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# Recent Cases

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# RECENT CASES

## Bar Admissions—The Character Investigation as an Unconstitutional Scheme to Promote Conformity: Comment on *LSCRRC v. Wadmond*

In a combined class action, law students, organizations of law students,[1] and applicants to the bar[2] sought to invalidate[3] by injunctive and declaratory relief[4] certain sections of the statutory scheme and regulations[5] governing admissions to the New York Bar. The bar admission standards were administered by the defendants, members of the Committee on Character and Fitness of Applicants for Admission to the Bar of the Appellate Division of the Supreme Court of New York in the First and Second Judicial Departments.[6] Plaintiffs alleged that the statutory scheme, and specifically certain rules[7] and ques-

1. The Law Student's Civil Rights Research Council, Inc. (LSCRRC) is a non-profit membership corporation composed of approximately 1,500 law students from 60 law schools throughout the country. Its principal objectives involve non-partisan research and active participation in the areas of civil rights and civil liberties. Second Amended Complaint for Plaintiff at 2-3, Law Student's Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969). The Columbia Law Student's Guild and the New York City Chapter of the National Lawyer's Guild include law students and applicants to the bar at Columbia University School of Law and various law schools in New York City. Both organizations seek the protection and fostering of civil rights and liberties by active engagement in these fields. 299 F. Supp. at 140.

2. These individuals have taken and passed the written examination required of all applicants for admission to the New York Bar. N.Y. JUDICIARY LAW § 464 (McKinney 1968).

3. Plaintiffs invoked the court's jurisdiction, Judiciary Act of 1948, 28 U.S.C. § 1343(3) (1964), to enforce the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." A three-judge court was convened pursuant to Judiciary Act of 1948, 28 U.S.C. § 2281 (1964).

4. Judiciary Act of 1948, 28 U.S.C. §§ 2201-02 (1964) provide for declaratory and further relief.

5. Admission to the bar is governed by minimal standards which are established by the legislature and applied through court prescribed rules and questionnaires. *See* note 60 *infra*.

6. The State of New York is divided by law into four judicial departments. N.Y. CONST. art. 6, § 4; N.Y. JUDICIARY LAW § 90 (McKinney 1968). The rules and questions of the first and second departments regarding admission are functionally identical. N.Y.R. CIV. PRAC. 9401, 9404 provide for the appointment of a character committee for each judicial district in a department by the respective appellate division and autborize these committees to prescribe questionnaires.

7. Plaintiffs focused their challenge on N.Y.R. CIV. PRAC. 9406, *infra* note 62. Other rules relevant to the statutory scheme include: RULES OF THE COURT OF APPEALS FOR THE ADMISSION

tions[8] formulated to ascertain whether the applicant possesses the character and general fitness requisite for an attorney, were unconstitutional[9] on their face and as applied.[10] Defendants denied that the statutes and their implementation were unconstitutional and claimed that the New York judiciary had autonomous control over the selection of its officers.[11] The District Court for the Southern District of New York, *held*, injunction denied. The statutory scheme governing admissions to the New York Bar did not violate the fourteenth amendment, but certain rules and questions implementing the statutes were vague and overbroad and thus violated the due process clause of the fourteenth amendment. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 229 F. Supp. 117 (S.D.N.Y. 1969).

After control over the legal profession had been established by the judiciary,[12] the Civil War spawned wartime legislation regulating the loyalty of the profession.[13] In *Ex parte Garland*,[14] a member of the

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OF ATTORNEYS AND COUNSELORS-AT-LAW, published as an appendix to N.Y. JUDICIARY LAW Rule VIII-1 (McKinney 1968): "Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State." Rule VIII-2: "Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committeee on Character and Fitness or otherwise." Rule VIII-4: "The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper."

8. *See* notes 66, 68, 70, 72 *infra*.

9. Plaintiffs alleged, *inter alia*, that the statutory scheme, through overly broad, vague, and unaseertainable standards, unlawfully delegated to defendants the means to deprive plaintiffs of admission to the bar. Therefore, the scheme violated first amendment rights of free association and expression, the fifth amendment right to a fair hearing, the sixth amendment right of assistance of counsel, the ninth amendment right of privacy, and fourteenth amendment rights. Second Amended Complaint for Plaintiff at 9-10, Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969).

10. In addition to the affidavits of good moral character and complete answers to the tendered questions, applicants, as a matter of practice, must appear for a personal interview before a member of the Committee on Character and Fitness. Rule VIII-2, RULES OF THE COURT OF APPEALS FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS-AT-LAW, published as an appendix to N.Y. JUDICIARY LAW (McKinney 1968).

11. *See* Theard v. United States, 354 U.S. 278 (1957).

12. *See, e.g., Ex Parte* Burr, 22 U.S. (9 Wheat.) 529 (1824) (Marshall, J.) (premising judicial regulation on the need to maintain the respectability of the bar and harmony with the bench).

13. *See, e.g.*, Act of Jan. 24, 1865, ch. 20, 13 Stat. 424; Act of July 2, 1862, ch. 128, 12 Stat. 502.

14. 71 U.S. (4 Wall.) 333 (1866).

Confederate Congress during the Civil War refused to take a declaratory oath disavowing his participation in the Confederacy as a condition for admission to the bar. The Supreme Court held the oath unconstitutional since it functioned as a bill of attainder and ex post facto punishment.[15] *Garland* was an early example of the Court's willingness to review qualifications for admission to the bar and clearly held that a lawyer is an officer of the court and not an officer of the government. During World War I,[16] the area of loyalty and national security produced considerable litigation;[17] however, disbarment rather than admissions cases prevailed.[18] Although few bar admission cases were litigated during World War II,[19] the Supreme Court, in *In re Summers*,[20] held that denial of admission to the bar by a state court on the ground that the applicant could not in good faith take the required oath did not violate the first amendment guarantee of freedom of religion.[21] The Cold War proliferated loyalty-security oaths;[22] but no significant cases involving the legal profession[23] arose until *Schware v.*

15. Ironically, Mr. Garland ultimately became Attorney General of the United States.

16. In the interim between the Civil War and World War I, there was a dearth of legal character litigation. In Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), upholding the state's power to deny a woman admission to the bar, the Court affirmed the proposition that the right to practice law was not a privilege or immunity of a citizen within the fourteenth amendment. *See also In re* Lockwood, 154 U.S. 116 (1894).

17. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919). *See generally* Chaffee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

18. *See, e.g., In re* Margolis, 269 Pa. 206, 112 A. 478 (1921) (advocating anarchism and obstructing the draft); *In re* Clifton, 33 Idaho 614, 196 P. 670 (1921) (disbarment for making unpatriotic statements reversed); Lotto v. State, 208 S.W. 563 (Tex. Civ. App. 1919) (statement that "Germany is going to win the war and I hope she will" not ground for disbarment); *In re* Hofstede, 31 Idaho 448, 173 P. 1087 (1918) (advising men not to register for selective service).

19. *See, e.g.*, Application of Cassidy, 268 App. Div. 282, 51 N.Y.S.2d 202 (1944), *aff'd*, 296 N.Y. 926, 73 N.E.2d 41 (1947).

20. 325 U.S. 561 (1945).

21. In *Summers*, Justice Black initiated his consistent dissent in bar admission cases dealing with loyalty oaths: "Test oaths, designed to impose civil disabilities upon men for their beliefs rather than for unlawful conduct, were an abomination to the founders of this nation." *Id.* at 576 (Black, J., dissenting). The precedent value of *Summers* has been weakened by Girouard v. United States, 328 U.S. 61 (1946). *Girouard* held that an alien who is willing to take an oath of allegiance and to serve in the army as a non-combatant, but who is unwilling to bear arms in defense of the country,because of religious scruples, may be admitted to citizenship.

22. See notes 39-40 *infra* and accompanying text.

23. The Supreme Court, however, recognized that permanent disbarment for alleged unprofessional conduct by lawyers defending accused Communists was an unnecessarily severe penalty. *See* Sacher v. Association of the Bar, 347 U.S. 388 (1954); *cf. In re* Isserman, 348 U.S. 1 (1954). In Sacher v. United States, 343 U.S. 1 (1952), the Court upheld contempt charges against lawyers defending communists, but indicated that: "We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice." *Id.* at 13.

*Board of Bar Examiners*[24] and *Konigsberg v. State Bar*[25] (*Konigsberg I*). In *Schware*, New Mexico had denied the applicant admission to the bar on the ground that he had not demonstrated "good moral character," because some twenty years earlier, he had used certain aliases to obtain employment, had been arrested in a labor dispute, and had been a member of the Communist Party. After examining these events and the affirmative evidence of Schware's good character, the Court, in an opinion by Mr. Justice Black, concluded that there was no evidence in the record which justified a finding that Schware was morally unfit to practice law.[26] In *Konigsberg I*, decided the same day, an applicant had been denied admission to the bar on the grounds that he had failed to prove that he was of good moral character and that he did not advocate the overthrow of the government by unconstitutional means. Konigsberg had refused to answer questions intended to ascertain whether he was or ever had been a member of the Communist Party. The majority of the Court indicated that Konigsberg had not been denied admission solely because of his refusal to answer the questions (an issue on which it reserved judgment) and held that upon an examination of the record the evidence did not rationally support the two grounds upon which admission was denied.[27] In 1961, the Supreme Court resolved the issue of whether denial of admission to the bar for refusing to answer questions concerning advocacy of the objectives of subversive organizations constituted a denial of first and fourteenth amendment rights. In *Konigsberg v. State Bar*[28] (*Konigsberg II*) and *In re Anastaplo*,[29] the Court affirmed state exclusion decisions since the questions were substantially relevant to an investigation determining fitness to practice law. By refusing to answer such questions, the applicants were obstructing the investigation of the examining committees. Four dissenting Justices maintained that compelling disclosure would be violative of the first and fourteenth amendments.[30] In subsequent cases, the Court applied stringent

24. 353 U.S. 232 (1957).

25. 353 U.S. 252 (1957).

26. Schware v. Board of Bar Examiners, 353 U.S. 232, 246-47 (1957).

27. Konigsberg v. State Bar, 353 U.S. 252, 262 (1957). Justice Harlan, dissenting, stated that the Court was acting like "a super state court of appeals." *Id.* at 277.

28. 366 U.S. 36 (1961). *See* Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 LAW IN TRANSITION 155 (1961).

29. 366 U.S. 83 (1961); *see* Berns, *Two Old Conservatives Discuss the Anastaplo Case*, 54 CORNELL L. REV. 920 (1969).

30. Justice Black, dissenting, reiterated his absolutist view that first amendment rights should not be balanced. *Id.* at 111-13.

procedural due process restrictions to bar admission hearings.[31] In *Hallinan v. Committee of Bar Examiners*,[32] the Supreme Court of California reversed a fitness committee's exclusion of an applicant who had been arrested for misdemeanors in civil rights demonstrations. The decision demonstrates a judicial policy preventing arbitrary denial from the bar and protecting the individual's broad fourteenth amendment rights from infringement by the state.

Inextricably related to the issue of character examinations for admission to the bar are analogous cases involving loyalty-security oaths for government regulated professions and employment, and the constitutionally permissible scope of state inquiry in determining an applicant's potential employment fitness. Early test oaths for ministers, attorneys, and other professional men were unconstitutional because they functioned as bills of attainder and ex post facto punishment.[33] In attempting to prevent arbitrary action by a state, while recognizing valid state interests which must necessarily impinge on individual freedom, the Supreme Court found it necessary to devise some test by which these two factors could be resolved. The "clear and present danger" test was first adopted by the Court to determine when a substantial state interest justified governmental invasion of the need for individual expression.[34] The Court next adopted a balancing test, which

31. *See* Spevack v. Klein, 385 U.S. 511 (1967), *overruling*, Cohen v. Hurley, 366 U.S. 117 (1961) (selfincrimination clause of fifth amendment is applicable in disbarment hearings); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (applicant cannot be denied admission without a hearing on the charges against him). In *Spevack*, Justice Harlan, dissenting, discussed the broad ramifications of the majority's opinion: "It exposes this Court itself to the possible indignity that it may one day have to admit to its own bar such a lawyer [one invoking the self-incrimination clause] unless it can somehow get at the truth of suspicions, the investigation of which the applicant has previously succeeded in blocking. For I can perceive no distinction between 'admission' and 'disbarment' in the rationale of what is now held." Spevack v. Klein, 385 U.S. 511, 522 (1967). Justiee Fortas, concurring, condoned inquiry by questions specifically relating to the conduct of a lawyer's job but rejected questioning by the state into the beliefs of the lawyer. *Id.* at 519-20.

32. 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

33. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866), which stated an equalitarian position: "The theory upon which our political institutions rest is, that all men have certain unalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law." *Id.* at 321. The oath in *Cummings* extended to words, desires, and sympathies. On the other hand, the police power of the state to require good character as a condition to the practice of medicine was affirmed in Hawker v. New York, 170 U.S. 189 (1898).

34. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941); Dennis v. United States, 341 U.S. 494 (1951); Beauharnais v. Illinois, 343 U.S. 250 (1952); Whitney v. California, 274 U.S. 357 (1927).

has vitality today.[35] Under this analysis, as the social value of state action increases, greater incursions into individual affairs appear reasonable and not arbitrary.[36] The broad concept of due process has allowed the Supreme Court to strike a balance between individual and state interests.[37] In *Dent v. West Virginia*,[38] the Court held that due process was intended to secure a citizen against any arbitrary deprivation of his rights, which include the ability to follow any lawful business, calling, or profession. Loyalty tests as a condition of employment appeared extensively in the early 1950's; in the majority of cases the Supreme Court held that state loyalty oaths were not a deprivation of due process.[39] As the McCarthy era ended, several Supreme Court cases held questions in state loyalty investigations to be violative of due process. If the question itself was unrelated to any legitimate state interest, regardless of the individual's answer, it was unlawful to ask the question, to deny any benefit sought because of a refusal to answer, or to penalize the individual for failure to cooperate.[40]

35. Mr. Justice Black, however, has retained his position that first amendment rights are absolute and cannot be balanced. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 137-38 (1959) (Black, J., dissenting).

36. *See, e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (oath required of union officer renouncing belief in the overthrow of the government by violent, illegal, or unconstitutional methods did not violate the first amendment).

37. *See, e.g.*, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

38. 129 U.S. 114 (1889). *See also* Meyers v. Nebraska, 262 U.S. 390 (1923) (the individual has a fourteenth amendment right to engage in any of the common occupations of life).

39. *Compare* Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (city employees), Adler v. Board of Educ., 342 U.S. 485 (1952) (teachers), *and* Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (candidates), *with* Weiman v. Updegraff, 344 U.S. 183 (1952) (state loyalty oath barring innocent teacher from employment without knowing association is a violation of due process). An example of a constitutionally valid oath appeared in Gerende v. Board of Supervisors, 341 U.S. 56 (1951). The oath required a candidate to pledge that he was not a person "engaged in one way or another in the attempt to overthrow the government by force or violence," and that he was not knowingly a member of an organization engaged in such an attempt.

40. *See, e.g.*, Bates v. Little Rock, 361 U.S. 516 (1960) (compulsory disclosure of NAACP chapter membership list under a city occupational license tax ordinance held unconstitutional); NAACP v. Alabama, 357 U.S. 449 (1958) (contempt conviction for plaintiff's failure to produce a membership list of a local chapter under a statute ascertaining qualifications to conduct intrastate business held invalid); Slochower v. Board of Educ., 350 U.S. 551 (1956) (dismissal of professor for refusal to answer committee questions by invoking the fifth amendment held invalid). *But see* Nelson v. County of Los Angeles, 362 U.S. 1 (1960) (summary discharge of public employee for refusal to answer questions at legislative hearing valid because of insubordination); Barenblatt v. United States, 360 U.S. 109 (1959) (professor fired and sentenced for refusing to answer whether he was then or had ever been a Communist was in furtherance of valid legislative purpose to investigate the Communist Party); Beilan v. Board of Pub. Educ., 357

In *Speiser v. Randall*,[41] the Court invalidated a California statute which required, as a prerequisite for the veteran's property tax exemption, that the applicant swear an oath[42] which the majority viewed as a limitation of free speech and a denial of due process. In *Shelton v. Tucker*,[43] the Court struck down a state statute compelling every teacher, as a condition of employment in a state supported school or college, to file annually an affidavit listing every organization to which he had belonged or regularly contributed within the preceding five years.[44] The current approach continued in *Cramp v. Board of Public Instruction*,[45] invalidating an oath for state employees as being void for vagueness, and in *Aptheker v. Secretary of State*,[46] implicitly recognizing the vitality of the right of free association in subversive activities cases. In *Aptheker*, the Supreme Court held a section of the Subversive Activities Control Act of 1950 unconstitutional on its face since the section indiscriminately infringed upon the fifth amendment substantive due process right to travel. In *Baggett v. Bullitt*,[47] the Court

U.S. 399 (1958) (state's interest in determining the qualifications of teachers in public schools including political beliefs outweighed the deterrent effect upon freedom of speech and association caused by compulsory disclosure); Lerner v. Casey, 357 U.S. 468 (1958) (dismissal of public employee for refusal to answer questions relating to Communist affiliation upheld).

41. 357 U.S. 513 (1958).

42. The oath read: "I do not advocate the overthrow of the Government of the United States or the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in the event of hostilities." *Id.* at 515.

43. 364 U.S. 479 (1960).

44. The Court concluded that the statute violated the first amendment freedom of association. "The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." *Id.* at 490.

45. 368 U.S. 278 (1961). The Florida statute required every employee to swear in writing that they have never "knowingly lent their aid, support, advice, counsel, or influence to the Communist Party." *Id.* at 279. *Cf.* NAACP v. Button, 371 U.S. 415 (1963) (solicitation of legal suits by civil rights group). "[S]tandards of permissible statutory vagueness are strict in the area of free speech." *Id.* at 432. In Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963), the plaintiffs alleged that a legislative investigation intruded upon their first and fourteenth amendment associational rights. In light of this contention, the Court required the state to show a substantial relationship between the information sought—NAACP membership lists—and a compelling state interest.

46. 378 U.S. 500 (1964). The challenged section proscribed travel abroad by any communist organization member who had knowledge or notice that such organization was registered or under final order to register with the Subversive Activities Control Board. *Id.* at 501-02.

47. 377 U.S. 360 (1964). The two oaths were: (1) a "positive loyalty oath" imposed on teachers, making them subscribe, *inter alia*, that they would "by precept and example promote respect for the flag and [federal and state] institutions, reverenee for law and order and undivided allegiance to the federal government;" and (2) a "negative disclaimer" imposed on all state employees requiring them to vow that they were not a "subversive person" or members of "subversive organizations." "Subversive person" was defined by the state law as "any person

struck down two loyalty oaths required of state employees and indicated that measures which purport to define disloyalty must be drawn precisely so that public servants are cognizant of the definition of disloyalty. The Court enunciated the concept of overbreadth[48] in *Brown v. Louisiana*,[49] and further developed and applied the doctrine to loyalty-security and character schemes in *Elfbrandt v. Russel*[50] and *United States v. Robel*.[51] In *Elfbrandt*, the oath and accompanying "statutory gloss" purported to exclude from employment members not subscribing to the unlawful ends of prohibited organizations. Consequently, the statutory scheme infringed upon first amendment associational rights.[52] In *Robel*, the Court invalidated a section of the Subversive Activities Control Act for overbreadth because of a provision proscribing any member of a Communist organization from knowingly engaging in employment in a designated defense facility while such organization was registered or under final order to register with the Subversive Activities Control Board. The provision was overbroad since it established guilt by association without a determination that the individual's association posed the subversive threat feared by the government.[53] The Court continued to circumscribe the permissible scope of loyalty oaths and accompanying regulations in the areas of education,[54] admission of a duly elected representative

who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter . . . the constitutional form of the federal or state government. . . ." *Id.* at 361-62.

48. *See* Note, *Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association From Scales to Robel*, 57 CALIF. L. REV. 240 n.7 (1969): "The concept of overbreadth must be distinguished from the concept of vagueness. . . . The individual never *knows* when he is subject to criminal sanctions under a statute which is unconstitutionally vague." An overbroad statute is one that deters the exercise of first amendment rights because the actor *knows* he is subject to criminal statutes. *Id.*

49. 383 U.S. 131, 143 (1966) (Brennan, J., concurring).

50. 384 U.S. 11 (1966).

51. 389 U.S. 258 (1967).

52. The oath provided: "I . . . do solemnly swear . . . that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies . . . ." "The Legislature put a gloss on the oath by subjecting to prosecution for perjury and for discharge from public office anyone who took the oath and who 'knowingly and wilfully becomes or remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations' or 'any other organization' having for 'one of its purposes' the overthrow of the government of Arizona . . . where the employee had knowledge of the unlawful purpose." 384 U.S. at 12-13.

53. Therefore, the Act encompassed membership which was constitutionally protected. United States v. Robel, 389 U.S. 258, 265 (1967).

54. *See* Whitehall v. Elkins, 389 U.S. 54 (1967) (sections of state loyalty oath do not distinctly delineate between permissible and impermissible conduct); Keyishian v. Board of

to a state legislature,[55] and eligibility of a seaman for promotion.[56] Federal courts have advanced the trend by holding that loyalty-security programs constitute an unconstitutionally restrictive means of accomplishing specific state and federal objectives.[57] On the other hand, in *Knight v. Board of Regents*,[58] the Court affirmed a decision holding that New York could reasonably require teachers in public or tax exempt institutions to subscribe to an oath supporting the federal and state constitutions and observing professional standards of competence and dedication.

In the instant case, after disposing of procedural matters,[59] the court held that section 90(1)(a) of the Judiciary Law[60] was not

Regents, 385 U.S. 589 (1967) (demonstrating the uncertainty of such words as "advising," "advocacy," "teaches," and "seditious" in the state loyalty laws and regulations). "The very intricacy of the [New York] plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism." *Id.* at 601.

55. In Bond v. Floyd, 385 U.S. 116 (1966), a unanimous Court held that the Georgia House of Representatives violated the freedom of expression of Mr. Julian Bond, a duly elected representative, by excluding him from the legislature because of statements he made and endorsed. The State claimed the right to examine Bond in order to test his sincerity and ability to take the constitutional oath. The Court ruled that the state did not have this right because "[s]uch power could be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues under the guise of judging their loyalty to the Constitution." *Id.* at 132.

56. Schneider v. Smith, 390 U.S. 17 (1968).

57. *See, e.g.*, Gilmore v. James, 274 F. Supp. 75 (N.D. Tex. 1967), *aff'd*, 389 U.S. 572 (1968) (statute prescribing an oath that state employees were not members of organizations on Attorney General's list was invalid because it applied to membership without specific intent to further the illegal aims of such organizations as well as membership with specific intent); Reed v. Gardner, 261 F. Supp. 87 (C.D. Cal. 1966) (provision of Health Insurance for the Aged Act denying benefits to members of organizations required to register under the Internal Security Act of 1950, as well as the use of questions inquiring whether applicants were members of such organizations, is unconstitutional as violative of first amendment rights of free speech, assembly, and association).

58. 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd*, 390 U.S. 36 (1968) (per curiam); *see* note 64 *infra*.

59. Judge Friendly, writing for the court, stated that: (1) plaintiffs had standing to sue as a class because they had sufficiently set themselves apart from the rest of the populace during their period of legal study; (2) the court of appeals need not be joined because the legislature delegated control over admissions to the appellate divisions; and (3) abstention was not appropriate in this matter of state concern since the Supreme Court had rejected such claims in Baggett v. Bullitt, 377 U.S. 360 (1964).

60. N.Y. JUDICIARY LAW § 90(1)(a) (McKinney 1968), provides: "Upon the state board of law examiners certifying that a person has passed the required examination . . . the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counselor-at-law, shall admit him to practice . . . in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys."

impermissibly vague. The court found no significant distinction between New York's requirement of character and general fitness and California's requirement of "good moral character," which was implicitly approved in *Konigsberg II*.[61] The majority ruled that the substantive challenge to Rule 9406[62] was grounded on recent loyalty oath cases which were distinguishable in the instant context.[63] Furthermore, the court indicated that Rule 9406 was not an oath which hung *in terrorem* over persons seeking admission to the bar since it only applied to belief at the time of admission. The majority further assumed that Rule 9406 would be implemented in accordance with its constitutional purpose; namely, to test whether applicants for admission to the bar can truly subscribe to the "constitutional oath of office."[64] After deciding that a three-judge court was appropriate to review the questionnaires,[65] the court considered the questions individually. Question 27(b)[66] was upheld as being essentially equivalent

61. 366 U.S. 36, 40-44 (1961).

62. N.Y.R. CIV. PRAC. 9406 (McKinney 1963) entitled "Proof" provides in pertinent part: "No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor-at-law in the courts of this state, unless he shall furnish satisfactory proof to the effect: 1. That he believes in the form of the government of the United States and is loyal to such government . . . ." The majority distinguished the instant case from Speiser v. Randall, 357 U.S. 513 (1958), in two respects. First, the Supreme Court in *Speiser* differentiated between loyalty oaths required of all veterans and oaths required of a limited class of persons in public positions who could create serious danger to the public safety. The instant court assumed that lawyers, as officers of the court, would fit into the latter distinction. Secondly, the court held that the Rule did not impose a true burden of proof, as the plaintiffs' alleged, relying on *Speiser*, but a permissible burden of coming forward with the evidence.

63. The Court distinguished Baggett v. Bullitt, 377 U.S. 360 (1964); Elfbrandt v. Russell, 384 U.S. 11 (1966); and Keyishian v. Board of Regents, 385 U.S. 589 (1967).

64. N.Y. JUDICIARY LAW § 466 (McKinney 1967), requires each person admitted to the Bar to subscribe to the "Constitutional oath of office.": "I do solemnly swear . . . that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office . . . according to the best of my ability." N.Y. CONST. art. XIII, § 1. This oath was upheld in Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd*, 390 U.S. 36 (1968).

65. The defendants contended that since the questionnaires under attack covered only two of New York's four departments, the case comes within the judicial exception to 28 U.S.C. § 2281 (1964), that excludes controversies not of state-wide importance. The court denied this contention because the effect of admission or denial is state-wide. Furthermore, the court noted that sound policy requires a three-judge court to decide all issues, even though jurisdiction over one is debatable.

66. *Questionnaire and Statement*, N.Y. Appellate Division, Supreme Court, First Department, Committee on Character and Fitness, 1968 [hereinafter cited as *First Department Questionnaire*]: 27. (a) Do you believe in the principles underlying the form of government of the United States of America? (b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to *and ready to support the Constitution of the United States* (emphasis added)?

to the state "constitutional oath," which was affirmed in *Knight*.[67] The majority found question 27(a) impermissible since the word "principles" was so vague that an applicant who favored drastic, though constitutional, reforms might be conscientiously unable to answer with a simple "yes." Likewise, question 26[68] was held invalid as imposing a potentially deterrent effect on the exercise of the constitutionally protected right of association. The court noted that the state's interest in informing itself of the prior associations of candidates for the bar with subversive organizations can be adequately protected by a question "more narrowly phrased."[69] Question 31[70] was held to have a serious *in terrorem* effect in that no interest of the state was sufficiently compelling to require the applicant to review his entire life history under the threat of denial of admission.[71] The court held that question 32(b)[72] was valid since an applicant who had read the Canon of Ethics need only explain why he dissented from a particular provision. Finally, the majority reasoned that the alleged broadness of the personal interview would necessarily contract when the scope of written inquiry was amended in compliance with the court's opinion. In spite of this conclusion, the court did not issue an injunction because of considerations of comity for respected fellow judges who administer the character investigations.[73] Judge Motley, concurring and dissenting

67. 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd*, 390 U.S. 36 (1968).

68. *First Department Questionnaire*: 26. Have you ever organized or helped to organize or become a member of or *participated in any way whatsoever* in the activities of any organization or group of persons which teaches or (taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force violence or any unlawful means? If your answer is in the affirmative, state the facts below (emphasis added).

69. 299 F. Supp. at 131.

70. *First Department Questionnaire*: 31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is yes, state the facts.

71. The first direction at the head of the *First Department Questionnaire* reads: "This is a statement made under oath. Applicant's failure fully and accurately to disclose any facts or information called for by any question may result in denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law."

72. *First Department Questionnaire*: 32. (a) Have you read the Canons of Ethics adopted by the American and New York State Bar Associations? (b) Will you conscientiously endeavor to conform your professional conduct to them?

73. Earlier in the opinion, the court held that it had the power to issue an injunction against a judge, although under The Civil Rights Act of 1871, 42 U.S.C. § 1983, a judge was not liable for damages under the doctrine of Pierson v. Ray, 386 U.S. 547 (1967). "To hold otherwise would be to leave without a remedy a significant class of the deprivations of federal rights under color of state law that Congress intended the federal courts to redress under 42 U.S.C. § 1983. . . ." 299 F. Supp. at 124.

in part, reasoned that although section 90 of the Judiciary Law was constitutional, its interpretation, implementation, and application by the defendants was invalid. She concluded that Rule 9406 was unconstitutional on its face and as interpreted, implemented, and applied by the defendants. The dissent indicated that the term "moral character," though not defined for purposes of the character affidavits, is not unconstitutional on the ground of vagueness because of proper past usuage. The affidavits and questionnaires adopted to implement section 90, however, failed to meet the standard of precision applicable to state regulations involving first amendment freedoms. She further noted that a strict application of the challenged statutes improperly focused upon an applicant's political beliefs and associations and resulted in an inappropriate use of a political test in determining admission to the bar.[74] Judge Motley found that Rule 9404 violated the first and fourteenth amendments because the applicant unconstitutionally bears the burden of proof.[75] Also, Rule 9404 lacked sufficient standards for determining who would be admitted to the bar.[76] Finally, the dissent concluded that the public danger actually created by a "subversive" lawyer is small, and that adequate criminal penalties and disbarment measures existed to punish and deter irresponsible conduct.[77]

The unquarried depths of good moral character are pretermitted by the majority's holding, which places too much trust in fellow judges to determine the fate of an applicant to the bar by means of an imprecise and subjective standard.[78] The personal interview to determine fitness, which the dissent incisively viewed as delving deeply into personal belief, is unavoidably influenced to a great extent by the personal predilections[79] of a traditionally conservative bar.[80] The

74. Judge Motley also found an invasion of the right of privacy in the state's questioning of every affiant concerning the applicant's personal life. 299 F. Supp. at 135, 145.

75. Judge Motley's opinion relies heavily on Speiser v. Randall, 357 U.S. 513 (1958).

76. Keyishian v. Board of Regents, 385 U.S. 589 (1967), was cited in the opinion for authority.

77. *See* Note, *Inquiries Into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 COLUM. SURVEY OF HUMAN RIGHTS L. 33 (1968).

78. *See* Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 489 (1953).

79. In 1953, commentators indicated that "bar examiners everywhere are groping for fair resolutions between the demands created by anticommunist tensions and the common tradition of implicit loyalty that did not have to be 'proved' or sworn to." *Id.* at 499.

80. *See* Note, *Constitutional Limitations on the Process of Admission to the Bar*, 23 N.Y.U. INTRA. L. REV. 135, 152 (1969). *See also* Larson, *The Lawyer as Conservative*, 40 CORNELL L.Q. 183 (1955).

protean nature of contemporary mores and the debate centered on the generation gap lend support to the proposition that bar examining committees will be facing an influx of applicants whose personal beliefs concerning the legal profession and the country sharply differ from those of the examining lawyer.[81] The inevitable result of such conflict can only be the rejection of conscientious and scrupulous law students who hold radical beliefs.[82] In reality, only the honest and ingenuous will be faced with exclusion since the hard-core disloyal applicant will have no compunction about taking any form of oath.[83] This collision of values is not recognized by the majority in the instant case.

Although the majority predicated much of its decision on *Konigsberg II* and *In re Anastaplo*, recent cases such as *Elfbrandt, Keyshian*, and *Robel* have cast serious doubt on the vitality of the former cases as precedent. The majority also delegated the initiative of reform to the very body which promulgated the rules and regulations.[84] True reform in the structure of character investigations will result only when the committees realize that the statutory scheme constitutes an unnecessarily restrictive means of accomplishing state objectives. One commentator has suggested that the standard of "dishonorable conduct relevant to the occupation" should be the touchstone for character committees rather than "good moral character".[85] Such a standard would be particularly relevant to the legal profession since only overt illegal conduct could be considered as grounds for exclusion; and even such conduct, if the standard is strictly applied, would not exclude all applicants who had been arrested or convicted of a crime.[86]

81. One scholar has noted that a number of students will shun the legal profession rather than compromise their ideals. "Perhaps those idealistic students who now shun law schools and the legal profession are quite right; they would find little place for themselves in the present day profession." Reich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402, 1408 (1965). *See* A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 43-57 (1968), which discusses civil disobedience by contemporary youth; Note, *Admission to the Bar Following Conviction for Refusal of Induction*, 78 YALE L.J. 1352 (1969), which concludes that conscientious refusal of induction into the military cannot constitutionally be the sole basis for denial of admission to the bar. The breadth of the good moral character standard and the vagueness of the term "reputation of the bar" are critically explored.

82. In American Communications Ass'n v. Douds, 339 U.S. 382, 439 (1950), Justice Jackson, dissenting in part, reasoned: "Moreover, in judging the power to deny a privilege to think otherwise, we cannot ignore the fact that our own Government originated in revolution and is legitimate only if overthrow by force may sometimes be justified. That circumstances sometimes justify it is not Communist doctrine, but an old American belief."

83. *Cf.* F. MEYER, THE MOLDING OF A COMMUNIST (1959).

84. Brown & Fassett, *supra* note 75, at 483: "[T]he strength of a rule, as against legal attacks on its validity, is clearly enhanced when it is the offspring of the very court asked to undo it, rather than of the legislature or of a committee of the bar." *Id.*

85. W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 150 (1956).

86. *See, e.g.*, Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

This standard would also take into consideration the fact that few applicants have been exposed to situations in which character defects might be revealed.[87] For these reasons, a strong argument can be made for departure from the entire character examination and reliance by the legal profession upon disbarment and criminal penalties.[88] Another proposed resolution involves four steps: (1) the committee must initially presume the applicant loyal; (2) if an applicant's statement contains no disclosure of illegal political conduct, the committee must marshall evidentiary support for its negative presumptions; (3) no disclosure of first amendment rights should be required until the committee explicitly demonstrates on the record by independent evidence the relevance of the answer to its inquiry; and (4) the evidentiary showing must give in detail the source of information and the method by which it was obtained.[89] Hard cases will inevitably arise under any standard adopted by the examining committee, for example, the person who believes in the necessity of revolution but who assures examiners that he will not participate himself.[90] Recent cases such as *Robel* should control the situation in which a Communist applicant who does not advocate violent overthrow but views the Party as an instrument of social reform is denied admission to the bar.

The significance of an independent bar and the important role of the lawyer in a democratic society has been enunciated too often for the majority to ignore the implications of its limited holding.[91] The dissent recognizes the deterrent effect broad inquiry will have on law students, who will be more reluctant to join an organization or invoke

87. *See* Gellhorn *supra* note 85, at 151 n.

88. *See* Note, *supra* note 77, at 43; "Given a politically suspect lawyer, it might be slightly more difficult to keep him from being admitted to the bar by drawing inferences from some knowledge of or official research into his present or past political beliefs than to support disciplinary action on the basis of his actual past behavior in court. The first method belongs in the prudential area of planning total political security for an incumbent political system—always a problematic affair; the other is a control measure against specific abuses in the exercise of the lawyer's function." O. KIRCHHEIMER, POLITICAL JUSTICE 254 (1961). *See generally* Selinger & Schoen, *"To Purify the Bar": A Constitutional Approach to Non-Professional Misconduct*, 5 NATURAL RESOURCES J. 299 (1965).

89. *See* Note, *supra* note 80, at 151-52. *See also* Note, *Procedural Due Process and Character Hearings for Bar Applicants*, 15 STAN. L. REV. 500 (1963).

90. *See* Brown & Fasset, *supra* note 78, at 502.

91. *See, e.g.*, Casper, *Lawyers and Loyalty—Security Litigation*, 3 LAW & SOC'Y REV. 575 (1969); Ernst & Schwartz, *The Right to Counsel and the "Unpopular Cause,"* 20 U. PITT. L. REV. 725 (1959); Jackson, *The Advocate: Guardian of Our Traditional Liberties*, 36 A.B.A.J. 607 (1950); Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1 (1934); Note, *The "Right" to Practice Law*, 1 DUKE L.J. 249 (1951).

a cause.[92] Indeed, in 1953, a commentator noted that "the consequence of aimless hectoring of students about membership in left-wing organizations, like the National Lawyers Guild, may obviously be, as the word gets along, to discourage other students from joining such organizations."[93] Upholding such extensive inquires may lead to a deplorable attitude on the part of applicants and result in lip service and pro forma filing of an application. The serious consequence of not affording first amendment protection to prospective lawyers ensues from conditioning the right to pursue a chosen profession[94] on a waiver by the applicant of his constitutional rights. The concept of a profession as a property right subject to minimal state interference conflicts with the implicit view of the majority.[95]

The broad depth of inquiry implicitly approved in the instant case can be better examined in a comparative light with character requirements in other countries. The Canadian province of Ontario abolished the character investigation after finding no relationship between conduct prior to admission and professional capacity.[96] In England and Ireland, a complex of strong disciplinary rules coupled with a comprehensive apprentice process provides the functional equivalent of our admissions examination without necessitating a

92. "To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it." *In re* Anastaplo, 366 U.S. 82, 115-16 (1961) (Black, J., dissenting). *See also* Note, *"Good Moral Character" as a Prerequisite to Admission to the Bar: Inferences to be Drawn From Past Acts and Prior Membership in the Communist Party*, 65 YALE L.J. 873 (1956).

93. Brown & Fassett, *supra* note 78, at 401. "However desirable such a result might seem to the individual examiner, he should hardly use his official capacity to achieve it." *Id.*

94. *See* Dent v. West Virginia, 129 U.S. 114 (1889); Greene v. McElroy, 360 U.S. 474 (1959) (the individual rigbt to pursue a profession).

95. *See* Reicb, *The New Property*, 73 YALE L.J. 733 (1964); "The applicant wbo has expended time, energy and a large amount of money on legal education has as much a right to practice as the practicing lawyer. . . ." Note *supra* note 81, at 1379.

96. In response to a question concerning the extent bar examining authorities investigate an applicant's character before admission to the bar, Richard J. Roberts, Director, Ontario Bar Admissions Course, replied: "[W]e take people into the Bar Admissions Course, witb LL.B. degrees, as a matter of right. We used to require character certificates, and I saw no sense in them whatever. Everybody in the world can find a number of people who are stupid enough to give him character referenees, and I see no purpose in reading hundreds of these things, saying that he's a good fellow, when he may turn out to be quite otherwise later. Besides, in the days when these character references were required, it seemed to have no relation to subsequent disbarment. Some of the people who were disbarred had some of the most glowing character references you ever read, when you went back to their file." Response of John W. Durnford, Associate Professor of Law, McGill University, to the above question: "It is difficult to examine effectually as to character, and I do not believe that the Bar makes a practice of it, though it has the>right to." *The Canadian Approach to Legal Education and Admission to the Bar*, 36 BAR EXAMINER 6, 34 (1967).

determinative character examination.[97] Although requiring proof of character, Australian states have eliminated New York's probing interview and questionnaire. One procedure requires the applicant to supply two character references and a certification of good conduct.[98] Another method stipulates the posting of the student's name in a widely circulated newspaper to provide an opportunity for public objections to that individual's admission to the bar.[99] Thus many foreign jurisdictions do not subject the applicant to the political colloquy which accompanies character inquiry under the typical New York scheme. The particular emphasis on communist affiliation as a basis of exclusion in the United States is not followed elsewhere. In France, for example, the Counseil d'Etat admitted five applicants to the civil service after their denial because of communist ties.[100] Furthermore, the Soviet system serves as a useful comparison to the policies of the profession in the United States. The Soviet lawyer is required to be loyal to the Party and to the political, economic, and social system which the Party represents.[101] An analogy between the Soviet system and the exclusion of Communists from the legal

97. *Cf.* B. HOLLANDER, THE ENGLISH BAR: A PRIESTHOOD (1964); G. RUDD, THE ENGLISH LEGAL SYSTEM (1962). Admission for a Barrister requires two certificates of good moral character from two responsible residents of the United Kingdon who have known the applicant for one year or more and have had opportunities of judging his character. An applicant is not eligible for admission if he is an undischarged bankrupt or has been convicted of a criminal offence of such a nature that the Masters of the Bench, the examining body, deem his admission undesirable. THE CONSOLIDATED REGULATIONS OF THE INNS OF COURT 5-8 (rev. ed. 1968).

98. This is the procedure in New South Wales. Western Australia and Victoria require certificates from practitioners to establish character. In Canada, similar practices are found in New Brunswick, Nova Scotia, Saskatchewan, and Alberta. *See* Cullinan, *Requirements for Admission to Practice in England, Ireland, the Australian States, New Zealand, and the Canadian Provinces*, 19 BAR EXAMINER 2-41, 69-94 (1950).

99. *Id.* at 23. The functional equivalent of the public evaluation has been advocated by one author since members of the profession cannot objectively ascertain a standard of lay adequacy an applicant must meet, which he contends, is necessary for continuing respect for lawyers and the administration of justice. Thus the author advocates public representation on the examining committee. Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 9, 25-26 (1935).

100. *See* C. HAMSON, EXECUTIVE DISCRETION AND JUDICIAL CONTROL 22-41 (1954); KIRCHHEIMER, *supra* note 88, at 252-53. The 1958 West German Lawyer's Statute is viewed by one author as an attempt to weed out potential political troublemakers among the legal fraternity. He compares the statute with *Anastaplo* and *Konigsberg II*, finding neither favorable to the politically minded lawyer seeking admission. *Id.* at 253-55.

101. *See* J. HAZARD & I. SHAPIRO, THE SOVIET LEGAL SYSTEM (1962); Barry & Berman, *The Soviet Legal Profession*, 82 HARV. L. REV. 1 (1968); *cf.* Beilan v. Board of Educ., 357 U.S. 399, 416 (1958) (Douglas, J., concurring): "When we make the belief of the citizen the basis of government action, we move toward the concept of *total security*. Yet total security is possible only in a totalitarian regime—the kind of system we doubtless profess to combat."

profession in the United States is appropriate since both systems appear to strive for a homogeneous political philosophy.

The reconciliation of the admissions process with the policy needs of a free society has lagged markedly. One justification for this lack of progress is that the status of American lawyers in the administration of justice is considerably more influential than in other countries. But to the extent that admissions committees have attempted to consider the relationship of the lawyer to the public interest, they have exhibited an unrealistic view of the importance of the profession and the potential harm to the public created by lawyers labeled as subversive.[102] The idea that character committees are guardians of the profession affords law students a distorted image of what conformity to the bar will entail.[103]

The existence of overly cumbersome machinery for character inquiry is not calculated merely to weed out the criminal offender or the mentally unfit, rather, the investigation is structured to probe such normative traits as reliability, acquaintances, and political views.[104] The adoption of extensive character inquiry procedures in 1938,[105] during a period of social unrest and experimentation with communism,[106] lends support to the proposition that the inquiry was conceived as a political test for admission to the bar. Subsequent proposals have continued to perpetuate the existing system of inquiry.[107] Examples of such proposals include fingerprinting of law students[108] and character investigation at

102. An excerpt from an interview with former Chief Justice Warren illustrates a needless over-reaction by responsible members of the bar: "Warren: I remember when President Eisenhower appointed Loyd Wright, the former president of the American Bar Association, to head up a committee on subversion, and he reported that great possibilities for subversion stemmed from these young [Supreme Court] law clerks who were just out of the law school. He referred to them as a group of young radicals and proposed in his commission report that all of them be given complete F.B.I. investigations and that they be confirmed by the Senate before they could be employed by the Supreme Court." The Chief Justice noted that at that particular time the law clerks were more conservative than any young lawyers he had known. Lewis, *A Talk with Warren on Crime, the Court, the Country*, N.Y. Times, Oct. 19, 1969, § 6 (Magazine), at 130.

103. "[T]here is a special audience for character and fitness committees, as all law teachers know—the audience of young law students. They are likely to learn one way or another what is being asked. And they are certain to read any questions of this sort broadly as implying official scrutiny and surveillance of their opinions and associations." Kalven & Steffen, *supra* note 28, at 178.

104. *See* A. BLAUSTEIN & C. PORTER, THE AMERICAN LAWYER 213 (1954).

105. *See* THE NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINER HANDBOOK 48-107 (1968). This handbook provides an excellent history of the moral character criterion and the rationale behind its perpetuation.

106. *See, e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

107. *See* Barnes, *Character Investigation Within the Model Code for Admissions*, 38 BAR EXAMINER 71 (1969).

108. *See* Raymond, *The Role of the Law School Respecting Character and Fitness*, 35 BAR EXAMINER 3 (1966).

the time of law school registration.[109] This development ignores the deterrent effects on individuals concerned with privacy and anonymity.[110] Although the statutory scheme may be constitutional on its face, its application may be considered unconstitutional[111] on the authority of recent test oath cases.[112] The New York scheme of disclosure has the same effect in restricting and deterring activities of law students as the application of actual sanctions. Not only will students be affected, but the freedom of the bar to accept unpopular causes may consequently be curtailed.[113] The bar examiners must distinguish between the lawyer as a professional and the lawyer as an individual citizen and should accommodate and recognize divergent political philosophies regarding governmental change. In the process of screening lawyers, the examining committees should not attempt to license methods of governmental change on the basis of the applicant's political philosophy at the time of admission.[114]

A final challenge to the majority opinion involves the court's statement that Rule 9406 "goes to *belief* at the time of admissions only."[115] *Konigsberg I* and *Schware* left unresolved many questions regarding the admissions process including the examining committee's power to search out the applicant's belief rather than conduct.[116]

109. *See* Kanner, *Dual Character Investigation: At Time of Law School Registration and Prior to Admission to the Bar*, 30 BAR EXAMINER 60 (1961).

110. "[T]he right of privacy implicit in the First Amendment creates an area into which the Government may not enter." Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 570 (1963) (Douglas, J., concurring). The right of privacy in the investigative process deserves articulation by the courts in view of the sophistication of modern computer science and other investigative techniques. *See generally* Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091 (1969); Symposium, *Computers, Data Banks, and Individual Privacy*, 53 MINN. L. REV. 211 (1968); NOTE, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084 (1964).

111. *Cf.* Poulos v. New Hampshire, 345 U.S. 395 (1953) (dictum) (licensing scheme held valid on its face was invalidly applied).

112. *See* Note, *Loyalty Oaths*, 77 YALE L.J. 739 (1968); Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842 (1969); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

113. *See The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy*, 37 A.B.A.J. 123, 125 (1951).

114. *See* Countryman, *Loyalty Tests for Lawyers*, 13 LAWYERS GUILD REV. 149 (1953).

115. 299 F. Supp. 117, 126 (S.D.N.Y. 1969) (emphasis added).

116. Baird v. State Bar, *cert. granted*, 394 U.S. 957 (1969) (No. 1079, 1968 term; renumbered No. 53, 1969 term) is pending argument this term before the Supreme Court. The question presented is: "May state, consistent with First Amendment's guarantee of freedom of speech and association, Fifth Amendment's privilege against self-incrimination, and Fourteenth Amendment's Due Process Clause, exclude otherwise qualified applicant from practice of law solely because of her refusal to answer question whether she is now or ever was member of

Questions which have been approved by the majority seem calculated not to reveal the applicant's past or present conduct, but rather to assure the committee that the applicant does not adhere to an unorthodox political belief. Though freedom of mind is a recognized constitutional right,[117] these questions explore the subjective area of an applicant's viewpoint with complete license. The only reason for such inquiry in our system is to penalize the political heterodox.[118] "Inquiry on the issue of advocacy of the unlawful overthrow of the government is a greedy camel; it does not easily take its leave. It has a way of moving on into the domain of lawful economic and political belief, speech, and activity."[119] Since the process now requires the careful balancing of indeterminate interests and guaranteed freedoms, the whole theory of licensing as applied to the legal profession requires re-examination.[120]

## Civil Rights—Desegregation—HEW is Reqnired to Make a Program-by-Program Finding of Discrimination in Order to Terminate Federal Funds Under Title VI of tbe Civil Rights Act of 1964

The Department of Health, Education, and Welfare (HEW), having determined that petitioner, Board of Public Instruction of Taylor County, Florida,[1] violated Title VI of the Civil Rights Act of

Communist Party or any organization that advocates violent overthrow of United States Government. . . ." 38 U.S.L.W. 3006 (U.S. July 1, 1969); *In re* Stolar, *cert. granted*, 38 U.S.L.W. 3127 (U.S. Oct. 14, 1969) (No. 75).

117. Thomas v. Collins, 323 U.S. 516, 531 (1945): "The First Amendment gives freedom of mind the same security as freedom of conscience."

118. *See* Note, *The New Mexico Bar Admission Loyalty Oath: A Study in Unconstitutionality*, 9 NATURAL RESOURCES J. 248 (1969): "Inquiring into one's political beliefs and associations has no proper place in the determination of whether an applicant is fit to practice law. Short of overt criminal action, a belief in the need for change, even violent change, of our form of government bears no rational relation to the manner in which one carries out his duties as a lawyer." *Id.* at 265.

119. Konigsberg v. State Bar, 52 Cal. 2d 769, 776, 344 P.2d. 777, 782 (1959) (Traynor, J., dissenting).

120. The balancing of an ambiguous and obscure state interest against an indeterminate and subtle impact on free speech provides a situation in which the judge must inject his own personal values. *See* Kalven & Steffen, *supra* note 28, at 178-79. Since an objective standard would necessarily be restrictive, the abandonment of the character examination deserves serious study. *See generally* Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961).

1. Petitioner operates a small district of 8 public schools attended by approximately 2,900 white students and 975 Negro students. Prior to the 1965-66 school year, the school board

1964,[2] entered an order terminating all federal funds[3] arising under any act of Congress until such time as the petitioner corrected its discriminatory use of funds. Seeking judicial review, petitioner contended that the order entered by HEW in its administrative proceeding violated section 602 of Title VI,[4] which limits the termination of federal financial assistance to the particular programs or parts thereof found not in compliance with the Act. Respondent, Robert H. Finch, Secretary of HEW, maintained that the statute imposed no affirmative duty on HEW to make findings of fact for each program, but only created an affirmative defense for the school board in the event that a particular program was non-discriminatory.[5]

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maintained these schools on an entirely segregated basis. Following passage of the Civil Rights Act of 1964, HEW accepted the school board's "freedom of choice" plan as compliance with the Act. Thereafter, guidelines were issued by the Office of Education establishing minimum standards of desegregation. For the school year 1967-68, school board officials agreed to transfer 74 Negro students, which represented less than 8% of the Negro student population, and assign 4 teachers across racial lines. The guideline requirements, however, postulated the transfer of 12% of the Negro students and the reassignment of at least 16 teachers. After meetings between HEW and the school board failed to procure voluntary compliance, HEW brought an action against petitioner.

2. 42 U.S.C. §§ 2000d to d-4 (1964), *as amended*, 42 U.S.C. § 2000d-5 (Supp. 1965-67). Section 601 of Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1964). In order to effectuate the goals of Title VI, HEW, under direct legislative authority, 42 U.S.C. § 2000d-1 (1964), promulgated regulations covering racial discrimination in federally assisted school systems. 45 C.F.R. §§ 80.1 to -.13 (1969). To avoid termination of funds, a school board is required to submit assurance that it is in compliance with the Act. 45 C.F.R. § 80.4 (1969). This assurance can be made in one of three ways: (1) submission of HEW Form 441, an assurance that the district is operating a desegregated system, 45 C.F.R. §§ 80.4(a),(b) (1969); (2) submission of a court order directing the district to implement a specific desegregation plan, with an assurance the district will comply, 45 C.F.R. § 80.4(c)(1) (1969); or (3) submission of a desegregation plan acceptable to the Commissioner, with an assurance that the plan will be followed, 45 C.F.R. § 80.4(c)(2) (1969).

3. Petitioner was receiving federal funds under three congressional grant statutes: 20 U.S.C.A. §§ 241a-m (Supp. 1969) (federal aid for the education of children of low income families); 20 U.S.C.A. §§ 841-48 (Supp. 1969) (federal grants for supplementary educational centers); and 20 U.S.C.A. §§ 1201-13 (Supp. 1969) (grants for the education of adults who have not received a college education).

4. 42 U.S.C. § 2000d-1 (1964): "Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . . ."

5. Respondent reasoned that § 602 of Title VI was directed to the political entity whose funds were threatened rather than to the administrative agency terminating funds.

Furthermore, respondent contended that the term "program" did not refer to individual grant statutes, but to general categories such as school and road programs. On review by the Fifth Circuit Court of Appeals, *held*, order vacated and cause remanded to HEW. In order to terminate federal funds for violation of Title VI of the Civil Rights Act of 1964, an administrative agency must make findings of fact on a program-by-program basis indicating that a particular program is administered in a discriminatory manner. *Board of Public Instruction v. Finch*, 414 F.2d 1608 (5th Cir. 1969).

In 1955, the Supreme Court held in *Brown v. Board of Education*[6] that public school authorities have primary responsibility for implementing school desegregation "with all deliberate speed."[7] In response to only minimal progress[8] in desegregation of schools under judicial supervision,[9] Congress enacted Titles IV[10] and VI[11] of the Civil Rights Act of 1964. The paramount congressional purpose in passing Title VI was to eliminate discrimination in the expenditure and receipt of federal funds.[12] Another important objective of Title VI was to delegate the major responsibility of desegregation to administrative agencies.[13] In effect, Congress required[14] HEW to assume responsibility

6. 349 U.S. 294 (1955).

7. *Id.* at 301. In effect, *Brown* delegated enforcement of school desegregation to the courts.

8. In 1964, only 2.25% of the Negro children in the 11 States of the Confederacy and 10.9% in the entire region of Southern and Border States were attending school with white children. Of 3,031 biracial school districts, 1,555 were still fully segregated. U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-66, at 1 (1966). *See* HOUSE COMM. ON THE JUDICIARY REP. NO. 914, 88th Cong., 2d Sess. (1964), 2 U.S. CODE CONG. & AD. NEWS 2391, 2504-08 (1964).

9. Utilizing a case-by-case method of enforcement, courts were incapable of handling the burdensome task of desegregation. Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967).

10. 42 U.S.C. § 2000c (1964). Title IV authorizes the Attorney General to bring legal action designed to achieve desegregation when a complaint is received from an aggrieved party.

11. 42. U.S.C. §§ 2000d to d-4 (1964), *as amended*, 42 U.S.C. § 2000d-5 (Supp. IV 1965-67).

12. Senator Humphrey (D.-Minn.) remarked that the purpose of Title VI is to make certain that federal funds were not used to support discrimination. 110 CONG. REC. 6544 (1964) (remarks of Senator Humphrey). Senator Pastore (D.-R.I.) reached a similar conclusion. 110 CONG. REC. 7059 (1964) (remarks of Senator Pastore).

13. Title VI authorizes and directs each federal agency administering a financial assistance program to take action to enforce basics principles of non-discrimination. 110 CONG. REC. 6544 (1964) (remarks of Senator Humphrey). Title VI provides express statutory and legislative authority to enforce termination standards. 110 CONG. REC. 7061-62 (1964) (remarks of Senator Pastore).

14. Section 602 provides: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by

for school desegregation by arming it with the effective sanction[15] of termination of funds. The Senate and House debates on Title VI suggest that even though the language of section 602 is ambiguous,[16] enforcement would be mandatory[17] whenever discrimination was found. Although enforcement was compulsory, the legislative history indicates a congressional desire to avoid use of termination as a punitive power[18] and to utilize it only as a final expedient.[19] Unquestionably, the intent of Congress was not to allow termination of all federal aid to a state because there had been discrimination in one specific program.[20] Furthermore, the statutory language exemplifies a congressional intent to limit termination "to the particular program, *or part thereof*" found to be discriminatory.[21] After passage of the Act, HEW issued

issuing rules, regulations or orders . . . ." 42 U.S.C. § 2000d-1 (1964). HEW is required to act and adhere to the precise language of Title VI. 110 CONG. REC. 12720 (1964) (remarks of Senator Humphrey).

15. Since federal financial assistance under the Elementary and Secondary Education Act of 1965 constitutes a significant portion of school budgets, termination could be deleterious. U.S. COMM'N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 1-2 (1967).

16. Section 602 of Title VI provides: "Compliance with any requirement adopted pursuant to this section *may* be effected . . . ." 42 U.S.C. § 2000d-1 (1964) (emphasis added). Although Congress intended enforcement to be mandatory, the use of the word "may" seems to suggest that enforcement was contingent upon the discretion of HEW.

17. Senator Humphrey concluded that: "Title VI will *require* [administrative agencies] to act." 110 CONG. REC. 6544 (1964) (emphasis added). *See* Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 835 (1967-68).

18. Senator Humphrey stated: "It seems to be assumed, by some of the opponents of Title VI, that its purpose is a punitive or vindictive one. Nothing could be farther from the truth." 110 CONG. REC. 6544 (1964). Senator Pastore also stated: "Section 602, by authorizing the agency to achieve compliance 'by other means authorized by law,' encourages agencies to find ways to end discrimination without refusing or terminating assistance. These careful safeguards certainly demonstrate that the proposed statute is not intended to be vindictive or punitive." 110 CONG. REC. 7063 (1964); 110 CONG. REC. 7059 (1964) (remarks of Senator Pastore).

19. Termination is contingent upon numerous restrictions and requirements: the agency must give notice of failure to comply; attempts to secure voluntary compliance must have failed; a hearing must specifically find discrimination; action is not final until 30 days after a written report goes to Congress; and judicial review is available. 42 U.S.C. § 2000d-1 (1964).

20. 110 CONG. REC. 6544 (1964) (remarks of Senator Humphrey); 110 CONG. REC. 7059 (1964) (remarks of Senator Pastore); 110 CONG. REC. 7103 (1964) (remarks of Senator Javits (R.-N.Y.)). One of the purposes of § 602 is to protect the innocent beneficiaries of programs not affected by discrimination. Clearly, the purpose was not to effectuate wholesale cutoff of funds. 110 CONG. REC. 7061 (1964) (remarks of Senator Pastore).

21. 110 CONG. REC. 6544 (1964) (remarks of Senator Humphrey); 110 CONG. REC. 7059 (1964) (remarks of Senator Pastore); Letter from Attorney General Robert F. Kennedy to Senator Cooper, Apr. 21, 1964, in BNA, THE CIVIL RIGHTS ACT OF 1964, at 361 (1964) (emphasis added). Senator Ribicoff (D.-Conn.) stated: "[A]ny fund cutoff must be limited not only to the particular program in which discrimination occurs, but also must be limited to the part of the program in which discrimination occurs." 110 CONG. REC. 13126 (1964).

guidelines[22] establishing proper standards of desegregation that local school boards could follow. One HEW regulation[23] allows a school system to follow a court-approved plan of integration in place of the guideline standards and still retain federal aid.[24] In light of this, HEW's position as the major enforcement instrument of desegregation was bolstered by judicial recognition of the guidelines.[25] In 1967, the Fifth Circuit Court of Appeals,[26] held that school boards had an affirmative duty to integrate segregated public schools and that HEW's guidelines constituted the minimum standard of integration to be utilized by the courts. Various courts have subsequently recognized the guidelines as the proper standard,[27] and HEW's enforcement of Title VI through the termination of funds has resulted in marked progress in desegregation of schools.[28] Consistently, HEW has completely terminated[29] a school district's federal funds upon a finding of discrimination in any single program. Federal funds were suspended at the end of the fiscal year 1967 in 64 of the 4,882 Southern and Border States school districts.[30]

22. The 1965 and 1966 guidelines are discussed in U.S. COMM'N ON CIVIL RIGHTS. SOUTHERN SCHOOL DESEGREGATION 1966-67, at 10-19 (1967). For implementation of these guidelines, *see id.* at 23-36. The 1968 guidelines required school boards under voluntary plans completely to eliminate segregation in the school systems by the 1969-70 school year. 1968 HEW ANN. REP. 69; Comment, *supra* note 17, at 893-95. HEW guidelines have been attacked as invalid since the President has not formally approved them. *Id.* at 852.

23. 45 C.F.R. § 80.4(c) (1969): "The requirements . . . with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to final order of a court of the United States for the desegregation of such school . . . ."

24. This exception has been the topic of much criticism as to whether a court order creating less stringent standards can be attacked by HEW as inadequate. *See* Lee v. Board of Educ., 270 F. Supp. 859 (M.D. Ala. 1967) (HEW could not terminate funds and disapprove a court-adopted and approved plan of desegregation).

25. The Fifth Circuit first recognized HEW's guidelines as constitutional in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967). *See, e.g.*, Kelley v. Altheimer, 378 F.2d 483 (8th Cir. 1967); *cf.* Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346 (M.D. Ala. 1967).

26. United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

27. *See* Kemp v. Beasley, 389 F.2d 178, 185 (8th Cir. 1968); *cf.* Davis v. Board of School Comm'rs, 393 F.2d 690 (5th Cir. 1968). Recognizing the importance of circuit-wide uniformity, other courts have decided upon their own standards. *Cf.* Yarbrough v. School Dist., 380 F.2d 962 (8th Cir. 1967); Bowman v. County School Bd., 382 F.2d 326 (4th Cir. 1967).

28. 1968 HEW ANN. REP. 69.

29. Nashville Tennessean, Sept. 23, 1969, at 9, col. 3. HEW does not attempt to separate the funds involved into the areas specified by statute, or even into broad categories such as vocational education or remedial reading. HEW views a school district's educational program as a single entity. *See* Note, *School Desegregation and The Office of Education Guidelines*, 55 GEO. L.J. 325, 344 (1966).

30. 1967 HEW ANN. REP. 141.

In 1968, 73 hearings under Title VI resulted in termination of federal funds in 63 school districts.[31] HEW's present policy of completely terminating a school district's federal funds[32] leaves 121 school districts at the start of the 1969-70 school year without any federal assistance.[33]

In the instant case, after disposing of a procedural problem,[34] the court concluded that the termination of funds by HEW was clearly disruptive of the legislative scheme to avoid a punitive application of the termination power. The court reasoned that segregation of faculty and students did not lead to the conclusion that all the school district's programs were constitutionally invalid. Addressing itself to whether HEW was required to make findings of fact for each program, the court indicated that since the statutory language is directed to the federal agency administering the funds, the burden of limiting the effects of termination is upon that agency.[35] The court found that this result was consonant with the purpose of limiting termination power, which was to benefit the potential recipient of federal aid.[36] Similarly, in considering whether the term "program" referred to particular grant statutes or to general categories of programs, the court again strictly interpreted the statutory language. Since termination is limited "to the particular program, or part thereof," and even if "program" referred to a "school program," the expression "or part thereof" must refer to the individual grant statutes within that "school program."[37]

31. 1968 HEW ANN. REP. 49-50. As of June 30, 1968, an accumulated total of only 96 districts had been actually barred from federal assistance because of noncompliance. *Id.* at 69.

32. Funds may be terminated upon a finding of discrimination in any one program. Note 29 *supra.*

33. N.Y. Times, Sept. 2, 1969, at 37, col. 6.

34. HEW had contended that since the petitioner had not raised the issue of wholesale termination during the administrative proceedings, the question was not properly before the court. The general rule concerning judicial review of decisions of an administrative agency is that courts should not overturn administrative decisions unless the administrative body has erred against objection made at the appropriate time. United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952). An exception, however, provides that rules of procedure are devised to promote and not to defeat the ends of justice. Hormel v. Helvering, 312 U.S. 552 (1941). In applying the exception to this case, the court indicated that justice required a decision on the merits since HEW's action in the proceedings below made it impossible for the court properly to review the case.

35. 414 F.2d at 1076. Legislative history was utilized by the court to reach this result. 110 CONG. REC. 13126 (1964).

36. The court reasoned that the burden of limiting termination should not be upon the state and that the failure of a state to assert the affirmative defense of limited termination allows HEW to deprive the actual beneficiaries of federal funds. This results in the perpetuation of an evil the statute was designed to avoid. 414 F.2d at 1077.

37. *Id.* Noting that each relevant grant statute was designated "a program" by its own statutory scheme, the court listed a number of grant statutes referred to in the Senate debates as "programs." *Id.* at 1076-77.

Finally, the court noted that the purpose of the statute was to prevent the condemnation of lawful programs along with discriminatory ones. Declaring that each program should receive its own "day in court," the court concluded that termination must be made only on a program-by-program basis.

The instant case represents the first time a court has delineated the scope of HEW's power of termination under Title VI of the Civil Rights Act of 1964. HEW must now find discrimination in each school program and can terminate funds only in the particular programs found to be discriminatory. Previously, HEW's policy[38] was to terminate *all* federal funds to a school district on finding discrimination in any one specific program. The legislative history, however, ostensibly affirms the congressional purpose of benefiting the ultimate recipient,[39] the student, and limiting the power of termination to the particular discriminatory program[40] so as not to punish the innocent along with the guilty. Although recognizing the correctness of the court's interpretation and the meritorious attempt to protect the student, the instant case, upon closer examination, presents a number of serious problems. Administratively, a program-by-program determination of discrimination will place an enormous burden upon an understaffed agency.[41] With only about 100 staff members[42] HEW must evaluate assurances, negotiate with school officials, and undertake field investigations to determine compliance[43] in approximately 4,900 southern school districts. The added work load will only exacerbate the difficult conditions and essentially render section 602 ineffective when applied to school desegregation.[44] Failure of Congress to appropriate sufficient funds to satisfy additional expenses would subvert the purpose and effect of Title VI.[45] In states where federal funds are paid

38. Note 29 *supra*.

39. 110 CONG. REC. 7061 (1964) (remarks of Senator Pastore).

40. Senator Saltonstall (R.-Mass.) stated: "Federal funds will be cut off for only those political entities or particular programs or *parts of programs* in which discrimination is prohibited." 110 CONG. REC. 12689 (1964) (emphasis added); 110 CONG. REC. 15896 (1964) (remarks of Congressman Celler (D.-N.Y.)). *See* note 21 *supra*.

41. U.S. COMM'N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 20-22, 39, 97 (1967).

42. *Id.* at 22; U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-66, at 25, 26 (1966).

43. U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-66, at 25, 26 (1966).

44. Note, *supra* note 29, at 346.

45. S. BAILEY & E. MOSHER, ESEA THE OFFICE OF EDUCATION ADMINISTERS A LAW 154, 155 (1968).

directly to a state agency and are disbursed to individual districts by the state in annual specific grants or on a piecemeal basis according to need, many practical difficulties will arise in tracing each individual expenditure to discrimination. It will be virtually impossible for HEW to terminate aid if it is required to link each dollar cutoff to the discriminatory action.[46]

The court order exception,[47] which exempts school districts under court-approved desegregation plans from termination, has made school desegregation a cooperative effort between HEW and the courts. This had led to inconsistencies as to the appropriate standard for desegregation,[48] particularly when a court's standards are less stringent than HEW's guidelines. For example, school districts often seek to avoid more stringent HEW standards by obtaining a court order.[49] Moreover, HEW cannot use its own enforcement procedures to compel school districts to comply with court orders.[50] Recognizing this means of avoidance, Congress enacted Title VI to mollify dissatisfaction with judicial progress in achieving desegregation.[51] Judicial enforcement of desegregation imposes a heavy case load on judges[52] and fails to achieve prompt and uniform desegregation.[53] Furthermore, the courts are unable to issue binding advisory opinions, and the contempt power is not an effective means of enforcement against school board officials.[54] Although one commentator has indicated that the courts are better suited to deal with the problem of desegregation,[55] the courts have recognized the expertise of the HEW staff in working with school districts.[56] Clearly, HEW's greatest inadequacy is lack of man-

46. Note, *supra* note 29, at 344, 345. For an additional administrative problem, see *id.* at 345 n.108.

47. 45 C.F.R. § 80.4(c)(1) (1969).

48. Clark v. Board of Educ., 374 F.2d 569 (8th Cir. 1967) (refusing to adopt *Jefferson I*); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 860 n.52 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

49. Comment, *supra* note 17, at 850.

50. Lee v. Board of Educ., 270 F. Supp. 859 (M.D. Ala. 1967).

51. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847, 853-54 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967); U.S. COMM'N ON CIVIL RIGHTS, 1 RACIAL ISOLATION IN THE PUBLIC SCHOOLS 239 (1967).

52. Dunn, *supra* note 9, at 42.

53. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 854-55 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

54. *Id.* at 855.

55. Note, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 342-43 (1967).

56. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 896 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967); Price v.

power.[57] Since 1964, however, the agency has been extremely successful in achieving desegregation.[58] Moreover, HEW has a congressional mandate[59] to bear the major responsibility of supervising school desegregation. Utilization of HEW's guidelines has allowed Congress to establish a national, uniform standard.

In order to correct the inconsistencies in the present administration of Title VI, the following possible solutions are suggested: (1) Congress should appropriate funds sufficient to satisfy HEW's administrative requirements;[60] (2) in an effort to establish complete uniformity in desegregation standards, HEW should ask the President to approve the guidelines giving them force of law.[61] Title VI requires formal Presidential approval of all HEW's regulations in order to give them effective legal authority.[62] Since the guidelines have never been formally approved by the President, this action would provide the guidelines with the necessary binding force of law; (3) in conjunction with approval of the guidelines, HEW should repeal its own court order exception in order to bring those school districts which seek less stringent desegregation guidelines under the purview of HEW's authority derived from Title VI. This would require all school districts to adhere to HEW guidelines as the proper standard of desegregation. Of course, courts would still serve as checks against any arbitrary and unreasonable action by HEW, since school districts whose funds were terminated could seek review of the administrative decision under Title VI.

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Board of Educ., 348 F.2d 1010, 1013 (5th Cir. 1965); Singleton v. School Dist., 348 F.2d 729, 731 (5th Cir. 1965). In addition to clerical workers, the staff of HEW includes professional educators who work with the school districts.

57. *See* notes 41-43 *supra* and accompanying text.

58. 1968 HEW ANN. REP. 69; N.Y. Times, Sept. 2, 1969, at 37, col. 1. For a state-by-state status of classroom desegregation at the opening of the 1969-70 school year, see N.Y. Times Sept. 2, 1969, at 37, col. 7.

59. 42 U.S.C. §§ 2000d to d-4 (1964), *as amended*, 42 U.S.C. §§ 2000d-5 (Supp. 1965-67).

60. U.S. COMM'N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 97 (1967).

61. *See* note 22 *supra*.

62. 42 U.S.C. § 2000d-1 provides: "No [federal agency's] rule, regulation, or order shall become effective unless and until approved by the President."

## Constitntional Law—Civil Rights—Section 1985(3) Does Not Reach Private Conspiracies

Seeking damages in federal court for a racially motivated assault,[1] Negro plaintiffs alleged that defendants had violated section 1985(3) of Title 42 of the United States Code[2] by conspiring to deprive them of equal protection of the laws and equal privileges and immunities under the laws. Plaintiffs contended that recent Supreme Court decisions[3] had impliedly extended section 1985(3) to include private discriminatory acts. The District Court for the Southern District of Mississippi dismissed the action on the ground that the statute required a finding of state involvement in the conspiracy.[4] On appeal to the United States Court of Appeals for the Fifth Circuit, *held*, affirmed. Section 1985(3) does not proscribe private conspiracies. *Griffin v. Breckenridge*, 410 F.2d 817 (5th Cir. 1969).

Section 1985(3) was enacted in 1871 as part of a broad anti-discrimination statute[5] which was originally equipped with both civil and criminal remedies. In 1883, however, the Supreme Court held

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1. Believing one of the plaintiffs was a civil rights worker, the two white defendants stopped the plaintiffs' car on the highway and threatened and beat the plaintiffs at gun-point.

2. 42 U.S.C. § 1985(3) (1964): "If two or more persons in any State . . . conspire or go in disguise on the highway . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . . [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do . . . any act in furtherance . . . of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . . ."

3. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); United States v. Guest, 383 U.S. 745 (1966).

4. The decision of the district court is not reported.

5. Act of April 20, 1871, ch. 22, 17 Stat. 13: "[A]ny person who, under color of any law . . . shall subject . . . any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law . . . . [I]f two or more persons . . . shall conspire . . . to overthrow . . . the government of the United States, or to levy war . . . or to oppose by force the authority of the government of the United States, or . . . to prevent . . . the execution of any law . . . or . . . to take . . . any property of the United States . . . or . . . to prevent any person from . . . holding any office or . . . to deter any party or witness in any court of the United States from attending such court, or . . . to influence the verdict . . . of any juror . . . *or shall conspire . . . or go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws* . . . each and every person so offending shall be deemed guilty of a high crime . . . . And if any one or more persons engaged in any such conspiracy shall do . . . any act in furtherance . . . of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured . . . may have . . . an action for the recovery of damages . . . ." (Emphasis added).

unconstitutional the part of the Act that made private conspiracies a crime on the ground that it was "not warranted by any clause in the Fourteenth Amendment to the Constitution."[6] Shortly thereafter, in the *Civil Rights Cases*,[7] the Court firmly established the state action doctrine by declaring that congressional power to protect fourteenth amendment rights was limited to legislation for "correcting the effects" of state laws and acts in violation of the amendment.[8] The restrictive effect of the state action doctrine on federal power to enforce civil rights was mitigated, however, by judicial recognition of a narrow class of "federal rights"[9] that could be federally protected against purely private acts. The delineation of these rights was achieved largely through a case-by-case application of section 241 of Title 18 of the United States Code,[10] which imposes criminal sanctions on interference with the "free exercise or enjoyment of any right or privilege secured . . . by the Constitution or laws of the United States." In 1951, *Collins v. Hardyman*[11] presented to the Supreme Court the question whether section 1985(3) would support a civil action for the invasion of a federally protected right by a purely private conspiracy.[12] The Court avoided the constitutional questions presented[13] and based its

6. United States v. Harris, 106 U.S. 629, 640 (1883). The language of the statute held unconstitutional is identical to § 1985(3) in its description of prohibited conspiracies. Significantly, the same language held to include private conspiracies in *Harris* was held to exclude private conspiracies in Collins v. Hardyman, 341 U.S. 651 (1951). *See* notes 11-13 *infra* and accompanying text.

7. 109 U.S. 3 (1883).

8. *Id.* at 11.

9. Note, *Fourteenth Amendment Congressional Power to Legislate Against Private Discriminations: The Guest Case*, 52 CORNELL L. REV. 586, 597 (1967): "Among these 'federally protected rights' are the right to perfect a homestead claim, the right to vote in federal elections, the right to be secure from unauthorized violence while in federal custody, the right to inform on violations of federal law, and the right to enforce a federal court order."

10. 18 U.S.C. § 241 (1964): "If two or more persons conspire to . . . intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . or [i]f two or more persons *go in disguise on the highway*, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—[t]hey shall be fined not more than $10,000 or imprisoned not more than ten years, or both." (Emphasis added).

11. 341 U.S. 651 (1951).

12. *Collins* involved the disruption of a political meeting called in order to petition Congress to oppose the Marshall Plan. The Supreme Court "assume[d], without deciding, that the facts pleaded show[ed] that defendants did deprive plaintiffs 'of having and exercising' a federal right . . . ." *Id.* at 660.

13. The Court noted that potential issues were "congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights." *Id.* at 659.

dismissal of the complaint upon an interpretation of the statute's language. The Court held that although the statute proscribed conspiracies to deprive another of equal protection or equal privileges and immunities, "private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so."[14] Three recent cases have seriously challenged the state action doctrine and its implications for section 1985(3). In *United States v. Price*,[15] and *United States v. Guest*,[16] the Supreme Court extended the scope of section 241 to include the protection of fourteenth amendment rights against discriminatory state action.[17] In *Guest*, however, six members of the Court, in two concurring opinions, indicated that section 241 protected fourteenth amendment rights from all conspiracies, and that state action was not essential to sustain the cause of action.[18] Likewise, in *Jones v. Alfred H. Mayer Co.*,[19] the Court held that a long-dormant statute proscribing purely private discrimination in the sale of housing was a constitutional exercise of congressional enforcement power under the thirteenth amendment.[20]

In the instant case, the court held that since the majority opinion in *Guest* had required and found state action to support its holding, the case "on its merits [did] not abolish state action."[21] Likewise, *Mayer* could not be held to authorize the extention of congressional enforcement power under the fourteenth amendment because it concerned a statute enacted pursuant to the thirteenth amendment. The court further held that the language of section 1985(3), as construed by the Supreme Court in *Collins*,[22] was limited by its own terms to conspiracies in which there was state involvement. Thus, even granting

14. *Id.* at 661.

15. 383 U.S. 787 (1966).

16. 383 U.S. 745 (1966).

17. Section 241 had previously been limited to the protection of "federal rights." *See* note 9 *supra* and accompanying text.

18. 383 U.S. at 761 (Clark, Black & Fortas, JJ., concurring); *Id.* at 774 (Brennan, Warren & Douglas, JJ., concurring in part and dissenting in part).

19. 392 U.S. 409 (1968).

20. Both the majority opinion in *Mayer* and Justice Brennan's concurring opinion in *Guest* quoted Chief Justice Marshall's classic test of the constitutionality of congressional enactments: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCullock v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

21. 410 F.2d at 820.

22. *See* text accompanying notes 11-14 *supra*.

congressional power to reach purely private conspiracies to invade fourteenth amendment rights, such conspiracies were not within the ambit of section 1985(3).

Although justified by stare decisis, the instant court's restrictive reading of section 1985(3) opposes a definite trend to expand federal jurisdiction over civil rights violations.[23] Contrary to the holding in *Collins*, which seems to have been dictated by a desire to avoid the constitutional issues presented,[24] the language of section 1985(3) supports a more liberal reading. Section 1985(3) and section 241 both refer to men going "in disguise on the highway"[25] and thus indicate a clear congressional intent to reach the private discriminatory acts of the Ku Klux Klan. Since the Act from which section 1985(3) was derived[26] contained another section that provided a civil remedy for discriminatory acts "under color of any law,"[27] the omission of this phrase from the section that is now 1985(3) was almost certainly not accidental. Therefore, an interpretation of section 1985(3) that included private acts within its scope would be consonant with the statute's language. If such an interpretation were merged with the reasoning of the concurring opinions in *Guest*, section 1985(3) would become an effective civil counterpart to section 241. Since the weight of the evidence required to find civil liability is less than that required to impose a criminal sanction, litigation under 1985(3) might succeed where a criminal prosecution under section 241 could not. In addition, the prospect of recovery would tend to encourage litigation of those cases that otherwise might never be adjudicated. On the other hand, such a result would attribute additional and ill-defined powers to the federal government, raise serious questions regarding the state-federal balance of power, and increase the amount of litigation in federal courts. Since it is doubtful that the existence of a federal statute providing a civil remedy for private discrimination would add much to the deterrent effect of present state and federal laws, the primary function of such a statute would be compensatory. This function, in theory at least, can be adequately exercised by the states under existing laws. Furthermore, the danger of discriminatory state inaction is not a significant factor because the initiative in a civil action rests with the

23. *E.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). *See also* cases cited note 3 *supra*.

24. *See* notes 11-14 *supra* and accompanying text.

25. 42 U.S.C. § 1985(3) (1964); 18 U.S.C. § 241 (1964). *See* notes 2 & 10 *supra* and accompanying text.

26. Act of April 20, 1871, ch. 22, 17 Stat. 13. *See* note 5 *supra*.

27. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (now 42 U.S.C. § 1983 (1964)).

injured party. Thus, although the current interpretation of section 1985(3) is not in accord with the legislative intent, major problems would result from its rejuvenation. Such practical objections should not, however, prevent the courts from according the statute the scope that Congress intended.

## Constitutional Law—Criminal Procedure—Sixth Amendmeut Does Not Require Right to Counsel for Iu-Custody Suspects at Photographic Identifications.

Eighteen months after a savings association was robbed, defendant was apprehended and placed in a lineup. During the lineup proceedings, defendant was represented by counsel,[1] and certain photographs were taken. Subsequently, the photographs were privately shown,[2] in the absence of defendant's counsel, to witnesses who were not present at the lineup. Although none of the witnesses was able to identify the defendant at his trial,[3] prior photographic identifications[4] were admitted over defendant's objection that the absence of counsel at the private pre-trial exhibition of the lineup photographs was a violation of his sixth amendment rights.[5] On appeal to the United States Court of Appeals for the Fourth Circuit, *held*, affirmed. The sixth amendment does not require the presence of counsel for an apprehended suspect at an identification proceeding where photographs of the suspect in a lineup are displayed. *United States v. Collins*, 416 F.2d 696 (4th Cir. 1969).

The sixth amendment[6] guarantees the right to assistance of counsel for every criminal defendant. The Supreme Court has held that this right attaches at any "critical stage"[7] of the prosecution if the absence

1. United States v. Wade, 388 U.S. 218 (1967), requires that a suspect be represented by counsel at a lineup to insure his right to a fair trial. *See also* Gilbert v. California, 388 U.S. 263 (1967).

2. Defendant was in custody at the time the photographs were shown.

3. During the 10 month interval between the lineup and the trial, the defendant suffered a considerable weight loss, dropping from 250 to 175 pounds.

4. One witness was able to identify defendant at the lineup; two witnesses identified him from photographs; and a fourth witness was unable to identify the accused from either the lineup or the photographs.

5. Both the trial judge and the defense counsel extensively cross-examined the witnesses, in the absence of the jury, to aseertain whether there had been any improprieties in the identification process.

6. U.S. CONST. amend. VI. *See* Note, *The Right to Effective Counsel in Criminal Cases*, 18 VAND. L. REV. 1920 (1965).

7. The Supreme Court has specifically required the presence of counsel at various critical

of counsel might derogate the accused's right to a fair trial. In *United States v. Wade*[8] and *Gilbert v. California*,[9] the Court held that lineup identifications were critical stages requiring the presence of counsel. The Court reasoned that since this type of identification process "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even critically, derogate from a fair trial,"[10] the presence of counsel could reduce the possibility of prejudice to an accused.[11] In *Simmons v. United States*,[12] however, the Supreme Court refused to extend the critical stage doctrine to photographic identifications when the suspect is not in custody.[13] The Court reasoned that such identification procedures were necessary for swift and effective law enforcement.

In the instant case, the court held that *Wade* and *Gilbert* were not controlling since they protected an accused from unrestrainable suggestion in a congregation of persons. The court reasoned that since the defendant was represented by counsel at an impartial lineup, the subsequent display of photographs of that lineup was also impartial. The court noted, however, that the identification proceeding lacked conditions embracing the apprehensions of a lineup. Acknowledging that some non-lineup identifications could conceivably be unfair, the court found that no prejudicial circumstances were evident in this instance.[14] One judge, dissenting,[15] maintained that the display of lineup

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stages, including: the arraignment, Hamilton v. Alabama, 368 U.S. 52 (1961); certain preliminary hearings, White v. Maryland, 373 U.S. 59 (1963); secret interrogation prior to arraignment, Escobedo v. Illinois, 378 U.S. 478 (1964); custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966); and the trial, Gideon v. Wainwright, 372 U.S. 335 (1963). An accused, however, may waive his right to counsel at any time if the waiver is intelligently and understandingly made. Carnley v. Cochran, 369 U.S. 506 (1962).

8. 388 U.S. 218 (1967). *See* Note, *Right to Counsel at Pre-trial Lineup*, 63 NW. U.L. REV. 251 (1968).

9. 388 U.S. 263 (1967). *See* Note, *Lawyers and Lineups*, 77 YALE L.J. 390 (1967).

10. United States v. Wade, 388 U.S. 218, 228 (1967).

11. The Court was troubled by the effect of secret interrogations and the inability of a suspect's counsel to provide adequate representation at the trial without knowledge of what actually transpired at the identification proceeding. *See* United States v. Wade, 388 U.S. 218, 229-35 (1967).

12. 390 U.S. 377 (1968).

13. The Court recognized the dangers inherent in photographic identification but concluded that the danger could be substantially lessened by cross-examination at trial. *Id.* at 383-84.

14. The court found "no intimation" in the trial record of any intentional or inadvertant unfairness in the prescntation of the photographs for identification. The court relied upon Stovall v. Denno, 388 U.S. 293 (1967), for the proposition that a claimed violation of due process "depends on the totality of the circumstances surrounding it."

15. United States v. Collins, 416 F.2d 696, 700 (4th Cir. 1969) (Winter, J., dissenting). Judge Winter reasoned that photographic identifications of an in-custody suspect are clearly

photographs was a critical stage since the issue of identification was determined at that point.

In failing to deem the photographic identification of a suspect already in custody a critical stage, the court misinterpreted the main thrust of *Wade, Gilbert*, and prior related decisions.[16] Corporeal identification is not completely reliable[17] even under the best conditions; however, it is clearly superior to photographic identification.[18] Any identification process is susceptible to either intentional or inadvertant suggestion.[19] Fairness at a lineup cannot be equated with fairness at a subsequent showing of photographs of the lineup, since the verbal comments and the manner of presenting the photographs may substantially influence the result.[20] Although the Supreme Court in *Simmons* advocated cross-examination at the trial to reveal improprieties in a photographic identification,[21] it is doubtful that this procedure alone provides an adequate safeguard. The absence of counsel at the identification proceeding would seriously impair an attorney's ability to attack the credibility of a witness and to discern any possibilities of misidentification.[22] Since most witnesses are not aware of prejudical identification conditions and are not trained in the detection of subliminal suggestion, subconscious influence may go unnoticed.[23] This problem would intensify if a substantial period of

distinguishable from similar identifications of a suspect who is still at large; therefore, photographic identifications during custody require the presence of counsel.

16. *See* note 7 *supra*. The Court was primarily concerned with the effect of secret interrogations. United States v. Wade, 388 U.S. 218, 230 (1967). The Court indicated the undesirable effects a group of people have on an identification proceeding, hut did not base its decision on this issue. *See id.* at 234; Gilbert v. California, 388 U.S. 263, 270 (1967). The Court was also concerned with eliminating any potential for prejudice, and thereby preserving an accused's right to a fair trial. United States v. Wade, *supra* at 229, 233, 236. The Court recognized that the trial which determines the accused's fatc may not be in the courtroom but at the pretrial confrontation. *Id.* at 235.

17. *See generally* United States v. Wade, 388 U.S. 218, 228 n.6 (1967). For example, 17 people erroneously identified an innocent man as a bogus check artist. E. BORCHARD, CONVICTING THE INNOCENT 1-6 (1932). Even relatives and close friends have made mistaken identifications. P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 13 (1965).

18. P. WALL, *supra* note 17, at 70.

19. *See generally* United States v. Wade, 388 U.S. 218, 229 n.7 (1967).

20. The number of photographs shown, the manner in which they are presented, physical differences between the photographs, and any improper suggestions may substantially affect the outcome of the identification proceedings. P. WALL, *supra* note 17, at 73-85.

21. 390 U.S. at 384. The trial court adopted this procedure. *See* note 5 *supra*. Many other courts have likewise relied on cross-examination. *See, e.g.*, State v. Tafoya, 454 P.2d 145 (Ariz. 1969); People v. Neal, 77 Cal. Rptr. 65 (Ct. App. 1969).

22. United States v. Wade, 388 U.S. 218, 226, 232 (1967).

23. *See id.* at 230. A primary cause of erroneous identification is the susceptibility of the

time lapsed between the identification proceeding and the subsequent trial.[24] At the trial, therefore, an improper identification process may appear to have been proper. Furthermore, *Wade* indicated that cross-examination is not an absolute assurance of accuracy and reliability in an identification proceeding and that the primary concern must be the prevention of unfairness and the lessening of the hazards of eyewitness identification.[25] The instant court does not explain why a subsequent lineup was not held. Inasmuch as the suspect was already in custody, it would seem that a lineup could easily have been arranged.[26] Since photographic identification is proper only when corporeal identification is impossible, the law enforcement authorities in the instant case employed an identification procedure clearly inferior in reliability to one which was available.[27] If a suspect, in custody in the area of the crime,[28] is denied the benefits of counsel at a photographic showing, the *Wade* and *Gilbert* protections could easily be emasculated.[29] Unquestionably, most improper identifications are not the result of deliberate police procedures designed to prejudice an accused; rather,

human mind to suggestive influences. P. WALL, *supra* note 17, at 9, 29-35, 40. Furthermore, photographic identification is extremely susceptible to suggestion. *Id.* at 68-73.

24. In the instant case, the trial occurred 10 months after the photographs were shown.

25. 388 U.S. at 235.

26. Pittsburg, for example, averaged 3 lineups per week in 1967. Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Implementation of an Expanding Constitution*, 29 U. PITT. L. REV. 65, 79 (1968).

27. Photographs present a two-dimensional image which is "frozen" and often not similar to the living, moving subject. P. WALL, *supra* note 17, at 70.

28. If a suspect is apprehended many miles from the crime, a difficult problem is presented. For example, if a crime is committed in New York and a suspect is later apprehended in California, it would be impractical to have counsel represent the suspect at a photographic showing in New York only to have the suspect exonerated by the witnesses. On the other hand, if the unrepresented suspect is identified through photographs, his rights may be prejudiced since a subsequent corporeal identification proceeding in New York, at which counsel is present, would likely have the same result. This would be especially true if the suspect is rapidly transported across the country and the witnesses identify him shortly after the photographic showing. P. WALL, *supra* note 17, at 68-70. *See also* McClain v. State, 444 S.W.2d 99 (Ark. 1969) (suspect arrested in Louisiana but photographs identified in Arkansas); Commonwealth v. Geraway, 245 N.E.2d 423 (Mass. 1969) (Massachusetts photographic identification of suspect in prison in Connecticut approved). A possible solution to the dilemma is to appoint a neutral party to supervise all identification proceedings, either corporeal or photographic. Also, complete motion picture or video-tape coverage of the lineup would provide the defense attorney with an opportunity to scrutinize the procedure. The Supreme Court in *Wade* advocated legislation or other regulations, such as those of local police departments, to eliminate risks of abuse and unintentional suggestions. 388 U.S. at 239. *See also* 3 J. WIGMORE, EVIDENCE § 786(a) (3d ed. 1940).

29. If an accused is identified by photograph as the guilty party, any subsequent corporeal identification of the accused may be based upon the witness's recollection of the photograph instead of the features of the guilty party. P. WALL, *supra* note 17, at 68-70.

errors are caused by the dangers inherent in eyewitness identification.[30] In light of the potential for prejudice to an accused's rights, the added burden of providing counsel seems relatively small. The presence of counsel could hardly impede legitimate law enforcement and may assist enforcement by avoiding improper identifications.[31] The Supreme Court has held that "*Wade* and *Gilbert* affect . . . *all future cases* which involve confrontations for identification purposes conducted in the absence of counsel. . . ."[32] The reasons advanced by the Supreme Court for requiring the presence of counsel at a corporeal lineup also apply to a photographic lineup of a suspect in custody.[33] The potential for prejudice and misidentification is at least as great,[34] and the right of an accused to a fair trial may be irretriveably lost if attendance of counsel is not required.

## Constitutional Law—Equal Protection—States May Not Require More Than a Simple Majority to Authorize Local Bond Issues and Tax Levies Through Popular Election

Plaintiffs, voters of Roane County, West Virginia, brought a class action for a declaratory judgment[1] that the State constitutional requirements that county bond indebtedness and certain tax levies be approved by 60 percent of the voters in a public election[2] violates the equal protection clause of the Constitution of the United States.[3] In a 1968 election conducted by defendant Roane County Board of

30. *See generally* P. WALL, *supra* note 17. *See also* United States v. Wade, 388 U.S. 218, 235 (1967).

31. United States v. Wade, 388 U.S. 218, 238 (1967).

32. Stovall v. Denno, 388 U.S. 293, 296 (1967) (emphasis added). The Supreme Court further held that the exclusionary rules of *Wade* and *Gilbert* should be applied even though no unfairness is present. *Id.* at 299.

33. The compelling arguments for photographic identification of at large suspects are not applicable if the defendant is already in custody. *See* United States v. Collins, 416 F.2d 696, 701 (4th Cir. 1969) (Winter, J., dissenting); *cf.* United States v. Simmons, 390 U.S. 377, 384 (1968).

34. *See* P. WALL, *supra* note 17, at 66-89.

1. Plaintiffs also sought a mandamus to compel the Board of Education to authorize the issuance of bonds and to impose the additional tax levy.

2. W. VA. CONST. art. 10, § 1 requires that 60% of the local voters approve imposition of additional tax levies and W. VA. CONST. art. 10, § 8 lists the same 60% requirement for incurring local bond indebtedness.

3. Plaintiffs also alleged that the West Virginia state constitutional provision violated the guarantee clause of the Federal Constitution. U.S. CONST. art. IV, § 4.

Education, a majority[4] of the voters of Roane County favored the issuance of bonds and an additional tax levy to finance local school improvement and construction.[5] Plaintiffs, supporters of both proposals, contended that their votes had been diluted since two negative votes offset three positive votes and that this debasement contravenes the mandate of "one man, one vote." Defendants argued that the equal protection clause could not be construed to invalidate the right to require a fractional vote of greater than a majority. The use of fractional votes in state and federal constitutional provisions[6] refutes any theory that simple majority rule is a constitutional command. The trial court sustained defendant's motion for judgment on the pleadings and dismissed the action. On appeal to the Supreme Court of West Virginia, *held*, reversed. State action imposing a requirement that more than a simple majority of voters must support proposed local bond issuance and additional tax levies constitutes a denial of equal protection. *Lance v. Board of Education*, 38 U.S.L.W. 2060 (No. 12809) (W. Va., filed July 8, 1969).

Although the distinction has never been clearly enunciated by the Supreme Court, implementation of the equal protection clause has resulted in the identification of two categories of discriminatory state regulation.[7] Unequal treatment may be permissible in order to effect valid state policy, particularly in the case of economic regulation, if there is a *reasonable* basis for the classification,[8] but a "compelling

4. Of the votes cast, 51.55% favored the issuance of bonds, and 51.51% supported the additional tax levy.

5. There have been no new schools or major additions or improvements to existing schools in Roane County since 1946. Lance v. Board of Educ., 38 U.S.L.W. 2060, opinion at 10 (No. 12809) (W. Va., filed July 8, 1969).

6. *E.g.*, U.S. CONST. art. I, § 3 (two-thirds vote of Senate for impeachment); art. I, § 5 (two-thirds of either House to exclude a member); art. I, § 7 (two-thirds to override Presidential veto); art. II, § 2 (two-thirds concurrence of Senate to make treaties); art. V, (two-thirds of each house and two-thirds of state legislatures to amend the Constitution). W. VA. CONST. art. 4, § 9 (two-thirds vote of Senate for impeachment); art. 6, § 13 (three-fifths vote of legislature to call special session); art. 6, § 22 (two-thirds of legislature to consider other business during time set aside for review of budget); art. 6, § 29 (four-fifths to dispense with reading of a bill); art. 6, § 30 (two-thirds to change the time when an act takes effect); art. 10, § 7 (three-fifths popular vote to require special tax assessment); art. 14, § 2 (two-thirds of legislature to amend constitution).

7. For a discussion of the "two faces of equal protection," see R. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 169-80 (1965).

8. "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy." Allied Stores v. Bowers, 358 U.S. 522, 528 (1959); *accord*, McGowan v. Maryland, 366 U.S. 420 (1961) (upheld statute permitting only certain merchants to do business on Sunday).

state interest"[9] must be shown to justify a denial of "basic civil rights of man."[10] The right to vote has been unequivocally categorized as a fundamental right[11] which may be transgressed in only the limited circumstances in which significant state policy requires the restriction. Suffrage has been vigorously defended by the judiciary against any attempt to debase the vote or prevent its free exercise; for example, withholding the franchise from a class of otherwise qualified voters through poll taxes,[12] white primaries,[13] or gerrymandering[14] has been condemned. More recently, the Supreme Court struck down state statutes limiting eligible voters to those with an identifiable interest in the matter under consideration.[15]

*Baker v. Carr*[16] and its progeny have examined the narrower question of allowing disproportionate voting power in representation elections. The constitutional standard that has now emerged dictates that each legislator represent an equal number of the population,[17] whether the governmental unit is Congress,[18] a state legislature,[19] or a local governing body.[20] In denouncing vote dilution, early case language suggested that the courts' concern lay more with the inequality of voting power than with the unequal representation fostered by malapportionment.[21] *Gray v. Sanders*[22] gave a clear indication that the disapproval of dilution of votes had implications beyond questions of

9. Kramer v. Union School Dist., 395 U.S. 621, 627 (1969).

10. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (criminal sterilization statute invalidated).

11. Reynolds v. Sims, 377 U.S. 533, 555 (1964): "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

12. Harper v. Board of Elections, 383 U.S. 663 (1966).

13. Nixon v. Herndon, 273 U.S. 536 (1927).

14. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

15. Kramer v. Union School Dist., 395 U.S. 621 (1969) (eligible voters in school district elections limited to owners or lessees of taxable realty located in the district or parents or custodians of children enrolled in public schools); Cipriano v. Houma, 395 U.S. 701 (1969) (only "property taxpayers" allowed to vote on municipal bond issue).

16. 369 U.S. 186 (1962).

17. Early decisions required apportionment on as nearly as practicable an equal population basis, *e.g.*, Wesberry v. Sanders, 376 U.S. 1 (1964), but the most recent Supreme Court holding requires that a good-faith effort must be made to establish *absolute* equality in the number of people that each congressman represents. Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

18. Wesberry v. Sanders, 376 U.S. 1 (1964).

19. Reynolds v. Sims, 377 U.S. 533 (1964).

20. Avery v. Midland County, 390 U.S. 474 (1968).

21. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 555 (1964): "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

22. 372 U.S. 368 (1963).

mere legislative apportionment. At issue was the propriety of the Georgia county-unit nominating system which resulted in less populous areas being represented by proportionally more convention delegates than counties with large populations.[23] Although *Gray* was ultimately decided on the basis of unequal representation, the case presented the question whether votes may be weighed after they are cast.[24] The Court said the procedure was clearly unconstitutional since a qualified class of voters may not be stripped of equality of voting power.[25] The Supreme Court has hinted that strict population equality might not be all that is required to insure equal protection. The Court noted in *Burns v. Richardson*[26] that despite numerically equal representation, multi-member districts may contravene equal protection rights if invidious class discrimination characterizes the system. Accordingly, a multi-member district scheme which statistically provided an equal number of constituents for each representative, but which located a minority group in a large district so that it constituted a relatively small percentage of the population has been held by a lower court to dilute the *effective* voting power of the minority.[27]

In the instant case the court determined that the mandate of "one man, one vote" extends beyond the reapportionment cases. General language extolling equality of the vote was cited from the apportionment decisions[28] and *Gray* was heavily relied upon in concluding that "one man, one vote" has been established as a general principle without qualification or exception.[29] The court found that the West Virginia constitutional provisions gave "no" votes one and one-half times the voting power of "yes" votes, thereby diluting "yes" votes in contravention of the equal protection clause. If dilution or debasement through a 60 percent requirement were allowed, there would be no escape from the conclusion that the weight and force of votes "may legally be debased and diluted to the point of total extinction."[30] The dissent argued that "one man, one vote" can rationally be viewed as applying only to apportionment, for if the

23. Counties with small populations received the same number of delegates, but as the population increased the number of delegates allocated did not increase proportionally. *Id.* at 371-73.

24. *Id.* at 381 (Stewart & Clark, JJ., concurring).

25. *Id.*

26. 384 U.S. 73 (1966).

27. Chavis v. Whitcomb, Civil No. IP 69-C-23 (S.D. Ind., filed July 28, 1969), *noted in* 22 VAND. L. REV. 173 (1969).

28. *See* note 22 *supra.*

29. 38 U.S.L.W. 2060, opinion at 11-18 (No. 12809) (W. Va., filed July 8, 1969).

30. *Id.* at 19.

majority view were correct, logically all provisions of the state constitution requiring a two-thirds or three-fourths vote are likewise invalid.[31]

The case-by-case establishment of principles applicable to voting rights has resulted in generalities that after a period of time must be clearly delineated in their applicability. The issue facing the instant court was whether the Supreme Court has been endeavoring to secure the integrity of the individual's vote against class discrimination or merely seeking to effect equal population representation in republican institutions. The regularity with which the admonition against dilution has appeared and the concern of the courts in the multi-member district cases with *effective* voting power[32] seem to indicate that protection of the vote is the object of the decisions. The *Gray* Court questioned how one man can be given twice the vote of another simply because he lives in a rural rather than an urban area.[33] The West Virginia procedure involves weighting a man's vote according to whether it is a "yes" or "no" vote. The question is whether this after-the-fact weighting comes within *Gray*. It may be argued that each man has as much voting power as another prior to the balloting since he may vote either way; therefore it is impossible to say that anyone is categorized and discriminated against before the election, because the voter classifies himself by choosing to vote "yes" or "no." In rebuttal it must be pointed out that this line of reasoning ignores the fact that certain segments of the population will have a vested interest in one side of any given proposition. These people will be predisposed to vote in a particular way to protect that interest. A 60 percent requirement for the approval of additional property taxes, for instance, would favor property owners since they can generally be expected to resist passage of the measure.[34] It cannot logically be urged that property owners are

31. 38 U.S.L.W. 2060, dissenting opinion at 10 (No. 12809) (W. Va., filed July 8, 1969). *See* note 6 *supra*. Urging that the merits of the case should never have been reached, the dissent also argued that a state court is powerless to declare provisions of its state constitution violative of the Federal Constitution. The dissent reasoned that no court can declare invalid the document by which it was created. Seemingly supportive pronouncements of other cases were quoted out of context in an effort to establish that only the people of a state may alter the state constitution. *E.g.*, State *ex rel.* Smith v. Gore, 150 W. Va. 71, 77, 143 S.E.2d 791, 795 (1965), stated that "[t]his basic organic law [the state constitution] can be altered or rewritten only in the manner provided for therein." But this statement is made in upholding the superiority of a state constitution over state legislative enactments—not federally guaranteed rights.

32. *See* notes 27 & 28 *supra* and accompanying text.

33. Gray v. Sanders, 372 U.S. 368, 379 (1963).

34. On these grounds at least one writer has concluded that a proposed Washington state constitutional amendment which would impose a three-fifths majority requirement for passage by

a minority of the population and should be given more consideration in order to protect their interests, especially in light of the decision in *Cipriano v. Houma*[35] in which the Supreme Court invalidated a state law limiting eligible voters in tax elections to taxpayers. Clearly voters should not be disenfranchised merely to subserve vested interests; the fact of predisposition effectively establishes a class which is identifiable prior to the ballot and which is discriminated against in the vote counting procedure involved in a more-than-majority requirement. If this type of classification constitutes unconstitutional discrimination in apportionment, it should be no less offensive because the voters are themselves making the law rather than selecting the lawmakers.[36]

In this "important area of human rights"[37] invidious discrimination against an identifiable class by dilution of votes will not be allowed unless there is an overriding state or federal interest to be served. While the boundaries of "invidious discrimination" are not clearly defined, the multi-member district admonition of *Burns* and the strong language of *Reynolds* and *Gray* indicate that any unnecessary dilution of voting power will constitute invidious discrimination. Indeed, in the apportionment area *absolute* equality is now the rule, and there appears to be no reason why this test should not apply in popular election cases. In the instant case, the dissent warned that the majority's decision would mean the demise of all state constitutional provisions requiring more than a majority for action.[38] This observation may be entirely correct with limited exception. If more than a majority may not be required in a popular vote, there is little

local voters of an increased property tax would violate the equal protection clause. Note, *Constitutionality of the Voting Provisions in the Seventeenth Amendment to the Washington Constitution*, 42 WASH. L. REV. 640 (1967). *But cf.* 65-66 OPS. WASH. ATT'Y GEN. No. 83 (1966), *cited in id.* at 641 n.4.

35. 395 U.S. 701 (1969).

36. Note, *supra* note 34, at 646-47. *But see* Carroll County v. Smith, 111 U.S. 556 (1884), which implies that a state may require a majority of all registered voters to pass a measure rather than a majority of those voting. This would have the effect of permitting dilution of votes because some voters choose not to exercise the franchise; therefore, more than a majority would be needed to pass any given measure. *Carroll* stated that this view is not preferred, and in light of contemporary developments in interpretation of equal protection, the Supreme Court should have no trouble skirting *Carroll* as outdated by modern policy standards. Note, *supra* note 34, at 643-44.

37. Reynolds v. Sims, 377 U.S. 533, 561 (1964), *citing* Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).

38. 38 U.S.L.W. 2060, dissenting opinion at 10 (No. 12809) (W. Va., filed July 8, 1969) (Haymond, J., dissenting). The dissent's initial argument that a state court may not declare its own constitution unconstitutional will not be treated except to observe that while there is a superficial appeal to logic inherent in the proposition, it is incredible to urge that, under these circumstances, individual rights guarantced by the United States Constitution cannot be enforced in state courts.

justification for imposing it in the legislature which is representative of the people. Moreover, such a procedure may be shown to contravene the requirement of equal population representation. If a proposition requires two-thirds majority to pass the legislature and it may be shown that a group of legislators is predisposed to vote "no," then these men have been given more voting power than their colleagues. On that issue their constituents have greater representation than those of legislators inclined to vote "yes," and inequality prevails. Perhaps legislative functions which are oriented toward internal housekeeping do not present the opportunity for predisposition that more substantive questions afford; therefore, no identifiable class would exist prior to the vote and consequently no discrimination except after the fact. Whether this kind of weighting is vulnerable to an equal protection argument is yet to be determined, but to the extent that our assumptions in the popular vote cases are apposite, more than a majority should not be required in the legislature. Theoretically this would apply to Congress except for those more-than-majority requirements expressly set forth in the Constitution. While provisions of the Constitution itself obviously may not be declared unconstitutional, it is entirely possible that a contemporary interpretation of the equal protection clause may be inconsistent with certain other provisions of the Constitution. This does not necessarily mean that the new equal protection construction is incorrect, but may indicate that the contrary provisions should be viewed as creatures of the era in which people feared the "tyranny of the majority." Much the same reasoning has been employed by the Supreme Court in explaining the ideological inconsistency between their apportionment decisions and the institution of the electoral college. The "federal analogy" urged in support of malapportionment was rejected there[39] as it should be here. The Supreme Court has never allowed and need not now allow provisions grounded in history to serve to abort the application of a contemporary conception of equal protection wherever the Constitution does not expressly forbid it. Under present guidelines it appears that few more-than-majority provisions will survive. While the need for governmental stability may provide the requisite "compelling state interest" to justify making the constitutional amendment process difficult, the defensibility of other reasons for the imposition is less obvious. Assuming that it is

39. *See* Gray v. Sanders, 372 U.S. 368, 377-78 (1963) (acknowledging the inconsistency and explaining that the historical reasons for the electoral college have been supplanted by emphasis on individual rights in modern political theory).

determined that the existing limitations on simple majority rule should be preserved, a new standard must emerge if the import of "compelling state interest" is not to be absurdly distorted. The necessity of formulating a new test to vindicate the voting requirements under scrutiny will compel a reevaluation and balancing of state interests and individual rights. Whether any or all more-than-majority requirements endure depends on the policies derived from this balancing process.

## Constitutional Law—Reapportionment—Multi-Member Districts Which Minimize the Effects of an Identifiable Minority Group's Vote are Unconstitutional

Plaintiffs,[1] registered voters in a multi-member, at-large voting district, brought an action against the Governor of Indiana[2] seeking a decree that the at-large provisions of the Indiana Acts of 1965[3] are unconstitutional and an order directing a proper legislative apportionment of Marion County. The complaint alleged that the result of electing Marion County's state legislators at-large is to dilute the vote of a cognizable racial minority group within the county in violation of the equal protection clause of the fourteenth amendment.[4] Indiana denied that the dilution of any minority's vote occurred since the plaintiffs were a part of the constituency of each Marion County legislator; therefore each legislator must be somewhat responsive to each voter's interests. On trial before a three-judge panel in the United States District Court for the Southern District of Indiana, *held*,

1. There were 6 plaintiffs in this case. Andrew Ramsey and Mason Bryant were the only plaintiffs who resided in the ghetto area as defined by the court, *infra* note 20. The court concerned itself mainly with the specific complaint that the ghetto residents' vote was being cancelled and refused to grant the relief prayed for by the other plaintiffs.

2. The complaint originally purported to be a class action against the Indiana General Assembly and its individual members. The court granted plaintiffs' motion to join Edgar D. Whitcomb, Governor of the State of Indiana. The court then granted defendants' motion to dismiss as to the Indiana General Assembly and its individual members.

3. IND. ANN. STAT. §§ 34-102, 104 (Burns Supp. 1968) (originally enacted as Indiana Acts of 1965, ch. 4, § 3, ch. 5, § 3 (2d Spec. Sess.).

4. The possibility of a multi-member apportionment scheme coupled with at-large voting operating to minimize the voting strength of a minority is easy to visualize. Suppose that in a county entitled to elect 10 representatives, the members of one political party, or racial minority group, number 40% of the population, while the other political party or racial group can control 60% of the population. With at-large voting in the county, the majority will elect all 10 and the minority will elect none. If the county is divided into 10 equal population, single-member districts, and the minority is not spread over all 10, an apportionment might be obtained which reflects the relative strength of the parties, or 6-4.

judgment for the plaintiffs. When the record demonstrates that a multi-member apportionment scheme, in which all legislators are nominated and elected at-large, operates to minimize or cancel out the voting strength of an identifiable minority of the population, such scheme is unconstitutional under the equal protection clause of the fourteenth amendment. *Chavis v. Whitcomb,* ____ F. Supp. ____ (S.D. Ind. 1969).

The Supreme Court first dealt with the merits of a racial gerrymander in *Gomillion v. Lightfoot*,[5] but the drawing of municipal lines to exclude Negro voters was held to be a violation of the fifteenth, not the fourteenth, amendment. Only Mr. Justice Whittaker thought that the case presented a violation of fourteenth amendment equal protection rights.[6] The majority, relying on *Colegrove v. Green*,[7] felt that jurisdiction on fourteenth amendment grounds was barred because voting district apportionment was a political question, not a case or controversy as required by article III, section two of the Constitution. In *Baker v. Carr*,[8] the Court, overruling the precedent of *Colegrove*, held that citizens asserting that their votes were diluted or minimized in violation of the equal protection clause of the fourteenth amendment presented a justiciable issue within the jurisdiction of the federal courts. The Court held in *Reynolds v. Sims*[9] that the fourteenth amendment requires that both houses of a bicameral state legislature be apportioned substantially on a population basis in order to prevent the dilution of any citizen's vote.[10] The case of *Fortson v. Dorsey*[11] first

5. 364 U.S. 339 (1960).

6. *Id.* at 349.

7. 328 U.S. 549 (1946).

8. 369 U.S. 186 (1962).

9. 377 U.S. 533 (1964). Companion cases to *Reynolds*: WMCA v. Lomenzo, 377 U.S. 633 (1964); Lucas v. Colorado, 377 U.S. 713 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964). The Court held unconstitutional the apportionment statutes of New York, Colorado, Maryland, Virginia, and Delaware respectively along with the Alabama statute in *Reynolds*.

10. However, the Court in *Reynolds* rejected the notion that equal protection necessarily requires the formation of single-member districts. In discussing that problem the Court said: "One body could be composed of single-member districts while the other could have at least some multi-member districts." 377 U.S. at 577. There has been much discussion to the effect that mixed multi-member and single-member districts operate in favor of the multi-member district resident since he will be influencing the vote of more legislators in a position to cast the deciding ballot on any given legislative vote. Mathematical analysis leads to the conclusion that such representation more than overcomes the apparent deficiency that a legislator elected from a multi-member district must be responsible to more constituents. Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966). *See* note 24 *infra*.

raised the issue of whether multi-member districts, under the equal protection guidelines of *Baker* and *Rewnolds*, diluted the vote of minority groups.[12] In reversing the lower court decision, the Court stated that multi-member districts are not a per se violation of any minority's equal protection rights, but it did not deny the possibility that a multi-member apportionment scheme could, under the circumstances of a particular case, unconstitutionally minimize the voting weight of a cognizable minority.[13] In *Burns v. Richardson*[14] the Court decided that a multi-member districting scheme which functions, either casually or purposefully, to minimize a cognizable minority's voting strength, would constitute a violation of that minority's fourteenth amendment equal protection rights. In *Burns*, the Court noted that the presence of this minimization must be established, not as a matter of speculation, but as a demonstrable reality.[15] The Court then outlined certain conditions which, if present, would help establish dilution of a minority's voting strength. These conditions and their effects are as follows: (1) If the percentage of legislators elected in the multi-member district is large in comparison with the total number of legislators, it may indicate that the district is too large for legislators effectively to represent diverse interests within it. (2) If the legislators are residentially concentrated within a small geographic section of a multi-member district, they might tend to represent the uniform ideas and interests of that local area rather than the diverse interests of the entire district. (3) If each multi-member district serves as the exclusive political base from which both senators and representatives are elected, then the different bases of representation between the houses of a bicameral legislature are no longer present; this would result in a lesser chance for diverse representation in both houses of a legislature since the same majority would elect representatives to both houses from the

11. 379 U.S. 433 (1965). Appellees in *Fortson* neither argued nor attempted to prove beyond their mere contention that multi-member districts are unconstitutional.

12. The problem had been collaterally discussed in a previous case. At that time the Court talked about the adverse effects of multi-member districts. Lucas v. Colorado, 377 U.S. 713, 731 (1964).

13. 379 U.S. at 439. The *Fortson* Court emphasized that its holding was limited to the narrow question presented by the case: the validity on its face of a multi-member constituency feature of a state legislative apportionment statute. The Court warned that its "opinion is not to be understood to say that in all instances or under all circumstances such a system . . . will comport with the dictates of the Equal Protection Clause."

14. 384 U.S. 73 (1966).

15. This is the Court's own citation to this point. *Cf.* McGowan v. Maryland, 366 U.S. 420 (1961).

same district.[16] *Kilgarlin v. Hill*[17] upheld the standards of *Burns* as the principles for determining the presence of unconstitutional dilution of a minority's vote.[18]

In the instant case, the court noted that the first requirement in proving the existence of unconstitutional discrimination is to establish an identifiable racial minority against whom the discrimination operates. Using mathematical tables to demonstrate social, economic, and housing characteristics of the ghetto residents,[19] the court concluded that those residents had common interests of substantive law which diverge significantly from the interests of non-ghetto residents.[20] These common interests, shared by the Negroes in the Marion County ghetto, made them, the court said, an identifiable racial minority. After establishing this identifiable group, the court described how the weight of that group's vote is severely minimized both in the primaries and in the general election. The court said the minimization resulted from the strong control over the nomination of candidates by the two major political parties which are effectively controlled by non-ghetto residents. Therefore, the Negro voters were never presented with the opportunity of voting for a representative proportion of legislators who advocate the common interests shared only by the ghetto residents. The court further noted that legislators were hesitant to advocate the interests of ghetto residents once elected even though they might believe those interests to be proper. In part this was a result of voters accepting the recommendations of their party in the primary and the general

16. 384 U.S. at 88. The Court implied that the proving of these 3 conditions was not a conclusive showing of discrimination, but that it would only make the invidious minimizing effect easier to demonstrate.

17. 386 U.S. 120 (1967).

18. *Id.* at 125 n.3. Even though the standards of *Burns* were upheld in that case, the Court did not find them present, nor did it find dilution of the minority's vote.

19. Before describing the various characteristics of these ghetto residents, the court, realizing that the resolution of the case depended in large part on identifying the injured minority groups, analyzed the word "ghetto" carefully and adopted this definition: "A primarily residential section of an urban area characterized by a higher relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area which is inhabited predominantly by members of a racial, ethnic, or other minority group, most of whom are of lower socioeconomic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom." ___ F. Supp. at ___.

20. Those areas of substantive law that the court found common to the ghetto residents were housing regulations, sanitation, welfare programs (ADC, medical care, etc.), garnishment statutes, unemployment compensation, urban renewal and rehabilitation, unemployment training, law enforcement problems, raising the quality of education, and anti-discrimination measures. ___ F. Supp. at ___, ___.

election because the large number of candidates presented to the public caused voter confusion and made intelligent, issue-conscious voting almost impossible. The court concluded that the legislators, realizing this, accepted the position of the party on any given issue in order to secure nomination and election. Therefore, party control over nominations and elections tends to dominate the legislators' actions once elected. Relying on the proposition that a sizeable minority has interests that diverge from the majority non-ghetto residents, it followed that a legislator who represented those interests would, by definition, be deviating from the majority of his party.[21] The court pointed out that the partial responsiveness of all Marion County legislators to the ghetto interests would not be equal to the total responsiveness of the proportionate number of legislators to those same interests. Indeed, partial responsiveness to such a large minority was so minimal in Marion County that it constituted an actual dilution of that minority's vote.

Following its discussion of the minimizing effects of the party organizations' control, the court turned to the application of the three conditions outlined in *Burns* as standards to help prove the presence of discrimination in a multi-member district. First, Marion County elects fifteen and sixteen percent of the state representatives and state senators respectively, a number too large for one district in relation to the total number of Indiana legislators. Secondly, the court used mathematical tables to show that 14.6 percent of the population that reside in the upper middle-class, predominantly white, suburban Washington Township have 52.27 percent of the senators and 41.79 percent of the representatives living in their township, while 41.13 percent of the population, who reside in Center Township (which includes the Negro ghetto) have only 9.5 percent of the senators and 17.91 percent of the representatives.[22] Thirdly, in Indiana, both houses of the General Assembly are characterized by the same multi-member districts. The presence of these conditions and the effects they have on the weight of a minority group's vote, coupled with the diluting effect on the minority's vote by the strong, non-ghetto dominated party organizations demonstrated that the Marion County multi-member district invidiously discriminated against the cognizable minority group

21. The court noted that since 1920 only a little more than 1% of the Indiana General Assembly candidates from Marion County had been elected from the party that did not prevail.

22. The court pointed out that the ghetto population of Center Township is sufficient by itself to elect 2 representatives and one senator if it was districted under the single-member plan.

present within that county. Concluding from additional evidence[23] that multi-member districts give their constituents a greater voice in the legislature than the constituents of single-member districts, the court directed the Indiana General Assembly to redistrict the entire state as to both houses and further recommended that it give strong consideration to the principle of uniform population districts in making its apportionment scheme.[24]

The inference of *Baker v. Carr* and *Reynolds v. Sims* was that greater equality of representation would be the ultimate result of the equal protection apportionment litigation. But the remedies effected by those decisions were concerned with equal protection on the strict numerical basis of "one man, one vote." This strict numerical equality ignores the fact that people can be treated "equally" in different ways.[25] When consolidation of a minority in a multi-member voting

23. Relying on Banzhaf, *supra* note 10, the court in the instant case concluded that "where District A elects one representative from two candidates and District B, which is eight times as populous as District A, elects eight representatives from sixteen candidates . . . [and] [w]hen the representatives of a multi-member district vote as a bloc in a legislative body, each representative's vote has a greater weight than that of a representative from a single-member district. . . . [A]s each member of the bloc delegation is responsible to the voter majority who elected the whole, each Marion County voter has a greater voice in the legislature, having more legislators to speak for him than does a comparable voter in the . . . single-member . . . district[s]." ___ F. Supp. at ___, ___.

24. The court in the instant case noted that the uniform population district "is one method of curing defects in unequal representation. The principle is that equal numbers of persons should be represented by equal numbers of legislators in each district of a legislative body. . . . While application of the uniform district principle would require all districts to be equal in population and elect equal numbers of legislators from each uniform district, it does not require single-member districts. For example, the Indiana House of Representatives could consist of 100 districts electing one representative each, fifty districts with two representatives each . . . . The maximum size of the uniform districts should, of course, not be so large as to create the improper dilution of minority group voting found in the instant case." ___ F. Supp. at ___.

25. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1164 (1969): "If all men were identical—similar in every respect except that they were distinct individuals—the formal rule of equal treatment would be sufficient; all would then deserve identical treatment in terms of benefits conferred and burdens imposed. It is obvious, however, that men are not similar in all respects. Not only are they different in their physical characteristies, social and economic positions, and other relatively objective properties, but they differ also in subjective preferences, values, and tastes. Simply to say that it is right to treat two people equally rather than unequally is meaningless in this context, since to treat two people equally in one respect will always be to treat them unequally in others. For instance if *A* likes only scotch and *B* only bourbon, to give each a bottle of scotch treats them alike with respect to what they are given, but not with respect to what they would have preferred. Likewise if *C* has red hair but *D* does not, then to give a football to *C* but not to *D* treats them equally with regard to the rule that only red-haired people get footballs, but unequally with regard to the goods that each receives.

It becomes necessary, then, in order to apply the formal equality principle, to determine in what respects men are similar and to decide which of these are relevant to the kind of treatment they should receive. . . ."

district dilutes that minority's vote, even though the district is equally represented on the "one man, one vote" basis, it is apparent that a more proportional basis of equality is needed. The Court, in *Fortson* and *Burns*, laid down certain conditions, the presence of which demonstrates an adverse effect on a minority's ability to secure such proportional representation. This signaled the willingness of the Court to expand the equal protection clause of the fourteenth amendment to include the concept of proportional equality. The thrust of the instant case is not only that it has proved, using the standards outlined in *Fortson* and *Burns*, that those factors exist in the multi-member district of Marion County, and that they substantially affect the ghetto minority's ability to secure proportional representation, but also that it allows an inference that these factors exist wherever an at-large, multi-member district includes a ghetto within its boundaries. This inference leads to the presumption that this type of apportionment scheme will deny proportional representation and violate the equal protection clause. The presence of this invidious discrimination creates the need for a remedial apportionment plan. The instant court in its order suggested the legislature give strong consideration to the uniform population principle. The application of this principle in its extreme, so as to create single-member districts, seems best suited for eliminating the inequity. Due to the smaller geographic area of a single-member district, the interests would tend to be less diverse than in a larger multi-member district, thus allowing more responsive representation to the particular interests within a district. This would encourage more responsible voter participation because the candidates would seek support based on the substance of those interests rather than a county-wide party indorsement. It is possible that pursuant to this plan, the ghetto might be split by the legislature in such a way that each third would be in three separate single-member districts; again the identifiable racial group would be the numerical minority.

To ensure the minority proportionate representation and to avoid dividing the ghetto among a number of voting districts, the legislature could be tempted to form the districts along strict racial lines. This process would group the homogeneous population of the ghetto in the single-member district, ensuring the election of representatives totally responsive to the ghetto interests. Segregation in all other instances has been a detriment to the welfare of the ghetto dweller. Nevertheless, segregation may actually help to remedy the injustice presented in the instant case by giving the minority a larger voice in the decision-making process. Therefore, the traditional detriments of segregation

must be balanced against the benefits of greater political powers. It is submitted that to define voting districts in terms of race is an artificial distinction because the characteristics of poverty shared by the ghetto minority are common to other groups in the population who are not Negro.[26] If Negroes see their only base of political power concentrated in the ghetto they will be inclined to remain in the ghetto to keep that power. Also, political segregation might reinforce segregation in areas of education and housing which the Supreme Court has already found to be in opposition to the policy of integration of the races in this country.[27] Therefore single-member districts should not be drawn along racial lines, but should be drawn with no particular race or interest in mind. The ghetto minority could still exert greater pressure in the single-member district than in the multi-member district because there are fewer divergent interests in the geographically smaller district. With fewer divergent interests present, the interests of the ghetto acquire more than that minimal influence enjoyed by its voting power on a countywide basis.[28] The legislature should not interpret the court order as recommending a racially structured political subdivision. It is felt that the inherent characteristics of the uniform population, single-member district will eliminate the invidious discrimination found in multi-member districts. To go further and consciously draw the new districts along racial boundaries will only serve to promote the undesired effects of segregation.

## Constitutional Law—State Reporting System Which Gathered Information on Individuals and Organizations Involved in Civil Disturbances, Protests, and Demonstrations Violated the First Amendment

Seeking a declaratory judgment against the Attorney General of New Jersey, the NAACP and several individuals who were active in civil rights protest alleged that the use of a state-wide reporting system,[1] which gathered information about demonstrators participating

26. *See* note 21 *supra*. Primarily, the areas of substantive law are problems of poverty, not race. To provide a means that insures only the Negroes an opportunity to have their poverty problems represented discriminates against the poor whites in Marion County.

27. *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

28. *Cf.* R. DAHL, A PREFACE TO DEMOCRATIC THEORY 124-51 (1956).

1. Pursuant to a conference between Governor Hughes and mayors of various New Jersey cities, the Attorney General urged local police departments to employ two forms distributed by the State Police Central Security Unit and to return completed reports to the state authorities

in civil disturbances, violated their first amendment rights.[2] The plaintiffs contended that since any public gathering could qualify for a write-up and entry into the central files, the system would unconstitutionally deter individuals from exercising their freedom of expression. The Attorney General maintained that there was a relationship between individuals and organizations who engage in protest demonstrations and civil disorders and that the reporting system facilitated a legitimate state interest in preventing such disturbances.[3] The Superior Court of New Jersey for Hudson County, *held*, judgment for plaintiffs. The New Jersey central intelligence system was unconstitutional because its very existence might reasonably be expected to restrict the exercise of freedoms guaranteed by the first amendment. *Anderson v. Sills*, 256 A.2d 298 (N.J. Super. Ct. 1969).

Although the Supreme Court has never specifically articulated a right to anonymity[4] in the exercise of first amendment freedoms, the Court, in reviewing investigation of associational activities, has recognized the right to participate anonymously in lawful group activity without prior restraint or fear of subsequent punishment.[5] The

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for evaluation and dissemination. One form solicited the names and addresses of any organizations, groups, and leaders involved in any anticipated or completed "civil disturbance, riot, rally, protest, demonstration, march, confrontation, etc." It also required a general statement of the nature and purpose of the incident and a characterization of the group involved as "Left wing, Right wing, Civil Rights, Militant, Nationalistic, Pacifist, Religious, Black Power, Ku Klux Klan, Extremist, etc." The second form solicited information concerning individuals who were possibly connected with potential civil disorders and required extensive personal data concerning the subject, his spouse, employer, and associates. Anderson v. Sills, 256 A.2d 298, 301, apps. A & B at 305-13 (N.J. Super. Ct. 1969).

2. The court treated the rights associated with the first amendment collectively. Consequently, the specific first amendment rights asserted by the plaintiffs cannot be determined from the opinion.

3. The violence which characterized the summer of 1967 was acute in New Jersey. The city of Newark suffered $10.2 million damages and 23 persons killed. Furthermore, order was restored only after the National Guard occupied the city for three days. Violent rioting also broke out in Elizabeth, Englewood, Plainfield, and Jersey City. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 30-46 (1968). Surveys conducted under the direction of the Kerner Commission indicated that many citizens believed that the riots were conspiratorial or criminal in nature and were the inevitable consequence of protests. Also, over half of the people surveyed did not approve of protest in general and believed that more police control was the best preventive action for authorities. SUPPLEMENTAL STUDIES FOR THE REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 47-59, 96 (1968).

4. Anonymity is a state of privacy in the sense of an individual being free from identification and surveillance of his public activity. *See* Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's, Part I*, 66 COLUM. L. REV. 1003, 1021 (1966).

5. The Supreme Court has also recognized the right to anonymity in public expression. Talley v. California, 362 U.S. 60 (1960) (ordinance requiring the names and addresses of persons

concept was tentatively recognized in *Watkins v. United States*,[6] when the Court refused to permit the exercise of investigative power to expose private activities. More specifically, the Court has prohibited vague and overbroad[7] investigations into the membership of the NAACP and has consistently upheld the privilege of individuals to keep private their activities with dissident or unpopular groups.[8] In *NAACP v. Alabama ex rel. Patterson*,[9] the Court determined that if an investigation might possibly have a "deterrent effect"[10] on the free exercise of first amendment activity, the interference is unconstitutional unless the state demonstrates an absolute interest in investigating the activity. The Court has acknowledged that the government has a paramount interest in preserving national security and in pursuing this

who prepared, distributed, or sponsored handbills is unconstitutional). *See* Lamont v. Postmaster General, 381 U.S. 301 (1965); Heilberg v. Fixa, 236 F. Supp. 405 (N.D. Cal. 1964).

6. 354 U.S. 178, 198-99 (1957) (requiring a clear delegation of congressional authority to force a witness to disclose information concerning members of the Communist Party). *See* Sweezy v. New Hampshire, 354 U.S. 234 (1957). "[T]he inviolability of privacy belonging to a citizen's political loyalties has . . . overwhelming . . . importance to the well-being of our kind of society . . . ." *Id.* at 265.

7. Vagueness and overbreadth are distinct concepts, but have the same general effect since both deter constitutionally protected conduct. A vague statute fails either to specify prohibited conduct, or to guide intervention by law enforcement officials. Consequently, the individual never knows when he is subject to criminal sanctions. On the other hand, an overbroad statute notifies the actor that he is subject to criminal arrest, but deters the exercise of protected rights by punishing specific conduct which is constitutionally protected. Statutory schemes which punish protected conduct as well as unprotected conduct also fail for overbreadth. *See* Note, *Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association From Scales to Robel*, 57 CALIF. L. REV. 240, n.1 (1969).

8. *Accord*, Shelton v. Tucker, 364 U.S. 479 (1960) (statute requiring teachers to file annually an affidavit listing all organizations to which they belonged in the last 5 years went "far beyond" the state's interest in determining the competency of its teachers). *See* Bates v. City of Little Rock, 361 U.S. 516 (1960) (license tax requiring the disclosure of all members of the NAACP chapter operating within the city deterred the right of private association); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961) (the filing of an annual affidavit disclosing members of the Communist Party deterred free association when applied to the officers of NAACP); Gibson v. Florida Legislative Investigative Comm., 372 U.S. 539 (1963) (investigation of communist infiltration in racial organizations did not justify investigation of NAACP membership rolls); NAACP v. Button, 371 U.S. 415 (1963) (lawyer's association with NAACP not subject to regulation on pretense of bar rule preventing business solicitation).

9. 357 U.S. 449 (1958).

10. Alabama asked to inspect the membership rolls of the NAACP to determine if the association had violated a statute requiring the registration of foreign corporations. The Court ruled that the state interest in obtaining the information was insufficient to justify the "deterrent effect" such disclosures would have on the free exercise by NAACP members of their protected right of association. The Court noted that involuntary exposure could subject the members of unpopular groups to social ostracism or even physical reprisals by hostile members of the community and that a "deterrent effect" resulted when the possibility of exposure restrained an individual from exercising his first amendment rights.

interest may investigate associational activities.[11] However, in *Dombrowski v. Pfister*,[12] the Court stated that even when circumstances warrant investigation of an individual's associational activities, it would apply the deterrent concept to prohibit regulation which could be used to intimidate individuals by threatening prosecution without any expectation of securing valid convictions. Furthermore, in *Scales v. United States*,[13] the Court limited the scope of regulation to individuals who actively and specifically intend to further an unlawful objective of an organization. Finally, in *United States v. Robel*,[14] the Court concluded that any statutory scheme which interferes with an individual's first amendment rights must be narrowly drawn to exclude constitutionally protected activities.

In the instant case, after disposing of a procedural matter,[15] the Superior Court reasoned that although New Jersey officials had a legitimate interest in maintaining civil peace, approval of the reporting system depended upon the system's possible effects on the right of ordinary citizens to demonstrate their opposition to governmental policy. The court then examined the nature of the information solicited by the report forms and concluded that the forms went too far in attempting to achieve a legitimate governmental goal. The court acknowledged that while the files might facilitate the apprehension of some protestors whose activities were related to unlawful occurrences, many individuals would be reluctant to participate in any kind of public political expression because of a desire not to have such activity recorded.[16] More importantly, the forms were not restricted to

11. American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); *see* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

12. 380 U.S. 479 (1965). A Louisiana Un-American Activities Committee intimidated a civil rights group by threatening to prosecute them under the Louisiana Subversive Activities and Communist Control Act.

13. 367 U.S. 203 (1961) (an individual's association with the Communist Party did not warrant regulation unless the individual was an active member with the specific intent of furthering the Party's subversive activities). *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

14. 389 U.S. 258 (1967) (statute proscribing members of the Communist Party from working in a defense facility invalidated since it infringed upon the freedom of association).

15. Although the defendant challenged plaintiff's standing to bring the suit, the Superior Court ruled that under New Jersey precedent an individual did not have to violate the law before seeking relief as to the applicability of a statute. More importantly, the court noted that the United States Supreme Court generally relaxes standards of justiciability when governmental action inhibits the exercise of first amendment rights. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965).

16. The court reasoned that the forms had a deterent effect because in addition to recording the individual participant, the subject's family, friends, and employer would also be included in the central files.

specifically defined conduct and might be used to intimidate local political troublemakers. Consequently, the court concluded that the intelligence system was inherently dangerous because it tended to restrict lawful advocacy of social and political change and ruled that the completion, maintenance, and distribution of the forms violated the first amendment. The court then ordered the Attorney General to rescind the directive establishing the reporting system[17] and to produce and destroy all forms and files except those which contained information which would be used to charge persons with specifically defined criminal conduct.

The New Jersey reporting scheme opens to scrutiny a phase of surveillance which the judiciary has had little opportunity to review: that is, the extent to which authorities can compile data information.[18] Moreover, if the present decision is to have value as precedent, future courts must recognize arguments not articulated in the Superior Court's opinion. The facts that observation is a method of regulating activity and surveillance is a valuable means of deterring unlawful conduct support the conclusion that the reporting system has a deterrent on the exercise of associational activity.[19] More importantly, the purpose of surveillance should be the accumulation of data in order to present evidence in prosecution, or to continue investigation by conventional techniques such as search, seizure, and interrogation. Consequently, investigation of public activity and compilation of information concerning individual participants serve no legitimate law enforcement objective in the absence of probable cause that the conduct is criminal and a substantial likelihood of prosecution.[20] Therefore, under the *Robel* decision, the New Jersey system was unconstitutional

17. *See* note 1 *supra.*

18. The Supreme Court has reviewed data collection by surreptitious eavesdropping, searches and seizures, and lie detector tests because the collected information has been used for prosecution. On the other hand, there is little opportunity for judicial review of the legitimate limits of information storing when proseeution proceedings are not initiated. *See* Katz v. United States, 389 U.S. 347 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Schmerber v. California, 384 U.S. 757 (1966).

19. Studies by leading social scientists clearly indicate that observation exerts a restrictive influence on the freedom of human behavior and inhibits the incentive to express new or challenging ideas. Consequently, surveillance should be confined to specifically defined unlawful activities in order to minimize the danger of inhibiting the free exchange of ideas necessary for democratic society. For this reason, surveillance is an undesirable technique to investigate political protest. *See* Westin, *supra* note 4, at 1045, 1223.

20. Indeed, criminal investigation is conducted to ascertain the existence of a crime or to identify a criminal and the collection of information by legislative investigative committees is limited to data substantially related to the problem to be corrected. *See* Seigliano, *The Grand Jury, The Information, and The Judicial Inquiry*, 38 ORE. L. REV. 303 (1959).

because it not only categorized and reported lawful forms of protest as "civil disorders," but also authorized investigation of individuals who engaged in these constitutionally protected activities.[21] In concluding that the system violated the first amendment, the decision is therefore correct. Eliminating the system, however, while logical, merely prohibits a formalized reporting scheme. New Jersey police are still free to make ad hoc investigative decisions, and the power of police to maintain dossiers continues to be discretionary with local departments. Authorities, therefore, have retained the power to collect data on individuals who engage in perfectly lawful public conduct and can still intimidate those who maintain views that are unpopular or embarrassing to the investigative authorities.[22] This unlimited jurisdiction not only conflicts with the concept of public privacy,[23] but also with Supreme Court decisions establishing the right to control the knowledge and disclosure of an individual's associational activities.[24] The problem is further compounded since persons outside the law enforcement agencies often obtain and abuse police files.[25] Consequently, an unregulated authority to store information concerning private activities can have the same deterrent effect as the instant central intelligence system that was held unconstitutional. On the other hand, a total prohibition of data collection would make

21. The "civil disorders" included constitutionally protected activity such as marches, rallies, and demonstrations. *See* Edwards v. South Carolina, 372 U.S. 229 (1963); Yates v. United States, 354 U.S. 298 (1957); Terminiello v. Chicago, 337 U.S. 1 (1949).

22. Police discretion is especially critical because investigation of political activity many times is used to harass individuals who have unconventional views rather than to lead to criminal prosecution. *See* Editorial Note, *Police Undercover Agents: New Threats to First Amendment Freedoms*, 37 GEO. WASH. L. REV. 634, 660, 664 (1969); Note, *The Legitimate Scope of Police Discretion to Restrict Ordinary Public Activity*, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 233, 341 (1969); Note, *Riot Control and the Fourth Amendment*, 81 HARV. L. REV. 625 (1968).

23. An individual in a public place knows he is being observed but, unless he is a celebrity, he does not expect to he identified. Knowledge or fear that an individual is under systematic observation or that his actions and opinions are recorded destroys the sense of freedom men expect and seek in public places. *See* Westin, *supra* note 4, at 1021. Indeed, the concept of recording activities and compiling information on individuals is contrary to democratic principles. *See* Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961). A statement by Mr. Justice Douglas is appropriate: "If [an individual's] every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association. When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. Freedom as the Constitution envisages it will have vanished." Osborn v. United States, 385 U.S. 323, 354 (1966) (dissenting opinion).

24. *See* cases cited notes 8 & 9 *supra*.

25. *See* Karst, *"The Files": Legal Controls over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 365-71 (1966).

routine law enforcement unmanageable and, in time of crisis, there is perhaps justification for temporary reporting schemes.[26] Furthermore, the daily functioning of governmental and law enforcement agencies increasingly depends upon the availability of data concerning certain individuals.[27] In light of these requirements, the Superior Court's decision to abolish the system without further explanation does not assist police authoritics and legislators in striking a balance between the legitimate requirements of law enforcement and the individual's constitutional right to privacy.

## Criminal Law—Discovery—Witness's Deposition Held Admissible When Witness Legally Unavailable Tbrough Claim of Privilege

Appealing from his conviction for the illegal sale of drugs,[1] the defendant challenged the trial court's refusal to admit a defense witness's deposition after the witness refused to testify at the trial. The witness, who was arrested with defendant,[2] exercised her fifth amendment right to avoid testifying at the trial, but her deposition indicated that it was she and not the defendant who made the illegal sale. The defendant argued that the state statute[3] governing the use of

26. Indeed, the Kerner Commission recognized the need to remedy the lack of adequate information concerning riot developments. In defending the New Jersey system, the Attorney General stressed this point. The Commission, however, urged the "development" of an adequate intelligence system to be used in the context of controlling disorders which had escalated beyond the immediate police capabilities. Furthermore, the Committee envisioned an intelligence system which would not survey individuals but would dispel rumors that could distort events and increase confusion. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 173, 267, 269 (1968).

27. *See generally* Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REP. 1091 (1969); N.Y. Times, Nov. 8, 1969, at 1, col. 5.

1. State v. Yates (St. Louis Cir. Ct. Sept. 28, 1967) (opinion not reported).

2. The witness was living on the premises where the sale took place. The evening prior to petitioner's arrest an undercover police officer purchased drugs from the witness after asking to buy them from petitioner. Petitioner, who was not there on this occasion, was present the following night when the officer made the purchase culminating in petitioner's arrest. The witness was arrested for making the sale on the previous evening.

3. MO. ANN. STAT. § 492.400(2) (Supp. 1968-69) provides: "The facts which would authorize the reading of the deposition may be established by the testimony of the deposing witness or the certificate of the officer taking the deposition or the testimony of the person or officer who attempted to serve the witness with a subpoena (1) If the witness resides or is gone out of the state; (2) If he is dead; (3) If by reason of age, sickness or bodily infirmity he is unable to or cannot safely attend court; (4) If he resides in a county other than that in which the trial is

depositions provided for their admissibility in a criminal proceeding in which the deponent made himself legally unavailable to testify under a claim of privilege. The state contended, however, that the statute did not expressly provide for the use of depositions in these circumstances and that such a use could not be implied from its provisions. On appeal to the Supreme Court of Missouri, *held*, reversed. When a witness makes his direct testimony legally unavailable by invoking the self-incrimination clause of the fifth amendment, his deposition may be admissible as evidence. *State v. Yates*, 442 S.W.2d 21 (Mo. 1969).

A majority of states have "unavailability" statutes[4] that specify the situations in which the witness is unavailable so as to render his former testimony or deposition admissible at trial.[5] Although the language of these statutes implies that physical unavailability is required,[6] most courts facing this question have liberally construed them to include the legal unavailability of a witness.[7] This is especially true as to former testimony in both civil and criminal trials.[8] There are,

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held, or if he has gone a greater distance than forty miles from the place of trial without the consent, connivance or collusion of the party requiring his testimony; (5) If he is a judge of a court of record, a practicing attorney or physician and engaged in the discharge of his official or professional duty at the time of the trial; (6) If the witness is absent without the consent, connivance or collusion of the party requiring his testimony and the party, in the exercise of due diligence, has been unable to procure the attendance of the deponent by subpoena."

4. The equivalent unavailability rule in federal courts is FED. R. CIV. P. 26(d)(3) which provides: "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." This rule is very similar to typical state statutes such as Missouri's except for the broad scope afforded by subsection 5 which will allow the judge to permit testimony of a legally unavailable witness to be introduced into evidence.

5. Death is the most widely recognized example. Other common examples recognized in different states inelude absence from the jurisdiction, inability to find the witness, illness, senility, insanity, and imprisonment. *See generally* 5 J. WIGMORE, EVIDENCE § 1403-13 (3d ed. 1940).

6. At early English common law the witness had to be physically unavailable; however, the chancery courts did not confine themselves to so narrow an area and permitted use of hearsay evidence when the witness was legally unavailable. 2 U.C.L.A.L. REV. 138 (1954).

7. *See generally* Note, *Declarations Against Interest: A Critical Review of the Unavailability Requirement*, 52 CORNELL L.Q. 301 (1967); Comment, *Evidence—Whether Witness' Prior Voluntary Testimony Constitutes Waiver of Privilege of Self-Incrimination in Second Trial of Same Case*, 73 DICK. L. REV. 80, 94-99 (1968).

8. *See, e.g.*, Mason v. United States, 408 F.2d 903 (10th Cir. 1969); Wyatt v. State, 35 Ala. App. 147, 46 So. 2d 837 (1950); Woodward v. State, 21 Ala. App. 417, 109 So. 119 (1926); People v. Johnson, 68 Cal. Rptr. 599, 441 P.2d 111 (1968) (rev'd on other grounds); Johnson v.

however, few cases dealing with admissibility of a deposition and all are civil actions.[9] In a leading case, the Supreme Court of Missouri held a sworn affidavit to be admissible following a witness's refusal to testify under claim of privilege.[10] More recently, New Jersey reached a similar result when unsigned statements made to city health officers were admitted following the declarant's exercise of his right against self-incrimination.[11] The court noted that "there is a vital need for a provision [providing for admissibility of depositions where a witness is legally unavailable] to prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best evidence available."[12]

The court in the present case based its decision on the Missouri "unavailability" statute,[13] which lists the criteria for admitting a deposition or former testimony into evidence when a witness is unavailable. By invoking the fifth amendment and making her testimony legally unavailable, the court found that the witness was just as unavailable as if she were dead or had gone out of the state.[14] The court further stated that when a witness is thus "unavailable," there

People, 152 Colo. 586, 384 P.2d 454 (1963), *cert. denied*, 376 U.S. 922 (1964); Habig v. Bastian, 117 Fla. 864, 158 So. 508 (1935); State v. Terry, 202 Kan. 599, 451 P.2d 211 (1969); State v. Stewart, 85 Kan. 404, 116 P. 489 (1911); People v. Pickett, 339 Mich. 294, 63 N.W.2d 681 (1954), *cert. denied*, 349 U.S. 937 (1955); Moore v. Metropolitan Life Ins. Co., 237 S.W.2d 210 (St. Louis App. 1951); Travellers' Fire Ins. Co. v. Wright, 322 P.2d 417 (Okla. 1958); State v. Rawls, 451 P.2d 127 (Ore. 1969). *Contra*, People v. Lawrence, 168 Cal. App. 2d 510, 336 P.2d 189 (1959); Hayward v. Barron, 38 N.H. 366 (1858); Commonwealth v. Turner, 389 Pa. 239, 133 A.2d 187 (1957).

9. One of these cases is of doubtful value because of a later pronouncement by the same court. Wells v. New England Mut. Life Ins. Co., 187 Pa. 166, 40 A. 802 (1898) (deposition of doctor held admissible when he became legally incompetent to testify because of enactment of state statute). *But see* Commonwealth v. Turner, 389 Pa. 239, 133 A.2d 187 (1957) (former testimony of witness who recanted sought to be introduced on grounds that he was an unavailable witness held inadmissible).

10. Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945). The court relied primarily upon Wigmore's "Necessity Principle," which states that "[w]henever a witness is practically unavailable his statements should be received." 5 J. WIGMORE, EVIDENCE § 1456 (3d ed. 1940). When the statement sought to be admitted has been verified under oath and subjected to cross-examination, there is more reason to admit it.

11. Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 163 A.2d 465 (1960).

12. *Id.* at 559, 163 A.2d at 485, *citing* COMMENTS, REPORT OF THE COMM. ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY, Rule 63(4)(c) (1955).

13. MO. ANN. STAT. § 492.400 (Supp. 1968-69).

14. It would appear easier to hold a witness legally absent under MO. ANN. STAT. § 492.400(2)(6) (Supp. 1968-69) than to construe the statute to generally include legal unavailability as falling within it. It is interesting to note that the court has chosen not to do this but to follow other courts in declaring legal unavailability to be something akin to being dead or absent from the state.

may be a need to resort to testimony from a secondary source as a matter of necessity in order that the defendant might be accorded a fair trial. In reaching its decision, the court analogized to *State v. Stewart*,[15] which ruled on the admissibility of former testimony as opposed to a deposition. In *Stewart* the court stated that the admissibility of former testimony did not depend so much on the presence or availability of the witness as it did on the availability of his direct testimony. In reaching this conclusion, the *Stewart* court reasoned that since former testimony may be used when a witness is outside the jurisdiction, acquires an interest, or performs other acts that would disqualify him, he should not be allowed to defeat the use of the same testimony by claiming a statutory privilege when called to the witness stand.

This decision marks the first time that a deposition has been admitted in a criminal trial when the witness was physically present but refused to testify on grounds of self-incrimination. The court has thus expanded the use of a deposition in criminal trials and put it on a par with the use of former testimony.[16] In applying what is essentially a statutory exception to the hearsay rule, however, the court faces a peculiar dilemma. If the court permits the witness's deposition to be introduced, it deprives the jury of the chance to observe the witness's demeanor and introduces an added element of uncertainty to the evidence. If the court refuses to admit the deposition, the defendant may be deprived of the witness's testimony in any form. This problem becomes especially acute in a criminal proceeding in which the defendant should be accorded every benefit of the doubt. To resolve the competing values in such a situation, a court should, perhaps, consider the following alternatives. First, the witness could be required to testify under threat of contempt as to statements *already given*. A person who has previously waived his fifth amendment privilege should not be permitted to reassert it as to statements already given and which can be used against him regardless of his present testimony. On the other hand, if for some reason the witness's deposition would not be admissible against him, subsequent testimony as to those same statements should be inadmissible against him for the same reason.

15. 85 Kan. 404, 116 P. 489 (1911).

16. Although in theory there should be no distinction between a deposition under oath subject to cross-examination and former testimony, this has not been the case in practice. At common law, depositions were unknown, and even today there is no criminal pretrial discovery unless provided for by statute. This possibly is the reason that former testimony has had a heretofore broader use than depositions. In any event, both are sworn statements and, when subjected to cross-examination, should be treated equally.

Thus a court should require a witness to testify when it determines that it would be impossible for a witness to further incriminate himself by testifying about prior statements. Applying this rule, the ends of justice would be better served for all; the opportunity to observe the witness's demeanor and cross-examination would be preserved, and, at the same time, the witness would be protected from giving any new evidence against himself. The deposition would thus be used only as a last resort in the interests of obtaining justice. Secondly, in a situation where the court must resort to a deposition, only those statements that are favorable to defendant should be admitted into evidence. This is to say that it is unfair to the defendant to admit adverse statements that have not been given in a prior judicial proceeding in which the witness could fully recognize the serious import of his statements. Admission of unfavorable statements from a deposition may be further challenged on the grounds that the defendant has not received all possible protection due him and that his right of confrontation has been violated. Although most courts hold that a defendant is adequately protected by the opportunity to cross-examine the witness at the taking of the deposition, this argument overlooks the obvious difference between a deposition taken before a small audience and testimony given in the solemn atmosphere of a courtroom. A witness is far more likely to give unsubstantiated, incriminating evidence in a deposition proceeding where he knows most of the parties present than in the impersonal arena of a courtroom where all eyes are on him.