>

### C. *Miscellaneous Statutory Interpretation*

The Court dealt with a somewhat esoteric aspect of the Clean Air Act<sup>311</sup> which empowered the Administrator of the Environmental Protection Agency to promulgate emission standards for hazardous air pollutants.<sup>312</sup> Violations of the Act are made criminal.<sup>313</sup> The statute also specifically forbids judicial review of administrative action promulgating an emission standard except in the Court of Appeals for the District of Columbia Circuit within thirty days after promulgation of such a standard.<sup>314</sup>

In *Adamo Wrecking Co. v. United States*,<sup>315</sup> defendant company was indicted in connection with asbestos standards relating to building demolition. The regulation in question set out procedures to be used in demolition but did not set a specific emission level. The district court granted a motion to dismiss the indictment because it thought the regulation was not actually an emission standard although labeled as such. The court of appeals reversed on the basis that anything promulgated as such was an emission standard under section 112(c) of the statute, and therefore unreviewable within the terms of the Act. The Supreme Court reversed.

The Court characterized the issue as "[w]hen is an emission standard not an emission standard?"<sup>316</sup> Under an earlier decision,<sup>317</sup> questions involving the nonreviewability of administrative

---

310. *Pinkus v. United States*, 98 S. Ct. at 1815. Because of the way the Court disposed of the case, it did not pass on the question of whether the trial court had acted properly in rejecting defense comparison evidence in the form of films which assertedly had popular acceptance in Los Angeles and elsewhere in the country, and thus demonstrated community tolerance of the material *Pinkus* was charged with having mailed; the court of appeals was left free to resolve the issue on remand.

311. 42 U.S.C.A. §§ 7401 *et seq.* (Supp. 1977).

312. 42 U.S.C.A. § 7412(b)(1)(B) (Supp. 1977).

313. 42 U.S.C.A. § 7413(c)(1)(C) (Supp. 1977).

314. 42 U.S.C.A. § 7607(b)(1) (Supp. 1977).

315. 434 U.S. 275 (1978).

316. *Id.* at 278.

317. *Yakus v. United States*, 321 U.S. 414 (1944) (sustaining the validity of a provision of the Wartime Emergency Price Control Act that forbade contesting the validity of

regulations are not to be determined routinely. The Clean Air Act precluded review of but one class of regulations, not all regulations issued under its provisions. Moreover, Congress imposed criminal penalties for only some violations. The statute as a whole indicates that emission standards are of greater significance than other standards or regulations; hence the limitation on judicial review. But, the Court determined, under the canon of strict construction of criminal legislation, a criminal trial court may determine whether a regulation upon which prosecution is based is indeed an emission standard as delineated in the statute. This does not mean that federal district courts can review a standard generally, considering such matters as whether an agency complied with administrative promulgation procedures or whether it acted arbitrarily or capriciously. The only issue is whether the regulation in question is, on its face, an emission standard as defined by Congress.

On the merits of *Adamo Wrecking*, the Court found much to indicate that an emission standard must incorporate a level of pollution and not merely methods of avoiding pollution. While a subsequent amendment to the statute would not necessarily govern a decision relating to earlier conduct, a majority of the Court found, contrary to the prosecution argument, that a 1977 statutory reformulation confirmed the importance of emission levels and the distinction between such levels and work practice standards. Therefore, on the facts of the case, the district court ruled correctly.

*Adamo Wrecking* is thus a rather narrow ruling on a point esoteric to those not charged under the legislation. The Court certainly took pains to avoid opening up the constitutionality of legislation regulating the environment. Nevertheless, several asides by the Justices reflecting on a legislative ban on contesting regulations, at least in the context of criminal prosecutions, seems to signal a significant constitutional issue for later resolution.

The Sherman Antitrust Act is not strict liability legislation under the Court's view in *United States v. United States Gypsum Co.*<sup>318</sup> The government alleged that six primary manufacturers of gypsum board had conspired to fix prices, principally through the exchange of pricing information. At trial, the court instructed that the defendants were presumed to intend the necessary and

---

regulations in the course of any civil or criminal proceeding).

318. 98 S. Ct. 2864 (1978). A procedural aspect of the case is discussed in text accompanying notes 197-200 *supra*.

natural consequences of their acts. It also in effect ruled out reliance on compliance with the Robinson-Patman Act<sup>319</sup> as a defense to Sherman Act charges. Finally, it restricted the defense of withdrawal from a conspiracy to affirmative notice to all other members of a conspiracy or disclosure of an illegal enterprise to law enforcement officials. The jury convicted but the court of appeals reversed; the Supreme Court affirmed.

A majority of the Court thought that strict liability could not be imposed under the antitrust law:

[A] defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.<sup>320</sup>

There is nothing in the history of the legislation to signal a congressional purpose to make violations of the Act strict liability offenses. Moreover, the sweep of the language is broad (although not unconstitutionally vague and indefinite), and the punishment severe. There is a sufficient array of noncriminal enforcement measures under the statute to leave it enforceable without exacting strict liability criminal penalties. To meet its burden under the statute so construed, the government can rely on the premise that "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws."<sup>321</sup> As the Court noted, "[w]here carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent."<sup>322</sup> The trial court did not instruct properly in this respect.

The Court then turned to the question of whether verification of competitor price concessions, intended solely to fit within section 2(b) of the Robinson-Patman Act,<sup>323</sup> should also amount to a controlling circumstance precluding liability under section 1 of the Sherman Act.<sup>324</sup> The Court concluded a good faith belief that

---

319. 15 U.S.C. §§ 13-13b, 21a (1976). Section 13(b) relates to exchange of price information to meet competition.

320. 98 S. Ct. at 2872.

321. *Id.* at 2877.

322. *Id.* at 2878.

323. 15 U.S.C. § 13(b) (1976).

324. 15 U.S.C. § 1 (1976).

a price concession is offered to meet a correspondingly low price set by a competitor is a defense under the Robinson-Patman Act, and is available to defend against an antitrust prosecution as well. The Court discussed the likelihood of isolated inquiries being used successfully as a defense to a federal prosecution, and found little danger. However, "exchanges of price information—even when putatively for purposes of Robinson-Patman Act compliance—must remain subject to close scrutiny under the Sherman Act."<sup>325</sup>

The majority also found error in the trial court's instructions on withdrawal from a conspiracy. A more expansive version had been requested by defendants, and there is precedent for modes of withdrawal other than those to which the trial court limited jury consideration: affirmative actions inconsistent with the object of a conspiracy and communicated in a manner reasonably calculated to reach coconspirators, for example. Thus, a broader instruction was to be given on retrial, although regrettably the Court did not draft one for the guidance of federal trial courts.

In *United States v. Culbert*,<sup>326</sup> the Court construed the Hobbs Act<sup>327</sup> as not requiring proof of "racketeering" as a condition to conviction. The defendant, charged with having committed attempted bank robbery through threats of physical violence to an officer of a federally insured bank, claimed that such an element was indispensable. The Court disagreed.

The statutory language is clear in covering robbery as a means of obstructing interstate commerce; nothing on its face refers to a requirement of racketeering. Indeed, to implant such a requirement would raise "serious constitutional problems, in view of the absence of any definition of racketeering in the statute."<sup>328</sup> As a racketeering requirement might render the statute vague and indefinite, such an interpretation, in the Court's view, should be avoided. Preenactment materials were also consistent with an interpretation that racketeering is not an essential element under the statute, which was aimed at difficulties in earlier legislation not relating to racketeering. Congress was careful to define the covered criminal activity in detail, so that a congressional intent to include a term not defined in the statute as a prerequisite to criminality was inconceivable to the Court.

The defendant asserted that ambiguities should be resolved

---

325. 98 S. Ct. at 2884.

326. 435 U.S. 371 (1978).

327. 18 U.S.C. §§ 1951-1956 (1976).

328. 435 U.S. at 374.

in favor of lenity, but the Court "decline[d] to manufacture ambiguity where none exists."<sup>329</sup> It also was claimed that a problem in federal-state relations would arise unless racketeering were made an element of the federal crime, but preenactment materials clearly showed that Congress had considered the matter directly and had concluded that there was no conflict in light of state failure or inability to cope effectively with the problem at which the federal statute was aimed.

*County Board v. Richards*<sup>330</sup> sustained the power of local authorities to restrict street parking for the benefit of local residents. The Court found the parking control a reasonable encouragement to car pools and mass transit. A local legislature also may decide that controlled flow of traffic into a neighborhood is required to "enhance the quality of life there by reducing noise, traffic hazards, and litter."<sup>331</sup> The Constitution does not ban such objectives and does not presume that distinctions between residents and nonresidents are invidious. All that is necessary is that an ordinance "rationally promote the regulation's objectives,"<sup>332</sup> and this the Arlington County ordinance did.

### III. THE TERM IN HINDSIGHT

The Court's fourth amendment decisions perhaps have aroused the greatest controversy, particularly *Zurcher* and *Barlow's, Inc.* Yet, after relatively calm analysis, there is nothing strikingly new in the constitutional principles relied on. The same can be said of the Court's treatment of protracted searches in *Mincey v. Arizona*. In terms of the routine functioning of the criminal justice system, perhaps *Franks v. Delaware* will engender the most litigation, in that it is difficult to believe that frequent attacks on search (and perhaps arrest) warrant affidavits will not result, despite the Court's effort to limit its holding severely. If officers' safety can be endangered, the Court seems ready to adopt a constitutional interpretation to protect them, as the *Mimms* holding and *Mincey* asides illustrate. Finally, *Ceccolini* suggests that a balancing test<sup>333</sup> governs in the application of exclusionary rules, a conclusion bolstered by the Court's handling of the confessions aspect of *Mincey*. Hence, nothing in

---

329. *Id.* at 379.

330. 434 U.S. 5 (1977).

331. *Id.* at 7.

332. *Id.*

333. In effect, the need for probative evidence is balanced against the need to deter deliberate or reckless official misconduct.

the 1977-1978 Term signals a retreat from or additional major modifications of the scope of evidentiary exclusionary rules.

In the sphere of judicial proceedings, only the administration of the double jeopardy provision saw significant reevaluation by the Court. Even there, the net impact is less a reworking of fundamental doctrine than it is a bit of architectural embellishment here and some foundation repairs there. The Court manifested no desire to let states experiment very far in local variations on a federal theme, as *Crist v. Bretz* illustrated. Nor is the Court inclined to permit much balancing of harm to defendants against harm to the system, judging from its rejection in *Bretz* of such an approach as an alternative to an outright bar of retrial after the cessation of original proceedings on grounds other than manifest necessity. On the whole, however, the Court's doctrinal position is no worse, and may well be better, than the ad hoc application of a due process standard.

The Court's handling of Federal Civil Rights Act remedies reflects a somewhat similar mix to that found under the double jeopardy doctrine: in certain respects citizens' ability to recover under the law has been enhanced, but not at the expense of inordinate disruption of the justice system or massive revision of the spheres of responsibility of the states and the federal government.

That the remainder of a somewhat reduced number of criminal-law-related decisions (in comparison to the two or three preceding Terms) bears on fairly narrow points perhaps confirms a generalization which may be drawn from the entire body of decisions during the Term: pragmatic response to specific problems generated by a functioning legal system is more acceptable to a majority of the Justices than establishment of general principles of constitutional law to which specific decisions are made to conform, however uncomfortably. Such an approach naturally leaves many points to be resolved and inconsistencies to be eliminated when variant cases arise. On the whole, however, it cannot be said that the Court's current disposition of constitutional issues generates more second-generation litigation than the sweeping approach of the Warren Court era; it may indeed promote a more satisfactory administration of the justice machinery in the long run.